

A Clicklaw Wikibook

JP Boyd on Family Law

Resolving family law disputes in British Columbia
by John-Paul Boyd

May 2013



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JP Boyd on Family Law

Resolving family law issues in BC

by John-Paul Boyd

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Getting Started

Introduction to JP Boyd on Family Law

Welcome

Welcome to *JP Boyd on Family Law*.

You might want to know about your own family law issue, or you might be helping someone deal with their family law issue. Either way, this is for you. In this wikibook, John-Paul Boyd guides you through family law in British Columbia as if he was talking to you.

John-Paul Boyd is an experienced family law lawyer practising in Vancouver. For over a decade British Columbians have been using his BC Family Law Resource website as their go-to place for family law information. John-Paul doesn't assume you know about legal language and legal processes. He talks like an ordinary person. He explains legal terms and gives you tips on how to do things.

This wikibook is divided into chapters about the major areas of family law. In each chapter you will find an overview, then additional sections that give you more detailed information. Each chapter makes sense by itself. You won't have to go hunting for information in other chapters.

In addition to the chapters, this resource has a part called *How Do I?* It provides brief information on an array of family law topics. That's the place to go for a quick introduction to a procedure, or for a summary of the steps you have to take.

The best place to start is right here in Getting Started, with the Family Law in British Columbia section. That gives you the really big picture, and will be particularly helpful for people who have never had to deal with a legal problem before or who are new to Canada. After that, you'll want to move on to the chapters that interest you.

Let us know what you think of this wikibook. We aim to keep revising it to make sure it meets your needs. Please send your comments to us at editor@clicklaw.bc.ca ^[1].

- Editorial Team, for *JP Boyd on Family Law*

Why are we doing this?

You might be reading this text in the online wikibook *JP Boyd on Family Law*, in an offline version in PDF format, or in a thick, bound, printed book. We produced this as a wikibook so that free family law information can reach more people. Family law issues touch the lives of a lot of British Columbians, and when you're dealing with these issues, you need all the help and support you can get.

Clicklaw Wikibooks has teamed up with Vancouver lawyer John-Paul Boyd to turn his popular family law website, www.bcfamilylawresource.com, into this new Clicklaw Wikibook title, *JP Boyd on Family Law*. The migration of John-Paul's website into this new format preserves the accessibility, scope and tone of the original, which provided free family law information to more than 27,000 British Columbians a month and had been published for more than a decade.

As a wikibook, *JP Boyd on Family Law* continues John-Paul's commitment to explaining the legal system and providing free, plain language information on family law and divorce law, court processes and other family law dispute resolution mechanisms, while harnessing the versatility and strength of MediaWiki ^[2], the same open-source wiki platform that powers Wikipedia.

The clean page layout of the wikibook in its online form ^[3] provides a familiar user experience, and the online search functionality enables fulltext searching over the entire wikibook as well as other titles on Clicklaw Wikibooks. The wiki platform's *book creator* function allows libraries and individual readers to print as little or as much of this wikibook as they want, in convenient, user-friendly PDF or book formats that expand the reach of this resource to benefit British Columbians online and off.

A collaborative, community resource

John-Paul Boyd continues at the helm of *JP Boyd on Family Law* and will be joined by an editorial team of experienced family law lawyers who are committed to delivering comprehensive, useful and easy to understand family law information. The editorial team represents an enriching diversity of opinion, knowledge and perspective, while the Clicklaw Wikibook's platform enables them to respond to changes in the law quickly. The term *wiki* actually means "fast" or "quick" in Hawaiian, so the idea is that updates will immediately be available to readers at wiki.clicklaw.bc.ca.

John-Paul and the wikibook's editorial team are guided and assisted by an advisory committee composed of family law lawyers, public and legal library representatives, and educators.

Clicklaw Wikibooks

Transitioning John-Paul's resource to a wiki format enables a highly accessible experience both electronically and in print. You might be reading this page on a laptop in a coffee shop, or you could be flipping through this book at a public library. Both digital and print formats are made possible by the technology that powers Clicklaw Wikibooks, and helps provide legal information for the public and improve the legal collections of public libraries in British Columbia.

If you are interested in contributing as a writer, commentator or as a member of the editorial team, or have any feedback or other remarks about this wikibook, please contact editor@clicklaw.bc.ca ^[1].

References

[1] <mailto:editor@clicklaw.bc.ca>

[2] <http://www.mediawiki.org>

[3] <http://wiki.clicklaw.bc.ca>

Family Law in British Columbia

This section offers a short introduction to the principles of family law in British Columbia and the ways that family law problems are resolved. It's written in easy-to-understand language and is meant for people who have never had to deal with the legal system before and for people who are new to Canada.

This section is meant to be read as a whole, from start to finish. The main chapters of this resource go into each subject in a lot more detail. When you're done with this section, the chapter The Legal System has a more complete introduction to family law and dispute resolution processes in BC.

Here you will find an overview of common family law problems, the laws that deal with family law problems, the courts that deal with family law problems, and the other ways that family law problems are resolved. It talks about the law on the care of children, child support, spousal support, the division of property and debt, separation and divorce, and family law agreements.

Introduction

When a couple breaks up, they may have to decide how a child will be cared for, how property should be divided, and whether someone needs extra money to help pay the bills. Family law, sometimes also called divorce law, is the area of the law that deals with problems like these.

To understand how family law works in British Columbia, you need to have a basic understanding of the legal system, the laws about family law problems, and the way the courts apply those laws when a couple can't agree about something. Since it isn't always necessary to go to court when there's a problem, you also need to know about negotiation and mediation. These are the most common ways that people solve their problems without the help of a judge.

Family law problems are solved in one of two ways: the couple bargain with each other and come up with a solution that they both agree to; or, the couple can't agree and they have to go to court to have a judge come up with a solution. Going to court means that one or both people have to start a court proceeding. (Court proceedings are also known as *lawsuits*, *claims* or *actions*.) Going to court is called *litigation*; trying to come up with an agreement without going to court is called *negotiation*. Mediation is a kind of negotiation.

There are two courts that handle almost all family law litigation in British Columbia: the Provincial (Family) Court and the Supreme Court. Each court has its own rules, its own forms, and its own process.

There are two main laws that apply to family law problems. A law, in this sense of the word, means a rule made by the government. These laws are the federal *Divorce Act* and the provincial *Family Law Act*. Each law deals with different issues, although they share a lot of issues in common. For some couples, both laws will apply; for others, only one of these laws will apply, probably the *Family Law Act*.

You don't have to go to court, no matter how bad your problem is. The only times you *must* go to court are when:

- you need a divorce,
- someone is threatening to do something serious, like take the children away,
- there is a risk of violence,
- someone is threatening to hide property or money, or
- you just can't agree about how to fix the problem no matter how hard you try.

If you don't have to deal with one or more of these issues, you can always try to negotiate a way of fixing the problem, to find a solution that you both agree with. Couples who need help negotiating sometimes hire someone else to help, someone who is usually a stranger to them, called a *mediator*. Mediators help to guide the negotiation process and

encourage people to see different ways of solving the problem.

Lawyers who mediate family law problems are called *family law mediators*, and have special training in mediation apart from their training as lawyers. Because there are no rules about who can and who can't call themselves a mediator, you should look carefully at the mediator's credentials before you agree to use that person as your mediator.

Further reading:

- Introduction to the Legal System for Family Matters
- Resolving Family Law Problems out of Court
- Children in Family Law Matters, in particular the section on Parenting after Separation

Common family law problems

Couples who live together and couples who don't, couples how are married and couples who aren't can all have family law problems when their relationships end. Family law affects same-sex couples in exactly the same way that it affects opposite-sex couples. The sorts of problems a couple can have when their relationship ends include deciding how the children will be cared for, whether support should be paid, and who will keep which property and which debt.

Family law problems about children are:

- *parenting time* or *custody*, which include deciding where the children will live for most of the time,
- *parental responsibilities* or *custody*, which include deciding how the parents will make decisions about important things in the children's lives, about issues like health care and education, and
- *parenting time, contact* or *access*, which are about deciding how much time each parent will have with the children.

Support means money that one person pays another to help with that person's expenses. Family law problems about support are:

- *child support*, money that is paid to help with expenses for the children, like clothing and food, and
- *spousal support*, money that is paid to help with a spouse's day-to-day living expenses, like rent, the phone bill and the hydro bill, and sometimes to compensate a spouse for the economic decisions made during the relationship.

When a couple have property, sometimes including when only one person has property, they have to decide if and how that property will be shared between them. In family law, the property married spouses and unmarried spouses share is called *family property*, generally only the property that accumulated during a relationship. Family property can include things like houses, bank accounts, and cars. It can also include RRSPs and pensions.

Sometimes a couple also has to decide who will take responsibility for debts. Generally, only the debts that accumulated during a relationship will be shared between married spouses and unmarried spouses.

Married spouses also have to decide about whether they want to get divorced. Divorce is the legal end of a marriage, and only a judge can make you divorced. Most married spouses whose relationship has ended want to get divorced, but it's usually a low priority. Couples who aren't married, including unmarried spouses, never need to get divorced.

All of these family law problems will be discussed in more detail later on.

As you can see, the sorts of family law problems a couple can have sometimes depends on what their relationship was like. In family law, there are three types of relationship:

1. **Unmarried couples.** An unmarried couple probably think of themselves as boyfriend and girlfriend. They may have lived together, but not for too long. Sometimes an unmarried couple involved in a family law problem will have been together only for a very short while — perhaps just long enough to make a baby.
2. **Unmarried spouses.** Unmarried spouses are not legally married. Unmarried spouses have lived together in a loving relationship, and, for most purposes of the *Family Law Act*, must have lived together for at least two years or for less

than two years if the couple have had a child together.

3. **Married spouses.** Married spouses have been legally married, by a marriage commissioner or a religious official licensed to perform marriages, and their marriage has been registered with the government where they were married.

Further reading:

- Children in Family Law Matters
- Child Support
- Spousal Support
- Property & Debt in Family Law Matters
- Family Relationships, in particular the sections on Marriage & Married Spouses and Unmarried Spouses

The courts of British Columbia

There are three levels of court in British Columbia: the Provincial Court, the Supreme Court, and the Court of Appeal. The Court of Appeal is the highest court in the province and the Provincial Court is the lowest. Most family law litigation happens in the Provincial Court and the Supreme Court.

The branch of the Provincial Court that deals with family law is called the Provincial (Family) Court. Other branches of the Provincial Court include the Provincial (Youth) Court and the Provincial (Small Claims) Court. When this wiki talks about the Provincial (Family) Court, it will just say the "Provincial Court." The Provincial 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. On top of issues about the guardianship and the care of children, child support and spousal support under the *Family Law Act*, this court can also deal with:

- divorce,
- custody and access under the *Divorce Act*,
- dividing family property and family debt, and
- orders protecting property.

This chart shows which court can deal with which problem:

| | 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 | |

To get to court, you must start a court proceeding and tell the court what you want. In the Provincial Court, proceedings are started with a court form called an Application to Obtain an Order. In the Supreme Court, the court form is called a Notice of Family Claim. In the Provincial Court, the person who starts a court proceeding is called the *applicant*; in the Supreme Court, this person is the *claimant*.

Once a court proceeding has started, the person whom the proceeding has been brought against can answer the claims being made and make new claims. In the Provincial Court, this answer is called a Reply. In the Supreme Court, two court forms can be used: a Response to Family Claim and a Counterclaim. In the Provincial Court and in the Supreme Court, the person answering a court proceeding is called the *respondent*.

Applicants and respondents (in the Provincial Court), and claimants and respondents (in the Supreme Court), are called the *parties* to the court proceeding.

After the respondent has filed a reply to the claim, both parties can ask the court to make an *order* about some or all of the issues raised in the court proceeding. An order is a decision of a judge that requires someone to do something or not do something. For example, a court can make an order that a child live mostly with one party, an order that one party not harass the other, or an order that one party have the family car.

Orders can be made *by consent*, which means that they are made with the agreement of both people. If the couple can't agree on the terms of the order, they must go to a hearing before a judge and have the judge decide the terms of the order. There are two types of order: an *interim order*, which is any order made before trial; and, a *final order*, which is an order made at the end of a trial. A *trial* is the final hearing before a judge that concludes the court proceeding.

If you don't like the order you get from the judge, you can sometimes challenge the order before a higher level of court in a court proceeding called an *appeal*. An order of the Provincial Court is appealed to the Supreme Court. An order of the Supreme Court is appealed to the Court of Appeal. You cannot appeal an order that you agreed to.

Over time, the terms of an order may need to be changed. If there has been a serious change in your circumstances or in the circumstances of the children since an order was made, you can go back to court and ask that the order be changed to suit the new circumstances. This is called *varying* an order.

Further reading:

- Introduction to the Legal System for Family Matters, in particular the section on The Court System for Family Matters
- Resolving Problems in Court, in particular the sections on Starting a Court Proceeding in a Family Matter, Replying to a Court Proceeding in a Family Matter, and Interim Applications in Family Matters

The law

There are two kinds of law: laws made by the governments, called *legislation*, *statutes* or *acts*; and, laws made by the courts. Laws made by the courts are known as the *common law*, *precedent decisions* or *case law*. They come from the different proceedings that the courts have heard over hundreds of years, and the decisions the courts have made in those different proceedings.

Legislation is made by the federal government and the provincial government. The two pieces of legislation that are the most important for family law in British Columbia are the federal *Divorce Act* and the provincial *Family Law Act*. Each piece of legislation deals with different family law problems and applies to different kinds of relationships.

The *Divorce Act* only applies to people who are married or who used to be married to each other. It deals with:

- divorce,
- custody,

- access,
- child support, and
- spousal support.

The *Family Law Act* applies to married spouses, unmarried spouses, and unmarried couples who are neither married spouses nor unmarried spouses and are perhaps just dating. This law deals with:

- guardianship of children,
- parental responsibilities and parenting time,
- contact,
- child support,
- spousal support,
- dividing family property and family debt,
- orders protecting people, and
- orders protecting property.

Unmarried couples can only use the *Family Law Act* to ask for orders about the care of children, child support, and orders protecting people. Married spouses and unmarried spouses can use the act to ask for orders about the care of children, child support, and orders protecting people, as well as orders about spousal support, property and debt, and orders protecting property.

The Supreme Court can make orders under both the *Divorce Act* and the *Family Law Act*. The Provincial Court can only make orders under the parts of the *Family Law Act* that don't deal with property.

This chart shows which law deals with which issue:

| | <i>Family Law Act</i> | <i>Divorce Act</i> |
|--|--|--------------------|
| Divorce | | Yes |
| Care of children | Guardianship and parental responsibilities | Custody |
| Time with children | Parenting time or contact | Access |
| Child support | Yes | Yes |
| Children's property | Yes | |
| Spousal support | Yes | Yes |
| Family property and family debt | Yes | |
| Protection orders | Yes | |
| Financial restraining orders | Yes | |

There is a bunch of other legislation that deals with family law problems, such as the *Adoption Act* ^[1] (which deals with adoption), the *Name Act* ^[2] (which deals with changing your name and your children's names), the *Land Title Act* ^[3] (which has to do with land and houses), and the *Vital Statistics Act* ^[4] (which has to do with registering births, deaths, marriages, and divorces). The most important of these other laws is the Child Support Guidelines.

The Child Support Guidelines sets out the rules about how much child support should be paid according to the income of the person paying child support and the number of children child support is being paid for. For most people, the amount that should be paid is set out in a table at the end of the Guidelines. The Guidelines also sets out the rules about when

child support can be paid in an amount different than what the tables say should be paid.

Further reading:

- Introduction to the Legal System for Family Matters, in particular the section on The Law for Family Matters
- Legislation in Family Matters in Getting Started
- Child Support, in particular the section on Child Support Guidelines

The care of children

There are three things that parents must decide when their relationship ends: where the children will mostly live; how the parents will make decisions about the important events in the children's lives; and how much time each parent will have with the children.

The *Divorce Act* talks about these issues in terms of *custody* and *access*. Custody sort of means where the children live most of the time, but separated parents can both have custody, called *joint custody*, and not have anywhere close to half of the children's time. In cases like this, joint custody means an equal right to participate in making decisions about the children. Access is the word used to describe the schedule of the child's time between the parents.

The *Family Law Act* talks about these issues in terms of *parental responsibilities*, *parenting time* and *contact*. People who are guardians, usually parents, have parental responsibilities and parenting time. Someone who isn't a guardian, which might include a parent who isn't a guardian, has contact with a child.

Parental responsibilities are all about parenting. They include making decisions about where the children go to school, how they are treated when they get sick, whether they will play sports or take music lessons, and about the religion they will be taught. Parental responsibilities can be shared between guardians or divided between them, so that only one guardian can make decisions about a particular parenting issue. When more than one guardian share a parental responsibility, the guardians must try to work together to make decisions about that issue.

Parenting time and contact are the terms used to describe the schedule of the child's time between guardians and between guardians and people who are not guardians.

Further reading:

- Children in Family Law Matters, in particular the sections on Custody and Access and Guardianship, Parenting Arrangements and Contact

Child support

Child support is normally paid by the parent who has the children for the least amount of time to the parent who has the children for the most amount of time. Child support is paid to help with the children's day-to-day living expenses, and covers a lot of things, from new clothes to school supplies to the children's share of the rent. Child support is not a fee a parent must pay to see the children. Child support has nothing to do with custody or guardianship; it has nothing to do with access, parenting time or contact; it has nothing to do with whether a parent is a good parent or a bad parent. A parent has a duty to pay child support just because he or she is a parent.

Child support is almost always paid each month, in the amount set out in the Child Support Guidelines ^[5]. A parent's duty to pay child support does not end until the child turns 19. It can last longer than that if a child has an illness or disability that prevents the child from earning a living, or if the child is going to university or college full-time.

Normally a parent pays the exact amount of child support the Guidelines tables say should be paid. A parent can pay a smaller amount if the children's time is shared almost equally between the parents, if one or more children live with each parent, or if paying the amount required by the Guidelines would cause serious financial hardship.

The basic amount of child support is intended to cover most of the children's expenses. Some expenses, called *special or extraordinary expenses*, are not covered in this basic amount. Typically, extraordinary expenses are expenses like daycare and orthodontics — big, important expenses that most but not all children need. Where the children have extraordinary expenses, the parents contribute to those expenses in proportion to their incomes. For example, if one parent earns \$30,000 per year and the other earns \$20,000, the first parent would have to pay 60% of an extraordinary expense and the other would have to pay 40%.

Further reading:

- Child Support, in particular the section on the Child Support Guidelines

Spousal support

Spousal support is money paid by one spouse to the other for one of two reasons. Spousal support may be paid to help the other spouse meet his or her living expenses, or it may be paid to compensate a spouses for the economic consequences of the decisions made during the relationship. Spousal support is not automatically payable just because a couple were in a married or unmarried spousal relationship; the person who needs support must prove that he or she is entitled to get support.

The decisions made by a couple during their relationship can cause a spouse to be entitled to compensation if those decisions took the spouse out of the paid workforce, required them to move to a place where there was less financial opportunity, prevented the spouse from taking a promotion or have made it more difficult for the spouse to get a job after separation. Say, for example, a couple decided that one of them should quit work and stay at home to raise the children and be a homemaker. A spouse who stays at home may have to leave a job or a career, and it can be very difficult to return to work after being out of the workforce, particularly when the relationship was long and there is no career to return to.

The end of a relationship can cause a spouse to need financial help. After a couple separate, the same amount of money they had during the relationship now has to pay for two rent bills, two hydro bills and two grocery bills. When the couple were together, however, their combined incomes only had to pay for one rent bill, one hydro bill and one phone bill.

Spousal support is usually paid every month, although it can be paid in a large, single payment. The amount of spousal support that should be paid is usually an amount that the person with more money can afford to pay, using the money left over after that person's basic living expenses have been paid.

When a relationship was very long or the couple are older, spousal support can be paid forever or until they both get pensions or government benefits like CPP. When the couple is younger, spousal support is usually only paid for a specific amount of time. This is because the person getting support has an obligation to try to become financially independent from the person paying support.

The amount of spousal support that should be paid and the length of time support should be paid can also be calculated using the Spousal Support Advisory Guidelines. The Advisory Guidelines uses two formulas, one for when a couple has children and one for when they don't, that calculate how much support should be paid according to the length of the relationship and each party's annual income.

There are three very important things to know about the Advisory Guidelines:

1. The Advisory Guidelines is not a law and there is no rule saying that the Advisory Guidelines formulas must be used. Despite this, lawyers and the court use the Advisory Guidelines almost all the time when spousal support is going to be paid.
2. The Advisory Guidelines is only used when someone is proven to be entitled to receive support; if there is no entitlement, the Advisory Guidelines doesn't apply.

3. The formulas the Advisory Guidelines describes are very complicated. In particular, the formulas that are used when a couple has children cannot be done without a computer program.

Only people who are married spouses or unmarried spouses can ask for spousal support. Married spouse must ask for spousal support within two years of their divorce. Unmarried spouses must ask for spousal support within two years of their separation.

Further reading:

- Spousal Support, in particular the section on The Spousal Support Advisory Guidelines

Dividing family property and family debt

Married spouses and unmarried spouses who have lived together for at least two years are each entitled to half of the *family property* when their relationships end. Family property includes:

- the property the spouses got during their relationship, including real estate as well as personal property,
- bank accounts, investments, RRSPs and pensions,
- the interest of a spouse in a company, business or partnership,
- debts owed to a spouse, and
- the increase in value of "excluded property" during the relationship.

Each spouse is entitled to keep all of his or her *excluded property*. Excluded property includes:

- the property owned by each spouse on the date they began to live together or the date they married, whichever is earlier,
- gifts or inheritances received during the relationship,
- certain kinds of court awards and insurance payments made during the relationship, and
- property bought during the relationship with excluded property.

Each spouse is also responsible for half of the *family debt*. Family debt includes:

- all debts incurred by either spouse during the relationship, and
- debt incurred after separation, if the debt was incurred to maintain family property.

The spouses' right to a share in the family property and obligation to share in the family debt happens when the spouses separate. Separation doesn't always happen when someone moves out. Spouses can be separated while living together, as long as one of them has said the relationship is over and then the couple has behaved as if it was over, for example by stopping sleeping together or eating together, and stopping doing chores for each other.

Further reading:

- Property & Debt in Family Law Matters

Separation and divorce

You don't need a legal document to separate, and you don't need to see a lawyer or a judge to separate. You just leave the relationship or announce that it's over and then behave like it's over. There is no such thing as a *legal separation* in British Columbia.

For unmarried spouses and other unmarried couples, their relationship is over the moment they separate. That's it, it's done! There is no such thing as a "common-law marriage," and unmarried spouses don't need to get divorced.

For a marriage to end, however, married spouses must divorce, and that means they must get a court order saying that they are divorced. A married couple can be separated for many years but still be married if they haven't gotten a divorce

order.

Sometimes married people don't get around to getting a divorce for many, many years. That's fine. The only thing a separated married person can't do that an unmarried person can do is marry again. Separated married people can date someone else, live with someone else, be in an unmarried relationship with someone else, have property in their own name, have bank accounts and credit cards in their own name, and so on.

There are three reasons why a court will make a divorce order:

1. the couple have separated and have stayed separated for more than one year,
2. one spouse has had sex with someone other than his or her spouse, called *adultery*, or
3. one spouse has been verbally, emotionally or physically abusive to his or her spouse, which is what the *Divorce Act* means by *cruelty*.

To get a divorce order, you have to start a court proceeding. You don't have to ask the court for anything else except a divorce. When a couple agrees to get a divorce, they can get a divorce using the do-it-yourself desk order process, and they won't have to go in front of a judge ever.

Further reading:

- Separation & Divorce

Family law agreements

A family law agreement is a contract, like the contract you might have with your landlord or your employer, or the contract you might have if you leased a car.

There are three kinds of agreement a couple can make in family law:

1. cohabitation agreements, agreements that a couple may make when they are living together or plan to living together,
2. marriage agreements, which a couple may want if they are going to be getting married, and
3. separation agreements, which a married or unmarried couple may make after their relationship ends.

Cohabitation agreements and *marriage agreements* are for couples who are just starting a relationship. These sorts of agreements can talk about how the relationship will be managed (who will pay the bills, will there be a joint bank account or a joint credit card, or who will do what parts of the housework), but most often they talk about what will happen if the relationship ends. These agreements are usually meant to stop a couple from fighting after a relationship ends by setting out who will get what right from the start.

The law does not require that a couple make a cohabitation agreement or a marriage agreement when they start to live together or marry. You don't have to sign an agreement like this if you don't want to.

Cohabitation agreements and marriage agreements aren't for everyone. People who are bringing a lot of property, money, or children into a relationship may want a cohabitation agreement or a marriage agreement. People who don't have property or children, are young, and expect to have a long-term relationship may not need an agreement.

Separation agreements are made after a relationship has ended. They talk about how a couple has agreed to deal with things like the care of children, child support and spousal support, and how the family assets will be shared. Separation agreements don't have to cover all the family law problems a couple have. They can deal with just some of those problems and leave the rest for the court to decide.

Normally a couple talk together about the issues and try to make an agreement that they are both happy with. It is unusual for just one person to make the separation agreement without talking to the other person. *You do not have to sign a separation agreement if you don't want to.*

No matter what kind of family law agreement you have signed, you both expect that each of you will follow the agreement, and that the court will enforce the agreement if you don't follow it. The court will generally respect an agreement that a couple willingly signed, as long as the agreement was fair and neither person misled the other person about something important, like money or property.

Further reading:

- Family Law Agreements

Information for people who are new to Canada

In Canada, men and women have exactly the same rights. There is no difference between the rights a man has and the rights that a woman has, whether they are married to each other or not. Men do not have the right to control women or tell them what they may and may not do, even if a couple are married spouses or unmarried spouses.

Our courts are open to everybody who lives in Canada, not only to people who have Canadian citizenship. People who are new to Canada can make a claim in court, regardless of their citizenship status, and regardless of whether they have permanent residency or not.

There is no law that requires someone who is unhappy in a marriage to stay in that marriage. If someone wants to leave a relationship, he or she can, and that person does not need the permission or agreement of the other spouse to leave.

In Canada, there is no requirement for either dowry or dower to be paid when a couple marries or divorces. Even if a religion requires such a payment, the religious duty is not legally binding in Canada.

If an arranged marriage is proposed, the parties must agree to the marriage of their own free will. There is no law that allows someone to be forced to marry someone else. An agreement between relatives about a marriage is not legally binding on the people who are supposed to get married.

When one spouse sponsors another spouse to come to Canada, that person will usually sign a "sponsorship agreement" with the government. This agreement requires the sponsor to support the person who is coming to Canada, whether they stay married, separate or divorce. This agreement is only between the sponsor and the government. If the person coming to Canada needs spousal support, for example, he or she can ask the court for an order that spousal support be paid.

Separation does not automatically mean that someone new to Canada will have to leave the country. People who are permanent residents, for example, will usually be allowed to stay, regardless of what is happening in their relationship with their sponsors. You should, however, speak to an immigration lawyer just to be sure.

In Canada you must have a court order to divorce and legally end a marriage. Religious divorces are not recognized in Canada as divorces that legally end a marriage. The decisions of religious tribunals about how a separated couple will share their property or manage the care and control of their children may not be recognized in British Columbia.

Further reading:

- Other Family Law Issues, particular the section on immigration issues

✓ The above was last reviewed for legal accuracy by JP Boyd, May 12, 2013.

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Legislation in Family Matters

The most important statutes in family law and divorce law are the provincial *Family Law Act* and the federal *Divorce Act*. There is also a very important federal regulation, the Child Support Guidelines, and an important academic paper, the Spousal Support Advisory Guidelines.

You may also run into other laws, like the *Name Act* ^[1] or the *Partition of Property Act* ^[2], which weren't written just for family law disputes but still relate to your situation.

This section describes the basic legislation on family and divorce law, and briefly reviews some of the important secondary legislation touching on family law issues.

Two important statutes, one important regulation and one influential paper

The *Divorce Act*, the *Family Law Act* and the Child Support Guidelines are central to family law in British Columbia. While some of the subjects covered by the *Divorce Act* and the *Family Law Act* overlap, there are significant distinctions between the two laws that you need to be aware of.

The section The Law for Family Matters within the chapter Introduction to the Legal System for Family Matters has a detailed discussion of the federal and provincial authority to make laws.

Only the *Divorce Act* deals with divorce. Only the *Family Law Act* deals with the guardianship of children and the division of property and debts. Both acts deal with the care of children, children's parenting schedules, child support, and spousal support.

One of the most important distinctions between these two laws, as will be seen below, lies in how they define key words like *spouse*, *parent* and *child*. Depending on the particular law you're dealing with, you may fall inside these definitions or outside of them.

The *Divorce Act*

The *Divorce Act* ^[3], RSC 1985, c 3 (2nd Supp) is a federal law that you can find, along with other federal laws, at the website of the federal Department of Justice ^[4], or on CanLII ^[3], a free website for searching Canadian court decisions and legislation. Because of a constitutional rule called the *doctrine of paramountcy*, the *Divorce Act* is considered to be superior to the provincial *Family Law Act*. As a result, if you are entitled to ask for an order under the *Divorce Act* about child support or spousal support, you probably should.

The *Divorce Act* only applies to *married spouses*, people who are or were married to each other by a marriage commissioner or a religious official licensed to perform marriages. If you are not legally married, the *Family Law Act* is the only game in town. Although the court may allow someone who isn't a spouse to apply under the *Divorce Act* for an order relating to custody of or access to a child, that person must get the court's permission first, and the spouses must have already started a court proceeding between each other.

You must also be *ordinarily resident* in your province for at least one year before you can ask for an order under the *Divorce Act*. This means that you might have to delay filing for a divorce if you've moved to a new province within the last year.

The *Divorce Act* refers to children as *children of the marriage*. A child of the marriage is defined in s. 2(1) as:

A child of two spouses or former spouses who, at the material time,
(a) is under the age of majority and who has not withdrawn from their charge, or
(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

In other words, a child of the marriage is someone who is less than 19 years old, the age of majority in British Columbia, or who is 19 and older if the child cannot support him- or herself. Since only people qualifying as *spouses* are obliged to pay child support, the definition of child of the marriage is expanded in s. 2(2) to include stepparents:

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

The *Divorce Act* covers these basic subjects:

- divorce,
- custody of and access to children,
- child support, and
- spousal support.

JP Boyd on Family Law provides extensive coverage of the *Divorce Act*, including a chapter on *Divorce Act Basics*.

The Family Law Act

The *Family Law Act* ^[5], SBC 2011, c 25 is a law created by the government of British Columbia that you can find, along with other provincial laws, at the website of the Queen's Printer ^[6] or on CanLII ^[5], a free website that lets you search Canadian laws and court decisions. Both married and unmarried couples may apply for orders under this act, as well as other people who might have an interest in a child, such as a family member of the child.

Section 1 of the *Family Law Act* defines a *child* as someone who is under 19 years of age. Section 146 gives a bigger definition for child support, and defines child as including:

a person who is 19 years of age or older and 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

Under Part 3 of the act, a *parent* is presumed to be the biological father and the birth mother of a child. However, if assisted reproduction is used, parent can include:

- up to two people who intend to have the child,
- a donor of sperm and a donor of an egg, and
- a surrogate mother.

When child support is an issue, parent can include a stepparent. Section 146 defines a stepparent as:

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

Under s. 3, *spouse* includes:

- someone who is married to someone else,
- someone who has lived with someone else in a marriage-like relationship for at least two years,
- except for the parts of the act about dividing property and debt, someone who has lived with someone else in a marriage-like relationship for less than two years if they have had a child together, and
- former spouses.

Under s. 39(1) of the act, a child's guardians are usually the child's parents, as long as they have lived together during the child's life. Under s. 39(3), guardians include:

- people who are parents because of an assisted reproduction agreement, and
- parents who never lived with child and other parent, as long as the parent "regularly cares" for the child.

Under the act, someone who is a parent or guardian can be required to pay child support. Someone who is a guardian has "parental responsibilities" for the child and has "parenting time" with the child. Someone who is not a guardian, has "contact" with the child.

A *spouse* can be entitled to get spousal support from another spouse. Only spouses who are married or who have lived in a marriage-like relationship for at least two years are entitled to share family property and are responsible for family debt.

The *Family Law Act* covers these subjects:

- parentage of children and assisted reproduction,
- guardianship of children,
- parental responsibilities and parenting time,
- contact with a child,
- child support and spousal support,
- dividing property and debt,
- orders to protect people, and
- orders to protect property.

JP Boyd on Family Law provides extensive coverage of the *Family Law Act*, including a chapter on *Family Law Act* Basics.

The Child Support Guidelines

The Child Support Guidelines, often referred to as just the *Guidelines*, is a federal regulation that standardizes child support orders throughout Canada except Quebec. The Guidelines talk about how income is calculated and special expenses are shared between parents, and provide a series of tables, one for each province and territory, which set out how much child support should be paid based on the payor's income and the number of children support is being paid for.

The Child Support Guidelines apply to child support orders made under both the *Divorce Act* and the provincial *Family Law Act*. Because they are mandatory whenever child support is being paid, the Child Support Guidelines also apply to agreements about child support.

The Guidelines, and the exceptions to the Guidelines tables, are discussed in a lot more detail in the chapter Child Support.

The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines, often called the *Advisory Guidelines*, is not a law. It is an academic paper that describes a number of mathematical formulas that can be used to calculate how much spousal support should be paid and how long spousal support should be paid, once a person's entitlement to receive spousal support has been proven.

Although the Advisory Guidelines is not a law, the courts of British Columbia and many other provinces routinely rely on the Advisory Guidelines formulas when making decisions about spousal support. The Advisory Guidelines cannot be ignored if you have a problem involving the payment of spousal support.

The Advisory Guidelines formulas, and the way the courts have dealt with the Advisory Guidelines, are discussed in more detail in the chapter Spousal Support within the section The Spousal Support Advisory Guidelines.

Other legislation related to family law issues

This segment discusses some of the secondary legislation relating to marriage, children, child protection, the enforcement of orders and agreements relating to support payments, real property, wills and estates, and name changes.

Marriage

The federal *Marriage (Prohibited Degrees) Act* ^[7] sets out the degrees of consanguinity — relatedness by blood — a couple cannot have if they are to marry each other. The federal *Civil Marriage Act* ^[8] defines marriage as the "union of two persons" rather than "the union of a man and a woman," allowing same-sex couples to marry, and makes related changes to other federal legislation like the *Divorce Act*, allowing same-sex couples to divorce, and the *Income Tax Act* ^[9].

The provincial *Marriage Act* ^[10] deals with the formalities of marriage, and covers such things as who is entitled to marry people, marriage licences, and the age at which a couple can legally marry.

More information about marrying and marriage, including invalid marriages, is available in the Marriage & Married Spouses section in the Family Relationships chapter.

Children

The provincial *Age of Majority Act* ^[11] sets the age of majority at 19. The provincial *Infants Act* ^[12] describes the legal capacity of children, such as their ability to enter into legally binding contracts or marriage settlements.

The provincial *Adoption Act* ^[13] deals with such things as who can give a child up for adoption, who may adopt a child, and the general ins and outs of the adoption process. The process for adoption is described in more detail in the section on Adoption within the chapter Other Family Law Issues.

The provincial *Parental Responsibility Act* ^[14] says that parents whose children have been convicted of causing damage or loss of property may be held responsible for loss caused by their children's offences, up to a maximum of \$10,000.

Child protection

On 1 October 2002, the Children's Commissioner, which investigated serious injuries or deaths suffered by children, and the Office of the Child, Youth and Family Advocate, which investigated issues involving children in the care of or involved with governmental and private agencies, were replaced by the Office for Children and Youth. On 18 May 2006, this was in turn replaced by the Representative for Children and Youth ^[15], operating under the *Representative for Children and Youth Act* ^[16]. The goals of the representative, who has significant oversight powers, are to:

- foster respect for the fundamental rights of all children and youth in British Columbia,
- support and promote the rights of children and youth in the care of the state,
- promote awareness and understanding of key principles in the United Nations Convention on the Rights of the Child,
- monitor the effectiveness and responsiveness of services and programs in British Columbia,
- work collaboratively with public bodies, including the Chief Coroner and the Public Guardian and Trustee, to build an integrated, responsive process for the review and investigation of critical injuries and death, and
- draw on lessons learned to support and promote prevention initiatives and best practices with respect to intervention.

The provincial *Child, Family and Community Service Act* ^[17] gives the government, specifically the Ministry for Children and Family Development ^[18], the power to apprehend children believed to be suffering from child abuse or neglect, or who are at risk of child abuse or neglect. The act regulates the conditions under which children can be seized, the conditions in which they may be placed in the care of the government, and the authority and powers of child protection workers.

Enforcement of child support and spousal support

The provincial *Family Maintenance Enforcement Act* ^[19] establishes the Family Maintenance Enforcement Program ^[20], a government agency with the authority to enforce support orders, and sets the extent of that authority. The provincial *Court Order Enforcement Act* ^[21] sets out the ways in which money awarded under a judgment can be collected, such as by liens against property, the garnishment of wages, and so forth.

The provincial *Interjurisdictional Support Orders Act* ^[22] allows support orders made outside of British Columbia to be registered in this province for enforcement. It also allows someone affected by that order to start a process here that may result in the variation of that order in the court that originally made the order. The act does not apply to all support orders, only to the orders of the countries, provinces and states that have a reciprocal agreement with British Columbia.

Real property

The provincial *Land (Spouse Protection) Act* ^[23] protects the rights of married spouses and unmarried spouses to their interest in the family home by allowing them to file an entry on the title of the property, but the protection ends once the spousal relationship ends.

The provincial *Land Title Act* ^[24] deals with all aspects of real property in British Columbia, including the conditions of holding valid title to a piece of land, placing and removing encumbrances (like liens and mortgages) on the title of a property, and the conditions under which a Certificate of Pending Litigation can be placed on the title. The *Partition of Property Act* ^[2] gives someone who owns property jointly with someone else the right to force the sale of that property over the objections of the other owner.

Wills and estates

Marriage, divorce, and living in an unmarried relationship for at least two years can affect how property is distributed through a will and how property is distributed when someone dies without a will, called dying *intestate*. Two pieces of provincial legislation are important here, the *Wills Act* ^[25] and the *Estate Administration Act* ^[26]. The *Wills Act* ^[25] says that:

15 A will is revoked by the marriage of the testator, unless

(a) there is a declaration in the will that it is made in contemplation of the marriage, or

(b) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the person died intestate.

16 (1) In this section, "spouse" includes a person considered by a testator to be the testator's spouse.

(2) If in a will a testator

(a) gives an interest in property to his or her spouse,

(b) appoints his or her spouse executor or trustee, or

(c) confers a general or special power of appointment on his or her spouse,

and after the making of the will and before the testator's death

(d) a judicial separation has been ordered in respect of the marriage,

(e) the marriage is terminated by a decree absolute of divorce, or a judgment granting a divorce under the Divorce Act (Canada) for which a certificate was or could have been issued under that Act, or

(f) the marriage is found to be void or declared a nullity by a court

then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

A *testator* is a person who makes a will.

The *Estate Administration Act* ^[26] deals with the distribution of the estate of someone who dies intestate, that is, without a will. This is a critical piece of legislation because a certain amount of the dead person's estate is automatically allotted to his or her spouse, regardless of whether they are together or have been separated for two years or 20 years. Section 85 says that:

(2) This section applies if an intestate dies leaving a spouse and issue.

(3) If the net value of the person's estate is not greater than \$65 000, the estate goes to the spouse.

(4) If the net value of the person's estate is greater than \$65 000, the spouse is entitled to \$65 000, and has a charge on the estate for that sum.

(5) After payment of the sum of \$65 000, the residue of the estate goes as follows:

(a) if the intestate dies leaving a spouse and one child, 1/2 goes to the spouse;

(b) if the intestate dies leaving a spouse and children, 1/3 goes to the spouse.

(6) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the spouse takes the same share of the estate as if the child had been living at the date.

The provincial *Wills Variation Act* ^[27] allows close relatives, including unmarried spouses, who have been left out of someone's will to apply to court for an order giving them some of the dead person's estate.

Names and change of name

The provincial *Name Act* ^[1] is the law that deals with changes of name, both for a married spouse following divorce and for anyone who hankers to be called something different. (The process is fairly simple for a spouse following divorce.) The *Vital Statistics Act* ^[28] talks about the registration of new births and about the naming of infants, and should be read if you're thinking of calling your child something different like Moon Unit or Blue Ivy.

There's more information about naming and changing names in the aptly-named Naming and Changes of Name section of the Other Family Law Issues chapter.

International Treaties

Canada is a signatory to many multilateral international agreements, from agreements about the treatment of prisoners in wartime to agreements about money laundering. In family law, the two most important treaties concern the wrongful removal of children and the rights of children.

The Hague Convention on the abduction of children

The Hague Convention on the Civil Aspects of International Child Abduction ^[29] says what signatory countries must do when someone has wrongfully taken a child into that country. The convention explains how someone from the departure country can make an application for an order in the destination country for the return of the child. It outlines the defences that can be made to an application, the different orders the court in the destination country can make, and the factors that court must consider in making those orders.

More information about the Hague Convention, including a list of signatory countries, can be found in the chapter Resolving Family Law Problems in Court within the section Enforcing Orders in Family Matters.

The UN Convention on the rights of children

The UN Convention on the Rights of the Child (PDF) is an agreement about the human rights and legal rights of children in signatory countries. Among other things, Article 12 of the convention says that the views of children must be heard in any legal proceeding that affects their interests:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

You can get a copy of the complete text of the Convention from the website of the UN Office of the High Commissioner for Human Rights^[30] by searching for "convention rights child."

You can find more information about how the views of children are heard in family law disputes in the chapter Children in Family Law Matters.

Provincial legislation

Canada and British Columbia have made a number of important agreements with other countries for the mutual enforcement of court orders.

The *Interjurisdictional Support Orders Act*^[22] talks about getting and changing orders for child support and spousal support where the parties are living in different provinces or different countries. The Interjurisdictional Support Orders Regulation^[31] has a table showing which countries have signed up.

The *Court Order Enforcement Act*^[21] is about enforcing court orders for the payment of money or transfer of goods or property. The countries that have signed up can be found in the Notice of Reciprocating Jurisdictions^[21].

You can find more information about the *Interjurisdictional Support Orders Act* in the chapter Child Support, in the section Making Changes to Child Support. You can find more information about enforcement of orders in the chapter Resolving Problems in Court, in the section Enforcing Orders in Family Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, May 12, 2013.

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- [22] <http://canlii.ca/t/8413>
- [23] <http://canlii.ca/t/8451>
- [24] <http://canlii.ca/t/8456>
- [25] <http://canlii.ca/t/84fx>
- [26] <http://canlii.ca/t/840g>
- [27] <http://canlii.ca/t/84g0>
- [28] <http://canlii.ca/t/84fk>
- [29] http://www.hcch.net/index_en.php?act=conventions.text&cid=24
- [30] <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>
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Divorce Act Basics

The federal *Divorce Act* is the legislation on marriage breakdown in Canada. It only applies to spouses who are married to each other or who used to be married to each other. It talks about how married spouses get divorced and when divorce orders from another country are recognized here. It also deals with the care of children after separation, child support, and spousal support.

This section provides an overview of the *Divorce Act*. It is written primarily for justice system workers and legal advocates, but anyone can use it. All of the information provided in this section is discussed in more detail elsewhere in *JP Boyd on Family Law*. Use the search tool at the top of the page to find more information.

Introduction

Who does the *Divorce Act* apply to?

The *Divorce Act* is the main law on marriage breakdown in Canada. It applies to people who are or were married to each other, regardless of where they were married. If people in other kinds of relationships want orders about the care of children, child support, or spousal support and can't make an agreement, they must apply under provincial legislation. In British Columbia, that law is the *Family Law Act*.

If married spouses have started a court proceeding, other people — like grandparents, other family members, and children's other caregivers — can use the *Divorce Act* to ask for orders about the care of the spouses' children, but they must get the court's permission first.

What does the *Divorce Act* cover?

The *Divorce Act* talks about:

- divorce and foreign divorce orders,
- custody of children,
- access to children,
- paying child support,
- paying spousal support, and
- changing orders about custody, access, child support, and spousal support.

What is "corollary relief"?

The *Divorce Act* describes issues about the care of children and support as "corollary relief." *Corollary* means "related to"; a court that is hearing a divorce proceeding can make orders about the care of children and support because those issues are related to the court's ability to make a divorce order.

What about annulment?

When a marriage is *annulled*, the marriage is cancelled as if the couple had never been married at all. A marriage can be annulled if there is a problem with the legal requirements of the marriage ceremony or the legal capacity of the parties to marry.

The *Divorce Act* doesn't deal with the annulment of marriages, only divorce. Annulment is governed by the common law and is nowhere near as easy to get as a divorce. The section on Marriage & Married Spouses in the Family Relationships chapter talks about when and how marriages are annulled.

When can a court proceeding under the *Divorce Act* start?

A court proceeding for a divorce order can only start when either spouse has lived in the province or territory where the proceeding is started for at least one year. As long as this requirement is met, a court proceeding can be started as soon as the spouses have separated. If both spouses have moved to new provinces, the court proceeding must wait until the one-year requirement is satisfied.

Which court can hear a proceeding under the *Divorce Act*?

If you are married and want to get divorced, you must start your court proceeding in the Supreme Court. Both the Provincial Court and the Supreme Court can hear court proceedings under the provincial *Family Law Act*. However, only the Supreme Court has the jurisdiction to hear proceedings under the *Divorce Act*.

What happens if each spouse starts a court proceeding?

If each spouse starts a divorce proceeding, the court in which a proceeding was started first can continue to deal with that proceeding and the proceeding that was started last is considered to be dropped. This can be very important where spouses live in different provinces.

If the spouses somehow manage to start separate divorce proceedings on the same day, the proceedings are to be transferred to the Federal Court ^[1]. The Federal Court is a trial court like the Supreme Court of British Columbia but is common to all of Canada.

What about claims under the *Family Law Act*?

Both the *Divorce Act* and the *Family Law Act* talk about the care of children, child support, and spousal support. As long as a person is married, he or she can start a court proceeding about these issues under either law or under both laws at the same time. However, if orders about the division of property and debt, personal protection orders and financial protection orders, the parentage of a child or the use of the family home are required, a claim must be under the *Family Law Act*; see the section *Family Law Act Basics* for more information.

Child support

The rules about child support are almost the same between the two laws, except that it can be easier to get child support from a stepparent under the *Family Law Act*. The Child Support chapter talks about child support and when stepparents can be required to pay child support.

Spousal support

The rules about spousal support are very similar between the two laws, except that under the *Family Law Act* spousal support is also available to couples that aren't married to each other as long as they meet that act's definition of "spouse." There's no limit to when claims for spousal support can be brought under the *Divorce Act*. Under the *Family Law Act*, however, spouses who are entitled to ask for spousal support must begin a court proceeding for spousal support within two years of the divorce order, if the couple were married, or within two years of separation, if the couple wasn't married, or they will be out of time.

Children

The two laws are the most different in terms of how they talk about children. The *Divorce Act* talks about *spouses* who have custody and access. The *Family Law Act* talks about *guardians* who have parental responsibilities and parenting time, and people who aren't guardians who have contact. I prefer how the *Family Law Act* deals with children. It's more focused on the rights and interests of children and less focused on the rights of parents.

Because the two systems are so different, even though a married spouse can make a claim under both laws, it's probably best to just pick one. It will be less confusing for the court and it will be less confusing for you.

The law about divorce

Why will the court make a divorce order?

Under s. 8(1) of the *Divorce Act*, the court can make a divorce order only if the spouses' marriage has broken down. Under s. 8(2), there are three reasons why a marriage may have broken down:

- because the spouses have lived separate and apart for at least one year,
- because one spouse has committed adultery, and the adultery hasn't been forgiven by the other spouse, or
- because one spouse has treated the other with such cruelty that the spouses cannot continue to live together, and the cruelty hasn't been forgiven by the other spouse.

Separation

To get a divorce based on separation, the spouses must have lived separate and apart for one year.

The period of living separate and apart can pass while living under the same roof. However, the partnership quality of the relationship between the spouses — the "marriage-like" quality of the relationship — must have ended. In general, this means that the spouses have stopped sleeping together, eating meals together, doing chores for each other, and going out together as a couple.

Under s. 8(3), the spouses can attempt to reconcile and resume married life for up to 90 days during the one-year period. However, if the couple lives together for a total period of more than 90 days, the clock resets, and a new one-year period doesn't start running until the last separation.

Adultery

To get a divorce based on adultery, the spouse asking for the divorce has to be able to prove that his or her spouse had sex with someone else, without his or her permission. The evidence the court will require isn't circumstantial evidence, like a hotel receipt, but direct evidence, like a photograph or the spouse's admission.

You can't ask for a divorce because of your own adultery, only the adultery of your spouse.

Cruelty

To get a divorce based on cruelty, the spouse asking for the divorce has to be able to prove that he or she was treated with such mental or physical cruelty that it was impossible to continue living together. The evidence of cruelty that the court will require must come from someone else, like a doctor or a psychologist. The spouse's own evidence won't do.

You can't ask for a divorce because of your own cruelty, only the cruelty of your spouse.

The effect of forgiveness

The court will not grant a divorce based on adultery or cruelty if the adultery or cruelty has been forgiven, or *condoned*. If the bad behaviour has been condoned, the marital relationship hasn't broken down and the court can't make the divorce order.

When can the court make the divorce order?

If the claim for the divorce is based on separation, the spouse cannot apply for the divorce order until one year has passed from the date of separation. The one-year period doesn't run from the date the court proceeding is started; it runs from the date of separation.

The nice thing about claims based on adultery or cruelty is that the application for divorce can be made right away, without having to wait for one year. However, the adultery or cruelty must be proven, and if more than a year has passed by the time the court is asked to make the divorce order, the court may very well refuse to make the divorce order except because of the spouses' separation.

The process for getting a divorce order is talked about in detail in the Divorce section of the chapter Separation & Divorce.

What about child support?

The court may not make a divorce order unless it is satisfied that adequate arrangements have been made for child support. Section 11(1)(b) of the *Divorce Act* says that the court has the duty to:

to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made

What this means is that the court will usually refuse to make a divorce order unless child support is being paid under a court order or a separation agreement in the amount that would normally be required by the Child Support Guidelines. However, the court may be prepared to consider other terms of an order or agreement that provide a direct or indirect benefit to the children in deciding whether the amount of support being paid is reasonable.

Information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Guidelines.

When is a divorce order effective?

Under s. 12(1), a divorce order takes effect on the 31st day after the divorce order is made. That's because under s. 21(3) the deadline to make an appeal of a *Divorce Act* order is the 30th day after the order is made.

What's the legal effect of a divorce order?

A divorce order terminates a marriage. When a marriage is terminated, the parties stop being "spouses" and lose all of the obligations and benefits that come from being a spouse. A divorced person is free to marry again, but loses things like the right to claim a share of the other spouse's estate, the right to coverage under the spouse's medical and dental benefits, the right to share in the spouse's future CPP and pension earnings, and the right to receive death benefits.

What if spouses wait to get a divorce order?

Getting a divorce is often a low priority for spouses and some spouses wait for many years before starting a court proceeding for divorce. This isn't unreasonable, and usually happens for one of three reasons:

- the cost of getting a divorce can be too high,
- other issues, like the care of children or the division of property and debt, take priority, or
- a spouse's religion discourages or prohibits divorce.

However, there can be some complications.

No divorce without a divorce order

Firstly, no matter how long spouses wait to get divorced, they will always be married to each other until one of them dies or they finally get a divorce order. There's no such thing as an automatic divorce; the passage of time won't do it. You actually have to get that order.

New relationships

Secondly, separated spouses often move on with their lives, meet new people and get into new romantic relationships without having been divorced. There's nothing wrong with this and the new relationship won't stop the married person from getting a divorce when the time is finally ripe.

However, if it takes too long and a separated spouse moves in to live with someone new, it's entirely possible that the spouse can find him- or herself in a new spousal relationship without being divorced. Remember that under the *Family Law Act* people can become spouses without getting married.

Foreign divorce orders

Under s. 22 of the *Divorce Act*, a divorce order made outside of Canada will be recognized here, and be effective to determine a person's marital status here, as long as at least one of the spouses lived in the country that made the divorce order for at least one year before the divorce proceeding was started.

The law about children

Who is a child?

The *Divorce Act* talks about "children of the marriage." A child is a child of one or both spouses who is under the provincial age of majority, or older but "unable to withdraw" from the spouses' care. In British Columbia, the age of majority is 19. In other provinces, like Alberta and Manitoba, the age of majority is 18.

Although a court can make orders about the care of children who are under the age of majority, in practice the court usually won't make orders about children who are close to the age of majority. Children who are that old are usually old enough to make decisions for themselves about where they'd like to live, and the court will usually respect their decisions.

How are decisions about children made?

Section 16(8) of the *Divorce Act* says that the court should take "only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child" into account when making decisions about children.

The *Divorce Act* doesn't go into any further detail than this except to say, at s. 16(10), that:

the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

This doesn't mean that it is *always* best for a child to have an equal or near-equal amount of time with each spouse. It means that the court should give the child as much time with each spouse *as is consistent* with the child's best interests. That might be an equal or a near-equal amount of time, or it might be every other weekend, or it might be no time at all.

Orders for custody and access

Under s. 16(1) of the *Divorce Act*, a spouse or "any other person" can apply to court for an order that he or she has custody of or access to a child. However, a person who is not a spouse cannot make the application without first getting the court's permission.

Access usually refers to the parenting schedule of someone who isn't a spouse or the parenting schedule of the spouse who sees the child for the least amount of time.

Sole custody and joint custody

Under s. 16(4), the court can order that one or more persons have custody of or access to a child.

- When only one person has custody, that person has *sole custody* of the child.
- When more than one person has custody, they together have *joint custody* of the child.

Joint custody does not mean that the spouses share the child's time equally or near-equally. Joint custody usually just means that both spouses are expected to play a role in raising their children and in making decisions about their care and upbringing.

What rights does custody give?

A spouse with sole custody has the child's home and is responsible for the child on a day-to-day basis.

An order for joint custody gives each spouse custody of the children. In such cases the spouses need to and are expected to work together and cooperate in the raising of their children. The children may still spend more time, sometimes a lot more time, at one spouse's home than the other, but both spouses have the right to participate in making decisions about the children's care, welfare, and upbringing.

What rights does access give?

Access usually just refers to the schedule of a spouse's time with a child. More than this, however, under s. 16(5) of the *Divorce Act*, a spouse who has access also has:

the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

This provision doesn't apply to people who are not spouses and have access to the child under a *Divorce Act* order.

How are orders for custody and access enforced?

Orders for custody and access have effect throughout Canada, and are enforced under the laws of each province. In British Columbia, *Divorce Act* orders can be enforced by a spouse under the rules of court and the provincial *Court Order Enforcement Act* ^[2], and by a spouse and the Family Maintenance Enforcement Program ^[3] under the provincial *Family Maintenance Enforcement Act* ^[4].

How are orders for custody and access changed?

Under s. 17(1), a spouse or another person can apply to change an order for custody or access, but someone who isn't a spouse has to first get permission from the court.

The legal test that must be met before the court changes an order for custody or access is at s. 17(5):

Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

In other words, someone who wants to change an order must first show that there has been a change in circumstances. Then, when the court is deciding on a new order, it must consider the best interests of the child in light of that change.

The law about child support

Who is a child?

The *Divorce Act* talks about "children of the marriage." A child is a child of two spouses who is under the age of 19, the age of majority in British Columbia, or 19 and older but "unable to withdraw" from the spouses' care. Normally, adult children who are unable to withdraw are children who are ill or disabled or who are going to school full-time and are unable to support themselves.

Who is a spouse?

In the context of child support, "spouse" includes a spouse who is a parent of a child and a spouse who "stands in the place of a parent" for a child. In other words, *spouse* includes spouses who are *stepparents*.

Who is required to pay child support?

Section 15.1(1) of the *Divorce Act* says that a court may "make an order requiring a spouse to pay for the support of any or all children of the marriage." The act doesn't say that it's *parents* who have to pay; it's *spouses* who have to pay, and "spouse" includes stepparents.

Who can ask for child support?

Under s. 15.1(1) only spouses can ask for child support orders. If someone other than a spouse has custody of a child and needs child support, the person will need to apply for the child support under the provincial *Family Law Act*.

How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines. Most of the time, child support is simple to figure out by looking up the amount payable in the Guidelines tables based on the payor's income and the number of children support is being paid for. Child support can get more complicated when:

- a child is 19 or older,
- the payor has an income of more than \$150,000 per year,
- one or more children live mostly with each spouse, called *split custody*,
- the spouses share the children's time equally or almost equally, called *shared custody*, or
- the payment of the tables amount would cause "undue hardship" to either the recipient of child support or the payor of child support.

More information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Guidelines.

How is child support paid?

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

How are orders for child support changed?

Under s. 17(4) of the *Divorce Act*, the court can change an order for child support if there has been a change in circumstances that would result in a different amount of support being paid, such as an increase or a decrease in the payor's income, or a change in how the children's time is divided between the spouses.

When both spouses live in British Columbia

To change a British Columbia *Divorce Act* child support order when both spouses live here, the applicant must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules have special provisions for applications to change final orders.

When a spouse lives outside of British Columbia

To change a British Columbia *Divorce Act* child support order when the respondent lives in another province, the applicant first applies here, in British Columbia, for a *provisional order* under s. 18.

If the court makes a provisional order, it will send the order to the province where the respondent lives, and the court there will have a hearing to *confirm* the provisional order under s. 19.

The court at the confirmation hearing may:

- confirm the provisional order,
- confirm the provisional order with some changes,
- refuse to confirm the provisional order, or
- send the application back to British Columbia for more information.

A provisional order has no effect until and unless it is confirmed.

The law about spousal support

Who is entitled to ask for spousal support?

Only spouses can ask for spousal support. Under s. 15 of the *Divorce Act*, "spouse" includes *former spouses*, spouses who have been divorced. There is no time limit on when a spouse or former spousal can ask for child support.

A spouse's entitlement to spousal support is determined based on factors set out at s. 15.2(4):

In making an order [for spousal support], the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from child support. Anyone who is a spouse can *ask* for spousal support, but being able to ask doesn't mean they'll get it. They must also show that they are entitled to spousal support.

How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount to be paid and the length of time support should be paid for, called *duration*, is determined based on factors set out at s. 15.2(6):

An order [for spousal support] should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The amount of spousal support to be paid and the duration that it should be paid for is often determined using the Spousal Support Advisory Guidelines. The Advisory Guidelines is not a law like the Child Support Guidelines and is not mandatory. The *Divorce Act* does not mention the Advisory Guidelines.

Is a spouse's conduct taken into account?

Under the *Divorce Act*, the court is not allowed to consider a spouse's behaviour when making an order about spousal support.

How is spousal support paid?

Most of the time, spousal support is paid every month, usually on the first day of the month. It is possible for spousal support to be paid in a single lump sum. Payors can be required to pay by giving the recipient a series of post-dated cheques.

Are there tax consequences?

There are tax consequences when spousal support is paid on a regular basis. Spousal support is tax neutral when it is paid as a single lump sum.

The recipient of regular payments of spousal support must declare the support received in his or her income tax return and pay tax on it, just as if the support payments were employment income. The payor can deduct the spousal support paid from his or her taxable income, like how RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax at the end of the year while the payor gets a tax refund.

Remember that taxes should be taken into account when figuring out spousal support. At a minimum, recipients should be reminded to put some money aside to pay their taxes.

How are orders for spousal support changed?

Under s. 17(4.1) of the *Divorce Act*, the court can change an order for spousal support if there has been a:

change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order

When the court varies an order for spousal support, it must take the change of circumstances into account and consider, under s. 17(7), the same factors about amount and duration as it considered in making the original order.

When both spouses live in British Columbia

To change a British Columbia *Divorce Act* spousal support order when both spouses live here, the applicant must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules ^[5] have special provisions for applications to change final orders.

When a spouse lives outside of British Columbia

To change a British Columbia *Divorce Act* spousal support order when the respondent lives in another province, the applicant first applies here, in British Columbia, for a *provisional order* under s. 18.

If the court makes a provisional order, it will send the order to the province where the respondent lives, and the court there will have a hearing to *confirm* the provisional order under s. 19.

The court at the confirmation hearing may:

- confirm the provisional order,
- confirm the provisional order with some changes,
- refuse to confirm the provisional order, or

- send the application back to British Columbia for more information.

A provisional order has no effect until and unless it is confirmed.

Resources and links

Legislation

- *Divorce Act* ^[6]

Links

- Divorce Law Questions & Answers ^[7], from the Department of Justice
- What happens next? Information for kids about separation and divorce ^[8], from the Department of Justice
- Because Life Goes On... Helping children and youth live with separation and divorce ^[9], from the Public Health Agency of Canada

✓ The above was last reviewed for legal accuracy by JP Boyd, May 12, 2013.

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Family Law Act Basics

The provincial *Family Law Act* is the primary legislation on family law issues in British Columbia. It applies to married spouses, unmarried spouses, and people in other unmarried relationships. It also applies to people who have an interest in children, like a family member. The *Family Law Act* talks about the care of children after separation and about how guardians are appointed. It also deals with financial issues like child support, spousal support, and the division of property and debt, as well as with family violence, court processes, and ways of resolving family law problems without going to court.

This section provides a stem-to-stern overview of the *Family Law Act*. It is written primarily for justice system workers and legal advocates, but anyone can use it. All of the information provided in this section is discussed in more detail elsewhere in *JP Boyd on Family Law*. Use the search tool at the top of the page to find more information.

Introduction

Who does the *Family Law Act* apply to?

The *Family Law Act* is the main law on family breakdown in British Columbia. Although there is also the federal *Divorce Act*, the *Divorce Act* only applies to married spouses.

The *Family Law Act* applies to everyone in a family relationship in British Columbia, including people who:

- are married spouses,
- are in unmarried spousal relationships,
- are dating, or maybe didn't date at all, but have a child together,
- want guardianship of someone else's child,
- want contact with someone else's child,
- are at risk of family violence,
- are having a child with assisted reproduction, and
- want to manage a child's property.

The *Family Law Act* doesn't change the *Divorce Act*. The *Divorce Act* still applies to married spouses along with the *Family Law Act*.

How are family law problems resolved under the *Family Law Act*?

The *Family Law Act* tries to change how people solve family law problems. The law:

- encourages people to find solutions outside of court,
- promotes negotiation, mediation, collaborative settlement processes, and arbitration,
- makes financial disclosure mandatory, even outside of court,
- makes family law agreements more difficult to change, and
- promotes the use of parenting coordinators, when there is a final agreement or order about the care of children.

When people have to go to court, however, the *Family Law Act* gives the court new ways to:

- protect people who are at risk of family violence,
- enforce court orders and agreements, and
- manage court processes and manage the behaviour of people in court.

What does the *Family Law Act* cover?

The *Family Law Act* talks about all of the things covered by the old *Family Relations Act* as well as a lot of new things. The *Family Law Act* deals with:

- family violence and protecting adults and children from violence,
- determining who is a child's parent,
- having children through assisted reproduction,
- determining who is the guardian of a child, and how guardians are appointed and removed,
- how guardians share responsibility for the care of children,
- the time someone has with a child who isn't the child's guardian,
- what happens when a guardian wants to move, including with a child,
- enforcing time with a child provided under an order or an agreement,
- paying child support and how child support is calculated,
- paying spousal support,
- preserving property so that it can be divided,
- dividing property and dividing responsibility for debt, and
- managing children's property.

The law about children

How are decisions about children made?

The *Family Law Act* says that parents, judges, and other decision-makers must make decisions about children considering only the children's best interests and nothing else.

Determining the best interests of children

To decide what is in a child's best interest, parents and judges must consider all of the needs and circumstances of the child, as well as number of factors that are listed at s. 37. These factors include:

- the child's health and emotional well-being,
- the views of the child, unless it wouldn't be appropriate to consider them,
- the history of the child's care and the child's need for stability,
- the child's relationships with other important people,
- any court proceedings that are relevant to the child's safety and well-being, and
- the impact of any family violence.

The best interests of children and family violence

When family violence is an issue, parents and judges must consider an additional list of factors, set out at s. 38, to help assess the impact of the family violence on the child and on a person's capacity to care for the child.

The *Family Law Act* also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

How are children's views heard?

Under s. 211 of the *Family Law Act*, the court can order that a family justice counsellor, a social worker, or another person like a clinical counsellor or a psychologist, assess one or more of:

- the needs of a child,
- the views of a child, and
- the ability of a person to meet the child's needs.

These assessments replace reports made under s. 15 of the *Family Relations Act*.

Views of the child reports can be ordered under s. 37(2)(b). These reports usually just describe the child's views without making an assessment or recommendations, and are usually cheaper and faster to get.

Who is a parent?

Under the *Family Law Act*, a child's parents are the child's birth mother and biological father. If the court is not sure who the child's father is, the court can order medical tests to determine who the father is under s. 33.

When people have a child through assisted reproduction, a person who donates eggs or sperm is not presumed to be a parent. However, a woman who is a surrogate mother is presumed to be a parent.

The *Family Law Act* lets people make agreements when they have a child through assisted reproduction. These agreements can say who is a parent and who isn't. They can say that a donor of eggs or sperm is a parent, or that a surrogate mother isn't a parent.

Under the *Family Law Act*, a child can have more than two parents. The courts will have to figure out how child support will work in situations like this.

Guardianship

The *Family Law Act* describes the people who are responsible for caring for a child as *guardians*. A child can have one guardian, two guardians, or more than two guardians.

Who is a guardian?

Most of the time, a child's parents will be the child's guardians, as long as the parents have lived with the child. A parent who never lived with a child isn't a guardian unless:

- the court makes an order that the parent is a guardian,
- the parent and the child's other guardians make an agreement that the parent is a guardian,
- the parent "regularly cares" for the child, or
- the parent is a parent because of an assisted reproduction agreement.

The courts will have to figure out what *regularly cares* for a child means.

The court can make an order that someone who isn't a parent is the guardian of a child. The court can also make an order that someone who is a guardian is no longer a guardian. Both the Provincial Court and the Supreme Court can make

orders about guardianship.

The new partner or spouse of a guardian doesn't become a guardian just because of his or her relationship with the child's guardian.

Parental responsibilities

The different ways that guardians care for a child and the decisions guardians have to make are called *parental responsibilities*. Parental responsibilities are listed at s. 41 of the *Family Law Act* and include:

- making decisions about the day-to-day care of the child,
- deciding where the child will live,
- making decisions about the child's schooling and extracurricular activities,
- making decisions about the child's health care, and
- deciding how the child will be raised, including making decisions about things like religion, language, and culture.

When a child has more than one guardian, the guardians must usually make these decisions together. The guardians can agree or the court can order that only one guardian should have a particular parental responsibility. Both the Provincial Court and the Supreme Court can make orders about parental responsibilities.

If the child's guardians can't agree on a particular decision, they can go to see a family justice counsellor, a mental health professional, or a mediator to help them make the decision, or they can go to court.

Remember that only guardians have parental responsibilities and the right to make decisions for a child.

What happens if a guardian can't exercise parental responsibilities?

If a guardian is temporarily unable to exercise parental responsibilities, the guardian can authorize someone else to manage certain responsibilities. This person doesn't become a guardian but can:

- make decisions about the day-to-day care of the child,
- make decisions about the child's schooling and extracurricular activities,
- make decisions about the child's health care, and
- give or withhold permission on behalf of a child, like about going on a school field trip or having a medical treatment.

This is useful when a guardian is going to be sick or will be out of town for a period of time and someone else needs to care for the child, or if a child from outside British Columbia will be going to school here, and an adult is needed to care for the child.

What happens if a guardian has a terminal illness or dies?

Under the *Family Law Act*, a guardian can appoint someone to take over and act as the child's guardian if:

- the guardian has a terminal illness,
- the guardian is going to be permanently unable to care for the child because of a mental illness, or
- the guardian dies.

The new person takes over as guardian when the first guardian dies or becomes unable to exercise parental responsibilities.

A parent who is not a guardian does not automatically become the child's guardian when a guardian dies. If that parent wants to become the child's guardian, he or she will have to get a court order.

Parenting time and contact

The time a guardian has with a child is called *parenting time*. During a guardian's parenting time, the guardian is responsible for the care of the child and has the right to make day-to-day decisions for the child.

The time that someone who isn't a guardian has with a child is called *contact*. Parents who aren't guardians, other relatives of a child, and people who aren't a child's relative can have contact with the child.

Agreements about parenting time and contact can be made by the child's guardians. The court can make orders about parenting time and contact. Both the Provincial Court and the Supreme Court can make orders about parenting time and contact.

A guardian's parenting time and a person's contact with a child can be on conditions, like that the parenting time or contact must be supervised.

Remember that only guardians have parenting time. Everyone else has contact with a child.

How are parenting time and contact enforced?

The *Family Law Act* gives the court the power to enforce parenting time and contact when:

- parenting time or contact has been "wrongfully withheld" from a person entitled to parenting time or contact, or
- a person with parenting time or contact fails to use his or her parenting time or contact.

In certain situations, it isn't "wrongful" to withhold a child from a person entitled to parenting time or contact. Under s. 62, it isn't wrongful to withhold a child if:

- the guardian with the child believes there is a risk of family violence, or that the other person is impaired by alcohol or drugs,
- the child is sick, and the guardian with the child has a doctor's note,
- the other person has frequently failed to use his or her parenting time or contact in the past, or
- the other person told the guardian ahead of time that the parenting time or contact wasn't going to be used.

The court can make a number of orders to enforce parenting time and contact, including requiring:

- make-up time, when parenting time or contact was wrongfully withheld,
- a person or a child to attending counselling,
- the parties to try to resolve their dispute outside of court,
- payment of a party's expenses, or
- payment of up to \$5,000 to a person or as a fine.

Applications about the wrongful withholding of parenting time or contact must be brought within a year of when the parenting time or contact was withheld.

What happens if a guardian wants to move?

If a guardian wants to move, with or without a child, and the move will have an impact on the child's relationship with another guardian or someone who has contact with the child, the guardian must usually give 60 days' notice of the move, in writing. The notice must say where the guardian plans on moving to and when the guardian plans on moving.

Only other guardians can object when a guardian plans on moving. If a guardian objects, he or she has 30 days to go to court to get an order preventing the move. Remember that only a guardian can object to a proposed move! Someone who has contact can't prevent a guardian from moving.

When a guardian objects, the guardian who wants to move must show the court that:

- he or she wants to move in "good faith," and
- he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child, and with others who have an important role in the child's life.

The guardian who objects to the move must show that the move is not in the best interests of the child or the move will be allowed.

When a guardian objects and the moving guardian and the objecting guardian share the child's time equally or almost equally, the guardian who wants to move must show the court that:

- he or she wants to move in good faith,
- he or she has proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child, and with others who have an important role in the child's life, and
- the move is in the child's best interests.

Good faith means that the guardian who wants to move isn't planning on moving just to take the child away from another guardian, and that the move will likely improve the child's quality of life or the guardian's quality of life.

The courts will have to figure out what "reasonable plans" to preserve the child's relations with other people means, and what it means to say that a proposed move is or is not in a child's best interests.

The law about child support

Who is entitled to get child support?

Child support is usually paid to support children who are under the age of 19, or who are 19 or older but are unable to support themselves, including because they are going to college or university.

Under the *Family Law Act*, children who are younger than age 19 can stop being entitled to child support if:

- they become a spouse, or
- they withdraw from the care of their parents or guardians, as long as they aren't withdrawing because of family violence or because of poor living conditions.

Child support is usually paid to the person whom the child mostly lives with. Child support can sometimes be paid directly to the child, usually if the child is 19 or older and living away from home and going to college or university.

Who is required to pay child support?

All of a child's parents and guardians are required to support the child. The person who pays child support is either a parent who is not a guardian or the guardian who the child lives with the least.

Stepparents can also be required to pay child support. A *stepparent* is the married or unmarried spouse of a parent, as long as:

- the spouse has contributed to the child's costs for at least one year, and
- the claim for child support is made within one year of the spouse's last contribution to the child's costs.

Remember that under the *Divorce Act*, a stepparent is someone who is married to a parent and "stands in the place of a parent." This is a different legal test.

How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines. Most of the time, child support is simple to figure out by looking up the amount payable in the Guidelines tables based on the payor's income and the number of children support is being paid for. Child support can get more complicated when:

- a child is 19 or older,
- the payor has an income of more than \$150,000 per year,
- one or more children live mostly with each guardian, called *split custody*,
- the guardians share the children's time equally or almost equally, called *shared custody*, or
- the payment of the tables amount would cause "undue hardship" to either the recipient or the payor.

The *Family Law Act* doesn't change how any of these problems are handled. What the *Family Law Act* does change is the calculation of child support for guardians who are not parents and for stepparents.

Under the *Family Law Act*, the child support obligations of guardians who are not parents come second to the obligations of parents. The child support obligations of stepparents come second to both parents and guardians, and the amount of support a stepparent should pay is based on:

- the child's standard of living when he or she lived with the stepparent, and
- the length of time the child lived with the stepparent.

More information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Guidelines.

How is child support paid?

People can make agreements and the court can make orders about who should pay child support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about child support.

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the child will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay child support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the child support order is made or after the payor's death.

The law about spousal support

Who is entitled to ask for spousal support?

Only spouses can ask for spousal support. Under the *Family Law Act*, *spouse* includes people who:

- are married to each other,
- have lived together in a "marriage-like relationship" for at least two years, and
- have lived together in a marriage-like relationship for less than two years and have had a child together.

A spouse's entitlement to spousal support is determined based on factors taken from the *Divorce Act*, set out at s. 161 of the *Family Law Act*.

Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from child support. Anyone who is a spouse can ask for spousal support, but being able to ask doesn't mean they'll get it. They must also show that they are entitled to spousal support.

When do claims for spousal support have to be made?

Under the *Family Law Act*:

- married spouses have to start a court proceeding for spousal support within two years of the date of their divorce or the annulment of their marriage, and
- unmarried spouses have to start a proceeding for spousal support within two years of the date they separated.

Remember that there are no limits to when married spouses can ask for spousal support under the *Divorce Act*.

The two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer, or an arbitrator.

How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount to be paid and the length of time support should be paid for, called *duration*, is determined based on factors taken from the *Divorce Act*, set out at s. 162 of the *Family Law Act*.

The amount of spousal support to be paid and the duration that it should be paid for is often determined using the Spousal Support Advisory Guidelines^[1]. The Advisory Guidelines is not a law like the Child Support Guidelines and is not mandatory. The *Family Law Act* does not mention the Advisory Guidelines.

More information about spousal support is available in the Spousal Support chapter and the section on the Advisory Guidelines.

Is a spouse's conduct taken into account?

Under the *Divorce Act*, the court is not allowed to consider a spouse's behaviour when making an order about spousal support. The same thing is generally true under the *Family Law Act*, except that under this act the court to take into account misconduct that:

- unreasonably prolongs a spouse's need for support, or
- unreasonably undermines a spouse's ability to pay support.

In other words, the court can look at whether a spouse is being unreasonable in not becoming financially self-sufficient and whether a spouse has reduced work hours, quit a job, or refused to take a job in order to avoid paying support.

How is spousal support paid?

People can make agreements and the court can make orders about who should pay spousal support and about how much support should be paid. Both the Provincial Court and the Supreme Court can make orders about spousal support.

Most of the time, spousal support is paid every month, usually on the first day of the month. It is possible for spousal support to be paid in a single lump sum. Payors can be required to pay by giving the recipient a series of post-dated cheques.

Are there tax consequences?

There are tax consequences when spousal support is paid on a regular basis. Spousal support is tax neutral when it is paid as a single lump sum.

The recipient of regular payments of spousal support must declare the support received in his or her income tax return and pay tax on it, just as if the support payments were employment income. The payor can deduct the spousal support paid from his or her taxable income, like how RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax at the end of the year while the payor gets a tax refund.

Remember that taxes should be taken into account when figuring out spousal support. At a minimum, recipients should be reminded to put some money aside to pay their taxes.

Reviews

It can sometimes be very difficult to figure out when spousal support should end. The person getting support usually wants support to continue for as long as possible. The person paying support wants support to end as soon as possible. It is hard to settle on an end date if, for example, it's not known when a spouse will finish job training, become self-sufficient, or recover from an illness.

People often try to avoid this problem by agreeing that spousal support will be paid for now, but that the support will be reconsidered in a *review*, after a certain amount of time has passed or when a certain event has happened.

The *Family Law Act* says that agreements and orders for spousal support can be reviewable. Agreements and orders for reviewable spousal support can specify:

- what will trigger the review,
- the dispute resolution process that will be used at the review, and
- the factors that will be considered at the review.

The *Family Law Act* says that a review can also be triggered when someone begins to receive a pension, even if the agreement or order for spousal support doesn't call for the review.

What about if the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as the beneficiary of the policy. This way, the spouse will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay spousal support will continue after the payor's death and be paid from his or her estate. Court orders about this can be made at the time the spousal support order is made or after the payor's death.

Note that the rules about life insurance and support when the payor dies are the same for spousal support as they are for child support.

The law about dividing property and debt

Who is entitled to ask to divide property and debt?

Only spouses can ask to divide property and debt. Under the *Family Law Act*, *spouse* includes people who:

- are married to each other, and
- have lived together in a "marriage-like relationship" for at least two years.

Note that the people who are spouses for the division of property and debt are different than the people who are spouses for child support and spousal support.

When do claims for the division of property and debt have to be made?

Under the *Family Law Act*:

- married spouses have to start a court proceeding to divide property and debt within two years of the date of their divorce or the annulment of their marriage, and
- unmarried spouses have to start a proceeding to divide property and debt within two years of the date they separated.

The two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer, or an arbitrator.

Excluded property

Excluded property is the property each spouse has on the date they began to live together or got married, whichever was first. Excluded property includes certain property received by each spouse during the spouses' relationship, such as:

- gifts and inheritances,
- court awards for injury or loss, except for awards relating to both spouses or for lost income,
- insurance payments, except for payments relating to both spouses or for lost income,
- certain kinds of trust interests, and
- property bought with excluded property.

Family property

Family property is the property either or both spouses got after the date they began to live together or got married, whichever was first. "Ordinary use for a family purpose," the test under the old *Family Relations Act*, doesn't matter under the *Family Law Act*.

Family property includes:

- real estate,
- bank accounts,
- interests in companies and businesses,
- debts owed to a spouse,
- pensions and RRSPs, and
- other personal property.

Most importantly, the increase in value of excluded property over the course of the spouses' relationship is also family property.

Remember that excluded property includes property bought during the relationship with excluded property.

Family debt

Family debt is all debt incurred by either spouse after the date the spouses began to live together or got married, whichever was first, up to the date of separation.

Family debt also includes debt incurred after the date of separation if the debt was incurred to maintain family property, like repairing the family home or paying the mortgage.

How are property and debt divided?

Spouses can make agreements and the court can make orders about how property and debt should be divided. Only the Supreme Court can make orders about the division of property and debt.

Note that agreements and orders about debt made under the Family Law Act are only binding between spouses, and don't affect the rights of creditors or the steps they can take to collect on a debt.

Family property and family debt

Under the *Family Law Act*, spouses are presumed to:

- each be entitled to one-half of family property, regardless of how they contributed to or used the property, and
- each be responsible for one-half of family debt.

When spouses separate, they each become one-half owners of all family property as tenants in common and one-half responsible for all family debt. Under the *Family Relations Act*, spouses didn't become owners of family assets as tenants in common until they made a separation agreement, got divorced, or the court made a declaration under s. 57. Now all it takes is separation.

The court can divide family property and family debt unequally if an equal division would be "significantly unfair." The court can take into account a number of reasons why an equal division could be significantly unfair including:

- length of the spouses' relationship,
- a spouse's contribution to the other spouse's career,
- whether the amount of family debt is more than the value of family property,
- whether a spouse reduced the value of family property or got rid of family property to avoid sharing the property, or the full value of the property, with the other spouse, and
- any taxes owing from dividing the property.

The courts will have to figure out what "significantly unfair" means. The old law doesn't use this term.

Excluded property

Each spouse's excluded property is presumed to remain his or her separate property and to not be shared with the other spouse.

The court can divide a spouse's excluded property if:

- it can't divide family property or family debt that is located outside British Columbia, or
- it would be "significantly unfair" not to share the excluded property because of the length of the spouses' relationship or because of the contributions made by the spouse who doesn't own the property.

Value of property

The value of property is what a reasonable stranger would pay to buy the property in its current state. This is called the property's *fair market value*.

The date property is valued is the date of the agreement or court hearing dividing the property.

How are pensions divided?

Spouses can make agreements and the court can make orders about how pensions and assets that are like pensions are divided. Only the Supreme Court can make orders about the division of pensions.

Equalizing RRSPs

RRSPs are family property. If RRSPs are divided, the Income Tax Act allows them to be equalized without any taxes being paid.

Workplace pensions

In general, the part of the pension that accumulated between the date the spouses began living together or got married and the date of separation is family property and is divided equally between the spouses. This is true whether the pension is being paid out or not.

Agreements and orders about dividing pensions are carried out by the people who administer the pension plans, not by the spouse who owns the pension.

Note that the division of pensions can be very, very complicated. It is always best to speak to a lawyer about issues with pensions.

Canada Pension Plan credits

Spouses are entitled to equalize the CPP credits they each accumulated between the date they began living together or got married and the date of their separation or divorce.

Agreements and orders about the equalization of CPP credits are carried out by the people who administer the Canada Pension Plan in Ottawa.

Foreign property

Under the *Family Law Act*, the court can make orders about family property that is located outside of British Columbia, including about the:

- safekeeping of the property,
- right to use the property, and
- right to own the property.

The court can decide to divide property or family debt inside British Columbia to compensate for property outside of British Columbia, instead of trying to divide it.

Remember that the court can also divide excluded property between spouses if it can't divide property outside of British Columbia.

Children's property

Children sometimes get large amounts of money or property from inheritances, insurance policies, or court awards. Under the *Family Law Act*, a child's guardians are not automatically the trustees of the child's property, except for property with a value of less than \$10,000.

A guardian may apply to court to be appointed as trustee for the child's property. Only the Supreme Court can make orders about children's property.

Family violence and protection orders

What is family violence?

Family violence is defined in very broad terms in s. 1 of the *Family Law Act*, and includes obvious things like physical abuse as well as:

- sexual abuse,
- attempts to physically or sexually abuse someone,
- psychological and emotional abuse, including by harassing, stalking or intimidating someone, or by restricting their liberty, and
- in the case of children, being exposed to family violence.

Family violence does not include a person's use of force to protect him- or herself, or someone else, from family violence.

Duties of professionals

Family justice counsellors, mediators, lawyers, arbitrators, and parenting coordinators are required to assess for family violence and the extent to which it affects someone's safety or ability to negotiate, and to discuss how different family dispute resolution processes may or may not be appropriate.

Determining children's best interests

To decide what is in a child's best interests, parents and judges must consider all of the needs and circumstances of the child and a number of factors that are listed at s. 37 of the *Family Law Act*. The best interests factors include the impact of any family violence on the child.

When family violence is an issue, parents and judges must consider an additional list of factors to assess the impact of the family violence on the child and on a person's capacity to care for the child. The family violence factors are set out at s. 38 and include:

- the nature and severity of the family violence,
- the recency and frequency of the family violence,
- whether the family violence is situational or part of a pattern of controlling behaviour,
- whether the family violence was directed to the child and the extent to which the child was exposed to the family violence, and
- the harm caused to the child's safety and well-being.

The *Family Law Act* also says that an agreement or order is presumed not to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

Protection orders

What are protection orders?

The court can make an order against one family member to protect another family member. Protection orders can include orders:

- restricting contact and communications,
- requiring a person to stay away from someone else's home, school, place of employment or place of business,
- prohibiting stalking,
- prohibiting a person from possessing weapons, and
- requiring the police to remove a person from the family home.

Protection orders remain in force for one year, unless the protection order says otherwise. Protection orders can be renewed.

Who can ask for a protection order?

A person at risk of family violence, or someone on that person's behalf, can ask the court for a protection order as long as the at-risk person and the person from whom the protection order is sought are *family members* as defined by s. 1. In general, a "family member" is someone who lives with the other person, someone who is a spouse of the other person and someone who is a parent with the other person. People who don't live together and are just dating will not qualify as "family members."

Applications for protection orders can be made without notice to anyone else, and may be made whether there is an existing family law court proceeding or not.

What happens when a protection order conflicts with another order?

If a protection order conflicts with another order made under the *Family Law Act*, like an order for parenting time or contact with a child, the parts of the earlier order that are in conflict with the protection order are suspended until either the order is changed to remove the conflict or the protection order expires.

This rule applies to orders that are like protection orders and are made under the *Criminal Code* or under the laws of another jurisdiction.

How are protection orders enforced?

Protection orders cannot be enforced under the *Family Law Act* or the provincial *Offence Act*. They can only be enforced under s.127 of the *Criminal Code*, which makes breach of a court order a criminal offence.

The *Family Law Act* directs police officers to take action to enforce a protection order, and to use reasonable force if necessary.

Out-of-court processes

What are the alternatives to going to court?

Under the *Family Law Act*, processes that help people resolve family law problems outside of court are called *family dispute resolution* processes. Family dispute resolution processes include:

- assistance from family justice counsellors,
- mediation, collaborative processes, and arbitration, and

- parenting coordination.

People can make an agreement that they will resolve a family law problem, or a family law problem that might arise in the future, using a family dispute resolution process.

How are family dispute resolution processes supported?

Duties of professionals

Family justice counsellors, mediators, lawyers, and arbitrators are required to tell people about the different ways that family law disputes can be resolved outside of court.

Lawyers are also required to certify that they have told their client about family dispute resolutions processes when they start a court proceeding.

Duties of parties making agreements

People who are trying to resolve family law problems outside of court are required to provide each other with "full and true information." Agreements about spousal support and the division of property and debt can be set aside for a number of reasons, including if:

- a spouse did not make full disclosure of financial information, or
- a spouse took advantage of the other spouse's lack of knowledge or emotional upset.

However, when full disclosure is made, agreements about spousal support and the division of property and debt that were fairly negotiated are harder to set aside under the *Family Law Act* than they were under the old law.

Suspended time limits

Court proceedings about spousal support or the division of property and debt must normally be started within two years of the date of divorce, for married spouses, or within two years of the date of separation, for unmarried spouses. Under s. 198 of the *Family Law Act*, the countdown for the two-year limit stops while the spouses are involved in a family dispute resolution process with a family justice counsellor, mediator, lawyer, or arbitrator.

Mediation

Family justice counsellors, mediators, and lawyers who have special additional training can help people resolve a family law dispute through mediation.

In mediation, the mediator helps people reach their own settlement. Although some mediators also give information about the law and may offer an opinion about a person's position, mediators do not make decisions for people and do not have the power to impose a settlement.

When mediation is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

More information about mediation is available in the Resolving Family Law Problems out of Court chapter in the section on Family Law Mediation.

Collaborative processes

Lawyers who have special additional training can help people resolve a family law dispute through collaborative settlement processes. When people agree to use a collaborative process, they and their lawyers sign an agreement that they will use their best efforts to resolve the dispute outside of court, and that if the parties do have to go to court they will hire new lawyers.

Collaborative processes work like negotiation but involve other professionals when their participation will help the parties to reach a settlement:

- clinical counsellors or psychologists can be involved as *divorce coaches*, helping the parties work through their emotions,
- clinical counsellors or psychologists can be involved as *child specialists*, giving advice about parenting schedules and how the children are experiencing the parties' separation, and
- accountants, appraisers, and tax specialists can be involved to help figure out complicated financial problems.

When a collaborative process is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

More information about collaborative settlement processes is available in the Resolving Family Law Problems out of Court chapter in the section on Collaborative Processes.

Arbitration

In arbitration, a person with special training, often a lawyer, resolves a family law dispute by making a decision, called an *award*, that is binding on the parties like a court order.

Although arbitration can be a lot like going to court, it has a lot of advantages over court processes:

- the arbitration hearing can be scheduled whenever everybody is available without having to wait on trial scheduling,
- arbitration hearings happen in private, often in the arbitrator's office boardroom,
- the parties can choose the rules of the arbitration process, and
- the parties can choose to have the arbitrator decide a dispute not by hearing from witnesses but by hearing the parties' arguments, reading the parties' documents, or reading the parties' affidavits.

The result of an arbitration process is the arbitrator's written award. The arbitrator's award is private, but can be filed in court and be enforced like a court order.

Arbitration in British Columbia is governed by the *Arbitration Act* ^[2]. The *Family Law Act* makes a number of changes to this law to improve how it deals with family law problems.

More information about arbitration is available in the Resolving Family Law Problems out of Court chapter in the section on Family Law Arbitration.

Parenting coordination

Social workers, counsellors, psychologists, mediators, and lawyers who have special additional training can help people resolve disputes about the care of children through parenting coordination. Parenting coordinators are appointed by the parties' agreement or by a court order, and are appointed for terms ranging from six months to two years. A parenting coordinator's appointment can be renewed.

Parenting coordination is only used where the parties have an agreement or a final court order about parental responsibilities, parenting time and contact, and is meant to help with:

- implementing the parts of the agreement or order about children,
- improving how the parties deal with conflict about their children, and
- improving how the parties communicate with each other.

Parenting coordinators cannot help with child support, spousal support, or the division of property and debt.

Parenting coordinators try to resolve disputes about children by helping the parties find a settlement, like a mediator. However, when a settlement cannot be reached or the dispute is urgent, the parenting coordinator may make a decision resolving the dispute, like an arbitrator. A parenting coordinator's decision is called a *determination*. Determinations can be filed in court and be enforced like court orders.

More information about parenting coordination is available in the Resolving Family Law Problems out of Court chapter in the section on Parenting Coordination.

Court processes

Which court deals with which family law problem?

The powers of the Provincial Court are pretty much the same under the *Family Law Act* as they were under the old *Family Relations Act*. The Supreme Court can deal with all family law problems, but the Provincial Court can only deal with problems about the care of children, child support, and spousal support. As a result, the Provincial Court can make declarations about the parentage of a child, but only if it is necessary to handle a claim within its jurisdiction. The Provincial Court can also enforce agreements and orders, but only the parts of agreements or orders that are within its jurisdiction.

What happens when there's a proceeding in each court?

Starting a court proceeding in one court doesn't stop an proceeding being started in the other court, unless the claims made in the second proceeding have already been dealt with by the first court. Section 194 of the *Family Law Act* talks about what happens when there is a proceeding in each court:

- the making of an order by one court doesn't stop an application in the other court, unless the application is about the same thing as the order made by the first court,
- a court can refuse to deal with a claim until the claim has been dealt with by the other court, and
- the Supreme Court can consolidate a Provincial Court proceeding with its own proceeding so that both are handled as a single proceeding in the Supreme Court.

The Supreme Court can change a Provincial Court order to accommodate an order it is making. The Supreme Court cannot otherwise change Provincial Court orders except as the result of an appeal.

Managing people in court and court processes

Guiding principles

The *Family Law Act* says that court proceedings should be run with as little delay and formality as possible, and in a way that promotes cooperation between parties and protects adults and children from family violence.

The court is required to encourage parties to focus on the best interests of their children and minimize the effect of their conflict on their children.

Preventing misuse of court processes

If a party is frustrating or misusing the court process, the court can make an order prohibiting the party from making further applications without permission. When making such orders, the court can also:

1. make the order last for a specific period of time, or until the party has complied with another order,
2. require the party to pay another person's expenses, and,
3. make the party pay up to \$5,000 to a person or as a fine.

Conduct orders

Under s. 222 of the *Family Law Act*, the court may make a *conduct order* to:

1. encourage settlement,
2. manage a party's behaviour that is frustrating settlement, and,
3. prevent misuse of the court process.

Conduct orders include orders:

1. that the parties participate in a family dispute resolution process,
2. that one or more of the parties, or a child, attend counselling,
3. restricting communication between the parties, and,
4. that a party continue to pay for debts and services related to the family home, like paying the mortgage or paying the gas bill.

Note that conduct orders restricting communication can also be made as protection orders.

Case management orders

Conduct orders include *case management orders*. Case management orders include orders:

1. striking out all or part of a claim or application,
2. delaying a court proceeding while the parties participate in a family dispute resolution process, and,
3. requiring that all other applications be heard by the same judge.

How are orders enforced?

Some orders, like orders about parenting time and contact, have their own enforcement procedures. Where an order under the *Family Law Act* doesn't have a specific enforcement procedure, the general enforcement provisions of the *Family Law Act* are used. Under s. 230, the court may enforce an order by requiring a party to:

1. post security in court to guarantee his or her future good behaviour,
2. cover the expenses of the other party resulting from his or her conduct, or,
3. pay up to \$5,000 to another person or as a fine.

Where nothing else will get a party to obey a court order, the court may order that the party be imprisoned for up to 30 days.

Both the Provincial Court and the Supreme Court can enforce orders.

Resources and links

Legislation

- *Family Law Act* ^[3]

Resources

- A Very Brief Introduction to the Family Law Act (PDF): A plain-language overview of the *Family Law Act* written for justice system workers and advocates.
- An Overview of the Family Law Act (PDF): A more complicated overview of the *Family Law Act*, prepared before the act came into effect, written for lawyers and judges.

Links

- The Family Law Act Explained ^[4], from the Ministry of Justice
- The Family Law Act Regulations Explained ^[5], from the Ministry of Justice
- Amendments to Rules of Court ^[6], from the Ministry of Justice
- Family Law in BC after March 18, 2013 ^[7], from the Legal Services Society
- Guide to the New BC Family Law Act ^[8], from the Legal Services Society
- Living Together or Living Apart ^[9], from the Legal Services Society

✓ The above was last reviewed for legal accuracy by JP Boyd, May 12, 2013.

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- [2] <http://canlii.ca/t/84gc>
- [3] <http://canlii.ca/t/8q3k>
- [4] <http://www.ag.gov.bc.ca/legislation/family-law/acts-explained.htm>
- [5] <http://www.ag.gov.bc.ca/legislation/family-law/regs-explained.htm>
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- [9] <http://resources.lss.bc.ca/pdfs/pubs/Living-Together-or-Living-Apart-eng.pdf>

The Legal System

Introduction to the Legal System for Family Matters

This chapter looks at the three key components of the traditional legal system: the law, the courts, and the people involved in the court process. In a legal dispute, the parties present their competing claims to the court, and the judge who hears the case applies the law to the facts and makes a decision that resolves the dispute.

The chapter begins with a brief overview of the basic elements of our legal system and how they work together. The following sections discuss the legal system in more detail, covering the court system, the law, and the lawyer-client relationship.

Introduction

When some couples separate, they just separate and it's over and done with. For other couples, separation raises a bunch of practical and legal problems. If a couple has children, they'll have to decide where the children will mostly live, how they will make parenting decisions, how much time each parent will have with the children, and how much child support should be paid. If one person is financially dependent on the other, they may have to decide whether spousal support should be paid. If the couple has property, they'll have to decide who should keep what.

When a couple has problems like these, they also have to decide how they'll resolve them. In other words, they need to pick the legal process they'll use to figure everything out and get to a resolution. Some couples just talk it out. Others go to a trusted friend, family member, elder or community leader for help. Others use a mediator to help them find a solution. Others go to court.

In its narrowest sense, *the legal system* refers to the parties, the judges, the court staff and the lawyers that make up the litigation process, and of course the laws and rules that guide that process. To resolve a legal dispute without going to court, you can negotiate a settlement or you can ask someone other than a judge to decide what should happen. In its broader sense, *the legal system* also refers to dispute resolution options such as negotiation, mediation, collaborative settlement processes, and arbitration. You can find out about these alternatives to going to court in the chapter Resolving Family Law Problems out of Court.

Choosing the right process

Many people see court as their first and only choice. That might be true if your landlord is trying to evict you unfairly, if your business partner has broken a deal, if you've had a car accident and ICBC won't pay, or if you're suing some huge corporation. It is certainly not true for family law problems.

Deciding not to litigate

You could, for example, sit down over a cup of coffee and simply talk about the problem. You could hire a family law mediator to mediate your problems and come up with a solution that you're both as happy with as possible. You could hire a lawyer to negotiate a solution for you, or you could let the lawyer assist you as you work through the mediation

process. There's also collaborative law, a kind of negotiation process in which you and your ex each have your own lawyer and your own divorce coach, and you agree to work through your problems without ever going to court. Then there's arbitration, in which you both choose the rules that will guide the process and pick the family law arbitrator you want to serve as your own personal judge.

In almost all cases, negotiation and mediation, and even arbitration, are better choices than litigation. They all cost a lot less than litigation, they offer you the best chance of getting to a solution that you're both happy with, and they give you the best chance of maintaining a civil relationship with your ex after the dust has settled. Whatever you do, it's very important that you get legal advice from a lawyer in your area since most laws change from province to province.

Despite the obvious benefits of avoiding litigation, most people still go to court when they have the problem. Why? Usually because they are angry, sometimes because they want revenge. Sometimes they go to court because they see a bigger threat to their personal and financial well-being than really exists; sometimes it's because they can't trust their ex any more and simply don't know what to do next. Sometimes, it's because they are emotionally immature and can't get through their anger to return to a more rational, common sense point of view.

Today, the legal system isn't just about judges and courts, lawyers and the law. It also includes negotiation, collaborative processes, mediation, and arbitration. If you have a family law problem, litigation isn't your only choice. You have options.

When litigation makes sense

Sometimes litigation is your smartest choice; sometimes there's just no other option.

You'll need to start a court proceeding if you've tried to resolve things out of court but can't reach a final agreement. For some people, prolonging the conflict is a way of continuing a relationship past separation; others are afraid to commit to a final agreement for fear of an uncertain future. Still others refuse to accept anything less than their best-case outcome and don't see the financial and emotional benefits of settlement.

If your ex has started a court proceeding, on the other hand, you'll have to participate in the litigation or you risk the court making an order without hearing from you. However, just because a court proceeding has started, you're not necessarily headed to a trial. Most family law proceedings in the Supreme Court resolve without a trial; many Provincial Court proceedings also settle short of trial. Settlement can still be reached even though a court proceeding has started.

Even if litigation isn't underway or may not be required to resolve your dispute, you may want to start a court proceeding if:

- there's a history of violence or abuse in your relationship,
- you or your children need to be protected from your ex,
- your ex is threatening to do something drastic like take the children, hide property or rack up debt,
- your ex is refusing to disclose financial or other information,
- your ex is refusing to provide support and you need financial help, or
- you need to demonstrate that you're serious about moving things forward toward a resolution.

The law

When lawyers talk about *the law* they're talking about two kinds of law, laws made by the government and the common law.

Laws made by the government are called legislation. Important legislation for family law includes the *Divorce Act*, a law made by the federal government, and the *Family Law Act*, a law made by the provincial government. The government can also make regulations for a particular piece of legislation which might contain important additional rules or say how the legislation is to be interpreted. The most important regulation in family law is the Child Support Guidelines, a regulation to the *Divorce Act*.

The common law is all of the legal rules and principles that haven't been created by the government. The common law has been developed by the court since the modern court system was established several hundreds of years ago.

Legislated laws

Legislated laws are the rules that govern our day-to-day lives. The federal and provincial governments both have the authority to make legislation, like the provincial *Motor Vehicle Act*, which says how fast you can go and that you need to have a licence and insurance to drive a car, or the federal *Criminal Code*, which says that it's an offence to stalk someone, to steal or to shout "fire" in a crowded theatre.

Because of the *Constitution of Canada* ^[1], each level of government can only make legislation on certain subjects, and normally the sorts of things one level of government can make rules about can't be regulated by the other level of government. For example, only the federal government can make laws about divorce, and only the provincial government can make laws about property.

The common law

One of the court's more important jobs is to interpret and apply legislated laws. For example, the *Divorce Act* says this about orders for access:

In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.

The court has had to decide what "as is consistent with the best interests of the child" means when applying this section.

Unlike the laws made by governments, which are written down and organized, the common law is more of a series of principles and legal concepts which guide the courts in their process and in their consideration of each case. These ideas are not organized in a code or regulation. They are found in case law, judges' written explanations of why they have decided a particular case a particular way.

The common law provides direction and guidance on a wide variety of issues, such as how to understand legislation, the proper interpretation of contracts, the test to be applied to determine whether someone has been negligent, and what kinds of information can be admitted as evidence at trial. However, unlike legislated laws, the common law doesn't usually apply to our day-to-day lives in the sense of imposing rules that say how fast we can drive in a school zone or whether punching someone is a criminal offence. It usually applies when we have to go to court.

The courts

The fundamental purpose of the courts is to resolve legal disputes in a fair and impartial manner. The courts deal with all manner of legal disputes, from the government's claim that someone has committed a crime, to a property owner's claim that someone has trespassed on their property, to a shareholder's grievance against a company, to an employee's claim of wrongful dismissal.

No matter what the nature of the dispute is, the judge who hears the dispute must give each party the chance to tell their story and give a complete answer. The judge must listen to each party without bias, and make a fair determination, resolving the dispute based on the facts and the laws, including the legislated laws and the common law that might apply to the dispute.

The courts of British Columbia

There are three levels of court in this province: the Provincial Court of British Columbia, the Supreme Court of British Columbia, and the Court of Appeal for British Columbia. Each level of court is superior to the one below it. A decision of the Provincial Court can be challenged before the Supreme Court, and a decision of the Supreme Court can be challenged before the Court of Appeal.

The Provincial Court

There are four divisions of the Provincial Court: Criminal and Youth Court, which mostly deals with charges under the *Criminal Code*; Small Claims Court, which deals with claims about contracts, services, property and debt; Traffic and Bylaw Court, which deals traffic tickets and provincial and municipal offences; and Family Court, which deals with certain claims under the *Family Law Act*.

The jurisdiction of the Provincial Court is fairly narrow. It can only deal with the subjects assigned to it by the provincial government. Unless the government has expressly authorized the Provincial Court to deal with an issue, the Provincial Court cannot hear the case. For example, Small Claims Court can only handle claims up to \$25,000, and Family Court cannot deal with claims involving family property or family debt, or claims under the *Divorce Act*. Each branch of the Provincial Court has its own set of procedural rules and its own court forms.

The Supreme Court

The Supreme Court can deal with any claim and there is no limit to the court's authority, except for the limits set out in the court's procedural rules and in the constitution. There are three kinds of judicial official in the Supreme Court: justices, masters, and registrars. Justices and masters deal with most family law problems.

There are two sets of rules in the Supreme Court: the Supreme Court Family Rules ^[2], which apply just to family law disputes, and the Supreme Court Civil Rules ^[3], which apply to all other non-criminal matters. Each set of rules has its own court forms.

The Supreme Court is a trial court, like the Provincial Court, and an appeal court. The Supreme Court hears appeals from Provincial Court decisions, and justices of the Supreme Court hear appeals from masters' decisions.

The Court of Appeal

The Court of Appeal is the highest court in British Columbia and hears appeals from Supreme Court decisions; the Court of Appeal does not hear trials. The Court of Appeal has its own set of procedural rules and its own court forms.

The Federal Courts

The Federal Court of Canada is a second court system that is parallel to the courts of British Columbia and the other provinces and territories. The Federal Court and Federal Court of Appeal only hear certain kinds of disputes, including immigration matters and tax problems.

The federal courts also deal with *Divorce Act* claims in those rare cases when each spouse has started a separate court proceeding for divorce on the same day but in different provinces.

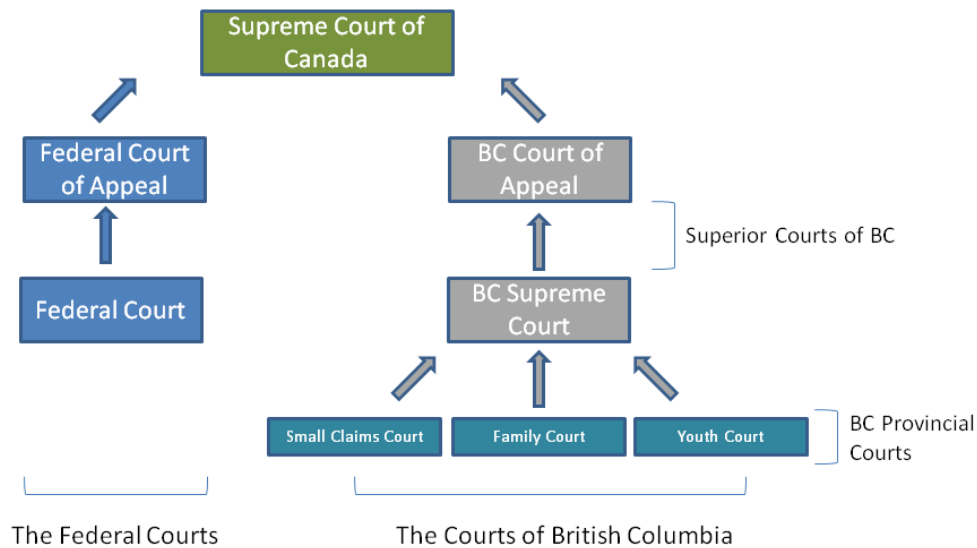
The Supreme Court of Canada

The highest level of court in the country is the Supreme Court of Canada. This court has three main functions: to hear appeals from decisions of the provinces' courts of appeal; to hear appeals from decisions of the Federal Court of Appeal; and, to answer questions of law for the federal government. Most of the court's time is occupied with hearing appeals.

Decisions of the Supreme Court of Canada are final and absolute. There is no higher court or other authority to appeal to.

A handy chart

This chart shows the structure of our courts. The lowest level of court in British Columbia are the provincial courts, the highest is the Court of Appeal for British Columbia; these courts are shown on the right. The highest court in the land, common to all provinces and territories is the Supreme Court of Canada, at the top.



Court processes

All court processes start and end more or less the same way. You must file a particular form in court and serve the filed document on the other party. After being served, the other party has a certain number of days to file a reply. If the other party replies there is a hearing. If the other party doesn't reply and you can prove that he or she was served, you can ask for a judgment in default. That's about it.

In the Provincial Court, you can start a court proceeding by filing an *Application to Obtain an Order*. The other party has 30 days after being served to file a *Reply*.

In the Supreme Court, court proceedings are started by filing a *Notice of Family Claim*, and sometimes by filing a *Petition*. A person served with a Notice of Family Claim has 30 days to file a *Response to Family Claim* and possibly a *Counterclaim*, a claim against the person who started the court proceeding. A person served with a *Petition* has 21 days to file a *Response to Petition*, if served in Canada, 35 days if served in the United States of America, and 49 days if served anywhere else.

Eventually, there will be a hearing, a trial, or an application for default judgment in the Provincial Court or the Supreme Court that will result in a final order that puts an end to the dispute.

In most family law proceedings, things rarely go from starting the proceeding straight to trial. Along the way you will likely have to:

- attend a judicial case conference, if you're in the Supreme Court, or a family case conference, if you're in the Provincial Court,
- produce financial documents and other documents that are important,

- attend an examination for discovery, if you're in the Supreme Court, and
- make or reply to one or more interim applications.

An *interim application* is an application to the court before trial for a temporary order, called an interim order. Interim applications and these other processes are all discussed elsewhere in this resource, such as the section on Interim Applications in Family Matters in the chapter Resolving Family Law Problems in Court.

If either party is unhappy with the result of the hearing or trial and can show that the judge made a mistake, that person can appeal the final order to another court. Orders of the Provincial Court are appealed to the Supreme Court, and orders of the Supreme Court are appealed to the Court of Appeal.

You start an appeal by filing a *Notice of Appeal*, or, depending on the circumstances, a *Notice of Application for Leave to Appeal*, and serving the filed document on the other party, usually within 30 days of the date of the final order. The other party has a certain amount of time to file a *Notice of Appearance* in the Court of Appeal or a *Notice of Interest* for appeals from the Provincial Court to the Supreme Court.

Eventually, there will be a hearing that will result in a final order that puts an end to the appeal. Appeals heard by the Supreme Court can be appealed to the Court of Appeal, and appeals heard by the Court of Appeal can be heard by the Supreme Court of Canada, but only if that court gives permission.

Trial basics

A trial is the presentation and testing of a legal claim before a judge with the authority to decide the claim. A claim might be that someone has been negligent, which caused harm to the person making the claim, or it might be that one spouse should pay spousal support to the other spouse. A claim is "tested" in the sense that the judge's job is to see whether the evidence and the law support the claim.

Evidence at trial is almost always given by witnesses and through documents like bank records, income tax returns and photographs; in rare cases, the evidence of a witness can also be given by an affidavit.

The person who started the court proceeding will go first and presents his or her evidence. The other party goes next and presents the evidence supporting his or her side of the case. When all of the evidence has been presented to the judge, each party tells the judge why the facts and the law show that the judge should decide the case in their favour.

In every case that goes to trial — and, to be clear, not every case does — the judge who hears the case must first make a decision about what the facts of the case are after he or she has listened to the evidence, since people hardly ever agree on the facts of the case. This is called a "finding of fact." The judge then reviews the law and the rules and legal principles that might apply, and decides what law applies to the legal issues. This is called making a "finding of law." The judge makes a decision about the legal claim by applying the law to the facts.

Sometimes the judge is able to make a decision after hearing all the evidence and parties' arguments. Most of the time, however, the judge will need to think about the evidence and the law before he or she can make a decision. This is called a "reserved judgment."

Appeal basics

The decision of the judge at the trial can be challenged to a higher court. A decision of the Provincial Court is appealed to the Supreme Court, and a decision of the Supreme Court is appealed to the Court of Appeal. Decisions of the Court of Appeal can be appealed to the Supreme Court of Canada, but only if the court agrees to hear the appeal.

An appeal is not a chance to have a new trial, introduce new evidence or call additional witnesses. You don't get to appeal a decision just because you're unhappy with how things turned out. Appeals generally only concern whether the judge used the right law and applied the law correctly. This is what the Court of Appeal said about the nature of appeals in the 2011 case of *Basic v. Strata Plan LMS 0304* ^[4], 2011 BCCA 231:

"Consideration of this appeal must start, as all appeals do, recalling that the role of this court is not that of a trial court. Rather, our task is to determine whether the judge made an error of law, found facts based on a misapprehension of the evidence, or found facts that are not supported by evidence. Even where there is such an error of fact, we will only interfere with the order if the error of fact is material to the outcome."

An appeal court does not hear new evidence or make decisions about the facts of a case; the appeal court will accept the trial judge's findings of fact. If the appeal court is satisfied that the trial made a mistake about the law, however, the appeal may succeed.

Appeals at the Supreme Court are heard by one judge; appeals at the Court of Appeal are heard by a panel of three or five judges. At the hearing, the person who started the appeal will go first and will explain why the trial judge made a mistake about the law. The other party goes next and explains why the trial judge appropriately considered the applicable legal principles and why the judge was right. Sometimes the court is able to make a decision after hearing from each party.

The *How Do I?* part of this resource has details about the procedures for making an appeal, under the heading *Appealing a Decision*. You may want to look at these topics:

- How Do I Appeal a Provincial Court Decision?,
- How Do I Appeal an Interim Supreme Court Decision?,
- How Do I Appeal a Supreme Court Decision?, and
- How Do I Appeal a Court of Appeal Decision?

Representing yourself

There is no rule that says that you must have a lawyer represent you in court. Although a court proceeding can be complicated to manage and the rules of court can be confusing, you have the right to represent yourself.

If you do decide to represent yourself in a court proceeding, you have a responsibility to the other parties and to the court to have a general understanding of the law that applies to your proceeding and of the procedural rules that govern common litigation processes like document disclosure and discovery and common court processes like making interim applications.

A good start would be to read through the other sections in this chapter, covering the court system, the law, and the role of lawyers, as well as the chapter on Resolving Family Law Problems in Court. You might also want to read a short note I've written for people who are representing themselves in a court proceeding, "The Rights and Responsibilities of the Self-Represented Litigant" (PDF).

To find out what to expect in the courtroom, read *How Do I Conduct Myself in Court at an Application?* It's located in the *How Do I?* part of this resource, in the section *Courtroom Protocol*.

Sometimes people begin a court action with a lawyer, and then start to represent themselves. If you do this, you need to notify the other parties and the court of the change. See *How Do I Tell Everyone That I'm Representing Myself?* It's

located in the *How Do I?* part of this resource, in the section *Other Litigation Issues*.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Constitution Acts, 1867 to 1982* ^[5]

Resources

- The Rights and Responsibilities of the Self-Represented Litigant (PDF)

Links

- Courts of British Columbia website ^[6]
- Supreme Court of Canada website ^[7]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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The Court System for Family Matters

There are three levels of court in British Columbia: the Provincial Court, the Supreme Court, and the Court of Appeal. Above all of these courts is the Supreme Court of Canada, the highest court in Canada. The Provincial Court and the Supreme Court are trial courts. They listen to witnesses and hear arguments and make decisions. The Court of Appeal only hears appeals. It listens to arguments about why the trial judge was wrong and sometimes cancels the trial decision.

The Provincial Court can only deal with certain kinds of issues and claims. The Supreme Court and the Court of Appeal are our province's superior courts and they can deal with all issues and claims; their jurisdiction is limited only by their rules and the constitution.

This section provides an introduction to the Provincial Court, the Supreme Court, and the Court of Appeal.

Introduction

Our court system has its origins hundreds of years ago in England. In the middle ages, people would come to the king on special days set aside for the hearing of "petitions," complaints made by someone (the *petitioner*) against someone else (the *respondent*). If the petition got heard, and not all did, the king would make a decision that the parties were obliged to accept, putting an end to the complaint.

As the rule of law became more and more important in maintaining a civil society and the law itself became more and more complicated, kings and queens began to farm out the job of hearing petitions to people specially appointed to hear them, called judges. Eventually the monarchy got out of the business altogether, and left the hearing of petitions to the judges. The English court system became more complex as time went on, and different types of courts, like the Courts of Equity and the Courts of the Exchequer, were eventually set up to deal with different kinds of problems.

The English court system was brought to British Columbia when the colonies of Vancouver Island and British Columbia were founded in the middle of the nineteenth century. Our local court system was brought into the Canadian system when British Columbia entered Confederation in 1871.

The fundamental purpose of the courts today is the same as it was then, to resolve people's disputes. We still use a lot of the same terms that were used hundreds of years ago — there's even a court form called a Petition — although we've merged the different types of courts into a single system with the authority to decide every sort of problem.

Our courts deal with all manner of disputes, from the government's complaint that someone has committed a crime, to a property owner's complaint that someone has trespassed on his or her property, to an employee's complaint of wrongful dismissal, to a driver's complaint that someone else was responsible for an accident and the damage the accident caused. The job of the judge is to hear each case and decide what an appropriate and fair solution should be, in a fair, impartial and unbiased manner, free from any interference by the government.

The courts of British Columbia

Today we have three levels of court in British Columbia:

1. the Provincial Court of British Columbia,
2. the Supreme Court of British Columbia, and
3. the Court of Appeal for British Columbia.

Each successive level of court is "superior" to the other, with the Provincial Court being the lowest level of court and the Court of Appeal being the highest. Above our Court of Appeal is the Supreme Court of Canada, which deals with cases from all of the courts of appeal across Canada.

The Provincial Court and the Supreme Court of British Columbia are where the bulk of family law court proceedings are heard. The Court of Appeal and the Supreme Court of Canada only hear appeals of decisions made by the lower courts. As a result, only a few family law cases are brought to the Court of Appeal. Fewer still are brought to the Supreme Court of Canada, partly because that court must give permission to hear appeals in non-criminal cases and partly because it can cost a great deal of money to take a case that far. Appeals generally tend to be complicated and fairly expensive. This generally discourages carrying cases beyond trial.

Making the choice of forum

There are important differences between the Provincial Court and the Supreme Court. Deciding in which court to start a proceeding is called making the *choice of forum*.

The Provincial Court can only deal with issues relating to parenting and the care of children, child support, spousal support, and protection orders. The Supreme Court has the authority to deal with all of those issues as well, but only the Supreme Court can make an order for divorce, make other orders under the *Divorce Act*, or make orders about the division of family property and family debts.

The rules of the Supreme Court can be very complicated and fees are charged for common activities, like starting a court proceeding, making an application, or hearing a trial. The rules of the Provincial Court are more straightforward and no fees are charged.

It is possible to start a proceeding in the Provincial Court to deal with things like child support and then start a proceeding in the Supreme Court to get a divorce and deal with things like property. However it can be confusing to manage two court proceedings, and you have to be careful not to bring up issues in one court that are being dealt with by the other court.

The Provincial Court

The Provincial Court is usually the most accessible court for people who aren't represented by a lawyer. The Provincial Court Family Rules ^[1] which govern the Provincial Court's process are written in easy-to-understand language, the court doesn't charge any filing fees, and most people who use the Provincial Court don't have a lawyer. There are also a lot more courthouses across the province for the Provincial Court than there are for the Supreme Court.

There are four divisions of the Provincial Court. Provincial (Family) Court is the one that deals with family law problems.

Jurisdiction

The Provincial Court can only deal with claims for orders under the *Family Law Act* and the *Interjurisdictional Support Orders Act* ^[2]. The Provincial Court does not have the jurisdiction to make orders for the division of family property or family debt, the management of children's property, or financial restraining orders. It cannot make orders under the *Divorce Act*.

The Provincial Court cannot make declarations about the parentage of a child except if necessary to deal with another claim about children, like a claim for child support or guardianship.

The Provincial Court can hear claims about these issues:

1. guardianship,
2. parental responsibilities and parenting time,
3. contact with a child,
4. child support,
5. spousal support,
6. changing and cancelling Provincial Court orders,
7. enforcing Provincial Court orders,
8. enforcing Supreme Court about guardianship, parental responsibilities, parenting time and contact, and
9. relocation.

Court proceedings

The Provincial Court has special rules just for family law proceedings, the Provincial Court Family Rules ^[1]. If you are involved in a proceeding in the Provincial Court, you should read and understand these rules. The rules of court say how every aspect of a Provincial Court case is run, from starting a court proceeding to scheduling a trial. They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directions ^[3] issued by the Chief Judge, which clarify aspects of the rules of court and describe additional processes and procedures.

Procedure

The person who starts a proceeding in the Provincial Court is the *applicant*. The person against whom the court proceeding is brought is the *respondent*.

The applicant starts a proceeding by filing in court an Application to Obtain an Order in Form 1 and serving it on each respondent. The Application to Obtain an Order must be personally served on the respondent by an adult other than the applicant. The respondent has 30 days to answer the claim by filing a Reply in Form 3; the court clerk will send a copy of the Reply to the applicant. The Reply can also be used to make a counterclaim, the respondent's own claim against the applicant. A respondent who does not file a Reply is not entitled to notice of further hearings in the case.

Depending on which courthouse the proceeding is started at, one or both parties may have to attend the parenting after separation course, and possibly also meet with a family justice counsellor, before they can go before a judge. Family justice counsellors are government employees trained in mediation who can help with issues about the care of children, child support and spousal support.

At the parties' first appearance before a judge, the judge may order the parties to attend a family case conference. A family case conference is a private meeting between the parties, their lawyers and a judge to talk about the legal issues and see whether any of them can be settled. In general, a judge will not make orders at a family case conference except with the parties' agreement. Family case conferences can be very helpful; there's more information about family case

conferences in the chapter Resolving Problems in Court in the section on Case Conferences.

Interim applications, applications for temporary orders, can be made by filing a Notice of Motion in Form 16. It is always best to file an Affidavit in Form 17 with the Notice of Motion. An affidavit is a person's written evidence, which the person swears is true before a lawyer, notary public or court staff member able to take oaths. There's more information about interim applications in the chapter Resolving Problems in Court in the section on Interim Applications. Applications to change final orders are made by filing an Application to Change or Cancel an Order in Form 2 and serving on the other parties. The other parties have 30 days to reply by filing a Reply in Form 3.

Addressing the court

Judges of the Provincial Court are addressed as "Your Honour."

Appeals

Final orders of the Provincial Court may be appealed to the Supreme Court. The appeal must be started within 40 days of the date the final order was made.

According to s. 233(1) ^[4] of the *Family Law Act*, only final orders may be appealed. In a case called *Dima v. Dima* ^[5], 2011 BCCA 86, the Court of Appeal confirmed that the only way to challenge an interim order of the Provincial Court is through judicial review under the *Judicial Review Procedure Act* ^[6].

It's important to know that an order that is appealed remains in effect unless the judge who made the order says otherwise. Starting an appeal doesn't mean that you can ignore the order you are appealing.

The Supreme Court

Unlike the Provincial Court, the Supreme Court has the authority to deal with all family law issues. If the Provincial Court cannot deal with an issue, the Supreme Court is where you will have to start a proceeding. As well, the Supreme Court is the only court that can grant an order for divorce.

There are fewer registries of the Supreme Court than there are for the Provincial Court. Court fees, fees for services like filing documents or starting a court proceeding, are also paid in the Supreme Court; no fees are charged by the Provincial Court.

The Supreme Court is also a lot more formal than the Provincial Court. While it is possible to represent yourself in the Supreme Court, the rules of court used for family law matters, the Supreme Court Family Rules, are complicated and are applied strictly. The assistance of a lawyer is highly recommended.

Court jurisdiction

The Supreme Court has authority to deal with the same issues as the Provincial Court and more:

1. the Supreme Court has *inherent jurisdiction*, which means it can deal with every kind of legal issue,
2. the Supreme Court can deal with claims under the *Divorce Act*, including making divorce orders, as well as claims under the *Family Law Act*,
3. the Supreme Court can divide family property and family debt under the *Family Law Act*,
4. the Supreme Court may divide assets between people who aren't spouses under the common law like the law of trusts, or under legislation like the *Land Title Act* ^[7] or the *Partition of Property Act* ^[8],
5. the Supreme Court may issue restraining orders freezing financial assets, and
6. the Supreme Court hears appeals from decisions of the Provincial Court.

Court proceedings

The Supreme Court has special rules just for family law proceedings, the Supreme Court Family Rules ^[9]. If you are involved in a proceeding before the Supreme Court, you should try to read and understand these rules. The rules of court govern every aspect of a Supreme Court case, from starting a court proceeding to scheduling a trial. They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directions ^[10] and Administrative Notices ^[11] issued by the Chief Justice, which clarify aspects of the rules of court and describe additional processes and procedures.

Procedure

Most Supreme Court family law proceedings are started by filing in court a Notice of Family Claim in Form F3. The person who starts a proceeding by a Notice of Family Claim is the *claimant*, and the person against whom the claim is brought is the *respondent*. In certain unusual cases, a proceeding can also be started by filing in court a Petition in Form F73. Someone starting a proceeding with a Petition is the *petitioner*, and the other party is the *petition respondent*.

Notices of Family Claim and Petitions must be personally served on the other party by an adult other than the claimant or petitioner.

A respondent may reply to a Notice of Family Claim by filing a Response to Family Claim in Form F4. A respondent who does not file a Response to Family Claim is not entitled to notice of further hearings in the case. The respondent may also file a Counterclaim in Form F5. A counterclaim is the respondent's own claim against the applicant.

In general, before anyone can do anything else, the parties must attend a judicial case conference. A judicial case conference is a private meeting between the parties, their lawyers and a master or judge to talk about the legal issues and see whether any of them can be settled. The master or judge who hears a judicial case conference cannot make orders, except for procedural orders, without the parties' agreement. Judicial case conferences can be very helpful; cases sometimes even settle at judicial case conferences. There's more information about judicial case conferences in the chapter Resolving Problems in Court in the section on Case Conferences.

Interim applications, applications for temporary orders, can be made by filing a Notice of Application in Form F31 and an Affidavit in Form F30. An affidavit is a person's written evidence, which the person swears is true before a lawyer, notary public or court staff member able to take oaths. The person making an application is the *applicant*; the person against whom an application is brought is the *application respondent*. An application respondent may reply to a Notice of Application by filing an Application Response in Form F32 and an Affidavit within five business days after service of the Notice of Application. There's more information about interim applications in the chapter Resolving Problems in Court in the section on Interim Applications.

Applications to change final orders are made by filing a Notice of Application in Form F31 and an Affidavit in Form F30 and serving them on the other parties. The process works like the process for interim applications, except that the application respondent has 14 business days to reply.

Addressing the court

There are two kinds of judicial official at the Supreme Court that hear applications and trials, *masters* and *justices*, both of which we'll refer to as "judges" for convenience. Masters have sort of the same kind of authority as Provincial Court judges and are responsible for hearing most interim applications. Justices hear other types of interim applications, trials and applications to change final orders.

Masters of the Supreme Court are addressed as "Your Honour." Justices are addressed as "My Lord" or "My Lady," or, if you want, as "Your Lordship" or "Your Ladyship."

Appeals

Interim orders of masters may be appealed to a justice of the Supreme Court. A party appealing the order of a master must file a Notice of Appeal in Form F98 within 14 days of the order.

Interim and final orders of justices of the Supreme Court are appealed to the Court of Appeal and must be brought within 30 days of the date of the order. Appeals to the Court of Appeal proceed under the Court of Appeal's rules of court and court forms.

It's important to know that an order that is appealed remains in effect unless the master or justice who made the order says otherwise. Starting an appeal doesn't mean that you can ignore the order you are appealing.

The Court of Appeal

The Court of Appeal has the same sort of jurisdiction as the Supreme Court. It can deal with every kind of legal problem. However, this court does not hear trials, it only hears appeals from decisions of the Supreme Court. Although the Court of Appeal's central registry is in Vancouver, the court occasionally hears cases in Victoria, Kelowna and Kamloops.

Appeals are a fairly expensive process. You should only bring an appeal after you've given a lot of thought to the cost of the appeal and your chances of success; don't leap to appeal a decision just because you don't like it or are angry. Give some serious thought to the appeal first and consider asking a lawyer to review your case and the reasons for judgment from trial. Simply put, the cost of the appeal may outweigh the benefit you will get even if you win.

Court proceedings

If you are involved in a proceeding before the Court of Appeal, you must read the *Court of Appeal Act* ^[12] and the Court of Appeal's Rules of Court ^[13]. The act and the rules govern every aspect of an appeal, from starting an appeal to the size and colour of paper to use for court documents. They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directives ^[14] issued by the Chief Justice, which clarify aspects of the rules of court and describe additional processes and procedures.

While it is possible to represent yourself in the Court of Appeal, the court requires strict compliance with its rules and the assistance of a lawyer is highly recommended.

Procedure

Appeals are started by filing in court a Notice of Appeal in Form 7 or, depending on the circumstances, a Notice of Application for Leave to Appeal in Form 1, and must be started within 30 days of the order appealed from. The person who starts an appeal is the *appellant*, the other parties are *respondents*. The appellant must serve the Notice of Appeal on all respondents. After being served, a respondent has 15 days to file a Notice of Cross Appeal in Form 8; this is only necessary if the respondent also wants to appeal the Supreme Court's order.

Interim applications, applications for temporary orders, can be made by filing a Notice of Motion in Form 6 and serving the Notice on the other parties. Applications are rarely necessary, but when they are, the rules say they must be completed within 30 minutes.

All appeals are based on the evidence before the judge who made the original decision. Before an appeal can be heard, the appellant must get transcripts of all of the oral evidence heard at trial, prepare a book with all of the documents used as evidence at trial, and prepare a book with all of the pleadings filed in the Supreme Court proceeding. (Transcripts in particular are hideously expensive to obtain.) Each side must also prepare a written argument, called a *factum*, as well as books containing all the statute law and case law he or she will be relying on in arguing the appeal. The court registry is very particular about how these materials are prepared; read the Court of Appeal Rules^[13] very carefully!

Appeals are heard by a panel of three judges; when a legal issue is particularly important, the appeal may be heard by a panel of five judges. The panel reaches its decision after reading through the parties' factums, hearing the parties' oral arguments, and considering the law that applies to the issues. The decision of the panel is the decision of a majority of the judges; the judge or judges who disagree with the majority decision are said to *dissent*.

Addressing the court

The justices of the Court of Appeal are addressed as "My Lord" or "My Lady," or, if you want, as "Your Lordship" or "Your Ladyship."

Appeals

Decisions of the Court of Appeal can be appealed to the Supreme Court of Canada. However, the Supreme Court of Canada must first grant leave for the appeal to be brought. There is no automatic right to appeal a judgment of the Court of Appeal.

Resources and links

Legislation

- *Provincial Court Act*^[15]
- *Supreme Court Act*^[16]
- *Court of Appeal Act*^[17]
- *Court Rules Act*^[18]
- *Family Law Act*
- *Divorce Act*
- *Interjurisdictional Support Orders Act*^[2]
- *Judicial Review Procedure Act*^[6]
- *Constitution Acts, 1867 to 1982*^[19]

Resources

- Provincial Court Family Rules ^[1]
- Provincial Court Practice Directions ^[3]
- Supreme Court Family Rules ^[9]
- Supreme Court Family Practice Directions ^[10]
- Supreme Court Administrative Notices ^[11]
- Court of Appeal Rules ^[13]
- Court of Appeal Practice Directives ^[14]

Links

- Courts of British Columbia website ^[20]
- Provincial Court website ^[21]
- Supreme Court website ^[22]
- Court of Appeal website ^[23]
- CanLII ^[24]
- Legal Services Society's page on the Legal System ^[25]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/85pb>
- [2] <http://canlii.ca/t/8413>
- [3] <http://www.provincialcourt.bc.ca/types-of-cases/family-matters/chief-judge-practice-directions>
- [4] <http://canlii.ca/en/bc/laws/stat/sbc-2011-c-25/latest/part-11/sbc-2011-c-25-part-11.html#section233>
- [5] <http://canlii.ca/t/fkmwm>
- [6] <http://canlii.ca/t/844v>
- [7] <http://canlii.ca/t/8456>
- [8] <http://canlii.ca/t/848q>
- [9] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/169_2009_00
- [10] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx
- [11] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/administrative_notices.aspx
- [12] <http://canlii.ca/t/84h4>
- [13] <http://canlii.ca/t/85bg>
- [14] http://www.courts.gov.bc.ca/court_of_appeal/Practice_and_Procedure/civil_practice_directives_/index.aspx
- [15] <http://canlii.ca/t/jj7h>
- [16] <http://canlii.ca/t/51x8q>
- [17] <http://canlii.ca/t/51tr9>
- [18] <http://canlii.ca/t/84h8>
- [19] <http://laws-lois.justice.gc.ca/eng/Const/index.html>
- [20] <http://courts.gov.bc.ca>
- [21] <http://www.provincialcourt.bc.ca/>
- [22] http://www.courts.gov.bc.ca/supreme_court/
- [23] http://www.courts.gov.bc.ca/Court_of_Appeal/
- [24] <http://canlii.org>
- [25] http://familylaw.lss.bc.ca/legal_issues/legalSystem.php

The Law for Family Matters

When lawyers speak about the law, they are really talking about two different things. The first kind of law is the laws made by the provincial and federal governments, called legislation. The other kind of law is the common law, which is the rules and principles developed by the courts as they decide case after case.

This section provides an overview of legislated laws, the common law, and the common law system of justice. It also talks about how to decide whether to begin a court proceeding under the *Divorce Act* or the *Family Law Act*.

Introduction

Under the *Constitution of Canada* ^[1], the federal and the provincial governments both have the power to make laws. Each level of government has its own particular area of jurisdiction, meaning that a subject that the federal government can pass laws on, the provincial governments generally can't, and vice versa. For example, the provinces have jurisdiction over property rights, so they can pass laws governing real estate, the sale of cars, the division of family property, and so forth. The federal government doesn't have the ability to make laws about property rights, except in certain special circumstances. On the other hand, the federal government can pass laws dealing with the military, navigation and shipping, and divorce, things that are outside the jurisdiction of the provincial governments. This distinction is important in family law because the laws of both the federal and provincial governments can relate to a problem, and you need to know which law governs what issue.

Legislated laws are only one source of law. Our constitution is another source of law, and another is the common law, also known as judge-made law. The fundamental principle of the common law is the idea that when a court has made a decision on a particular issue, another court facing a similar issue — with similar parties in similar circumstances — ought to make a similar decision. Courts are said to be "bound" by the decisions of earlier courts in previous cases. As no two cases are entirely alike, each court's decision is said to stand for a principle, a statement of what the law should be in the particular circumstances of that case. Sometimes this principle is an elaboration or a clarification of the general rule on a particular subject; sometimes it is a statement about what the law ought to be.

Our constitution requires that the courts be independent from the government. Despite this separation, the courts have a certain kind of authority over the government and the government has a certain kind of authority over the courts. For example, if the government passes a law that the court concludes is contrary to the constitution, the court can strike the legislation or make the government change it. On the other hand, the government has the authority to pass laws that change the common law rules made by the courts, although it can't change the court's decision in a particular case.

The common law

The common law of Canada is hundreds of years old and has its roots in England, in the *curia regis* established by King Henry II in 1178 and in the court of common pleas established by the Magna Carta in 1215, although really the oldest cases we are likely to refer to are from the 1800s. The common law is developed by the courts as they deal with each case, following a legal principle known by its Latin name, *stare decisis*. Under this principle, a court dealing with a particular kind of problem is required, usually, to follow the decisions of previous courts that dealt with the same sort of problem in the same sort of circumstances. Court decisions are sometimes called "precedents" or "precedent decisions" because of the *stare decisis* principle.

Think of it like this. A long time ago, someone sued someone else for riding a horse onto his potato field without being invited. The court decided that you shouldn't be free to enter onto the property of another unless you were invited to do

so, and found that the rider had *trespassed*. Someone else riding a different horse onto a different field would be found liable for trespass based on the principle established by the first court. The first case was a precedent for the court's decision in the second case.

The common law and government

While the court is more or less free to develop the common law as it sees fit, the principles of the common law can be overridden by legislation made by the government. For example, the laws that deal with the interpretation and enforcement of contracts were at one point entirely governed by the common law. The government, as it decided it needed to regulate different aspects of the law of contracts, has made legislation covering lots of different areas of contract law, including such laws as the provincial *Sale of Goods Act* or the federal *Advance Payments for Crops Act*. The new legislation overruled the old common law principles.

From a family law perspective, it used to be the case that a husband could sue someone else for "enticing" his wife to commit adultery or to leave him. Suing someone for enticement was a claim created by the courts. The *Family Law Act* now expressly forbids a spouse from bringing a court proceeding for enticement, thus overriding the common law rule. Other old common law claims abolished the *Family Law Act* include claims for breach of promise of marriage and loss of the benefits of marriage.

The common law and legislation

This leads to another important aspect of our legal system and the common law. The courts and the common law also play a role in interpreting laws made by the governments. Much of the case law in family law matters doesn't deal with ancient common law principles; it deals with how the courts have interpreted the legislation bearing on family law in the past. For example, s. 15.2(4) ^[2] of the *Divorce Act* says that in considering a claim for spousal support, the court must:

... take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

A lot of the case law that deals with spousal support is about how this particular section of the *Divorce Act* has been interpreted in past cases. A lawyer making an argument about why spousal support should be awarded to her client now might make an argument to the judge supported by case law showing how this section has been interpreted to award spousal support in the past to spouses in circumstances similar to those of her client.

Finding case law

Because the common law consists of the decisions of judges made over the past several hundred years, the common law is researched by looking at these decisions. These decisions are written down and printed in books. These books, depending on the publisher, are issued on a monthly, quarterly or annual basis. (When you see a promotional photograph of a lawyer standing in front of a giant rack of musty, leather-bound books, the lawyer is standing in front of these collections of the case law.) These books, called *reporters*, are where the past decisions of the courts are available if you need to make an argument about how the law applies to your particular situation. The most important reporter for family law is called the *Reports on Family Law*, or the RFL for short, published by Carswell. You can find collections of case law reporters in the library of your local courthouse or at a law school in your neighbourhood. These libraries are open to the public, although they may have restricted business hours.

Thankfully, these days almost every important decision is published online as well. This makes research a lot easier and saves a lot of time travelling to and from libraries. CanLII ^[3], the Canadian Legal Information Institute, has a collection of most cases published since 1990 and a growing number of older cases from all parts of Canada. There are video tutorials on using CanLII effectively, courtesy of CanLII's blog ^[4] and Courthouse Libraries BC's website ^[5].

The courts also post case law on their respective websites. Search the judgments of:

- the Provincial Court of British Columbia ^[6],
- the Supreme Court of British Columbia ^[7],
- the Court of Appeal for British Columbia ^[7], and
- the Supreme Court of Canada ^[8].

These websites also keep lists of recently released decisions that may be published there before making it to CanLII.

Another way to look up case law is to read digests of the law on particular subjects. The best materials on family law are two books published by the Continuing Legal Education Society of British Columbia: the *Family Law Sourcebook for British Columbia*, and the *British Columbia Family Practice Manual*. These books are available in some public libraries (the WorldCat ^[9] website will tell you if a library near you has copies) or at a branch of Courthouse Libraries BC ^[10].

Legal research can be terribly complex, partly because there are so many different reporters and partly because there are so many cases. In fact, legal research is the subject of a whole course at law school. You can get some help from the librarians at your local courthouse law library or university law library, all of whom are really quite helpful. In fact, the law library at UBC has a research desk that can help with certain limited matters. You might also consider hiring a law student to plough through the law for you, and the law schools at UBC, the University of Victoria and Thompson Rivers University will have job posting boards where you can put up a note about your needs and contact information.

If all else fails, or your issue is really complex, try hiring a professional legal researcher. The Legal Research section of the Canadian Bar Association BC maintains a list of freelance research lawyers, available on the Courthouse Libraries BC ^[11] website.

Legislation

Both the Parliament of Canada and the Legislative Assembly of British Columbia have the power to make laws in their different areas of authority. This kind of law is called legislation, and each piece of legislation, called a statute, is intended to address a specific subject, like how we drive a car or how houses are built, where and when we can fish or hunt, what companies can do, and how schools, hospitals and the post office work. Legislation governs how we interact with each other and implements government policy.

Government can also make regulations for a particular piece of statute that might contain important additional rules or say how the legislation is to be interpreted. The big difference between legislation and regulations is that legislation is publicly debated and voted on by the members of Parliament or the Legislative Assembly. Regulations are made by government without the necessity of a parliamentary vote, and often don't get much publicity as a result.

Because statutes and regulations have such a big impact on how we live our lives, they are relatively easy to find and relatively easy to understand. Unlike the common law, legislation is written down and organized. All of the current federal statutes can be found on the website of the Department of Justice ^[12]. All of the current provincial statutes can be found on the BC Laws ^[13] website run by the Queen's Printer.

CanLII ^[14] also posts all current federal and provincial laws. It has the advantage of letting you see older versions of some laws, and you can search for cases that refer to specific statutes or regulations. You can also find the old *Family Relations Act* on CanLII, which you won't be able to find on the BC Laws website.

The division of powers

The governments' different areas of legislative authority are set out in ss. 91^[15] and 92^[16] of the *Constitution Act, 1867*^[17]. The federal government can only make laws about the subjects set out in s. 91 and the provincial governments can only make laws about the subjects set out in s. 92.

From a family law perspective, this means that only the federal government has the authority to make laws about marriage and divorce, while the provincial governments have the exclusive authority to make laws about marriage ceremonies, the division of property, and civil rights. As a result, the federal *Divorce Act* talks about divorce and issues that are related to divorce, like the care of children, child support and spousal support. The provincial *Family Law Act* talks about the care of children, child support and spousal support as well, but also talks about the division of family property and family debt, the management of children's property, and determining the parentage of children.

The doctrine of paramountcy

Sometimes the subjects over which each level of government has authority overlap and, according to a legal principle called the *doctrine of paramountcy*, all laws are not created equal. Under this doctrine, federal legislation on a subject trumps any provincial legislation on the same subject. This is important because in family law both the *Divorce Act* and the *Family Law Act* deal with child support and spousal support. As a result, orders under *Divorce Act* will always be paramount to orders under the *Family Law Act* on the same subject.

Family law legislation

The two most important pieces of legislation relating to family matters are, as you will have gathered, the federal *Divorce Act* and the provincial *Family Law Act*. The most important regulation is the Child Support Guidelines, a regulation to the *Divorce Act* that has also been adopted for the *Family Law Act*.

The *Divorce Act* talks about:

1. divorce,
2. custody of and access to children,
3. child support, and
4. spousal support.

The *Family Law Act* talks about:

1. determining the parentage of children,
2. guardianship, parental responsibilities and parenting time,
3. contact with a child,
4. child support,
5. spousal support,
6. family property, family debt and excluded property,
7. children's property,
8. protection orders, and
9. financial restraining orders.

The Child Support Guidelines talks about:

1. calculating child support and determining children's special expenses,
2. determining income, and
3. disclosure of financial information.

Because family law issues can be very broad and touch on other areas of law, such as contract law or company law, other pieces of legislation may also apply to a problem. For example, the *Name Act* ^[18] allows a spouse to change her name following a divorce, the *Adoption Act* ^[19] deals with adoption, the *Land Title Act* ^[20] deals with real property, the *Partition of Property Act* ^[21] allows a co-owner of real property to force the sale of the property, and the *Business Corporations Act* ^[22] deals with the incorporation of companies, shareholders' loans, and other things that may be important if a spouse owns or controls a company.

Choosing the law and the court

Both the federal *Divorce Act* and the provincial *Family Law Act* deal with family law issues. As well, both the Provincial Court and the Supreme Court have the authority to hear proceedings dealing with family law issues. Deciding which legislation you are going to make your claim under is called making the *choice of law*. Deciding in which court you are going to bring your claim is called making the *choice of forum*.

Jurisdictional issues

Because of the rules set out in the *Constitution Act, 1867*, the federal government has the sole authority to make laws on the following subjects:

1. marriage,
2. divorce,
3. spousal support and child support, and
4. custody of and access to children.

Because of the same statute, provincial governments have exclusive authority to make laws dealing with these subjects:

1. the formalities of the marriage ceremony,
2. spousal support and child support,
3. guardianship, parental responsibilities and parenting time,
4. contact with children,
5. the division of family property and family debt,
6. adoption,
7. child welfare, and
8. changes of name.

To further complicate things, the Provincial Court and the Supreme Court can make orders about some of the same subjects, but not all, under some of the same legislation, but not all. The Provincial Court can only deal with applications involving laws made by the provincial government and, even then, it cannot deal with applications involving the division of a property or debt, or adoption. In family law proceedings, the Provincial Court can only deal with applications involving the following subjects:

1. guardianship, parental responsibilities, parenting time and contact under the *Family Law Act*,
2. spousal support and child support under the *Family Law Act*,
3. the enforcement of such orders made under the *Family Law Act*, and
4. protection orders under the *Family Law Act*.

The Supreme Court, on the other hand, can deal with all of these subjects and everything else, like divorce and other claims under the *Divorce Act*.

If you wish to make a claim for an order for divorce, adoption, determining the parentage of a child, management of children's property, the division of family property and family debt, or the protection of family property, you must make

your application to the Supreme Court. Otherwise, you can make your claim in either court.

Making matters worse, there can be simultaneous court proceedings involving the same people, and possibly the same problems, before both the Provincial Court and the Supreme Court. For example, an action for a couple's divorce can be before the Supreme Court at the same time as an application about parental responsibilities and spousal support is being heard by the Provincial Court. In such a circumstance, either party can make an application that the proceedings in the Provincial Court be joined with those in the Supreme Court so that both court proceedings are heard at the same time before the same court.

The choice of law

If you wish to obtain a divorce, you must make your claim under the *Divorce Act*. If you wish to obtain an order dealing with property or debt, you must make your claim under the *Family Law Act*. However, if you wish to apply for an order for almost anything else and you are married, you may make your claim under either piece of legislation.

There are one or two points you may wish to consider, however. Only married spouses make applications under the *Divorce Act*. Unmarried spouses and other unmarried people may make applications for relief under the *Family Law Act* alone. Also, if your proceeding is before the Provincial Court, you must make your claim under the *Family Law Act*. If your case is before the Supreme Court, you may claim under either the *Divorce Act* or the *Family Law Act*, or under both.

The following chart shows which law deals with which issue:

| | <i>Family Law Act</i> | <i>Divorce Act</i> |
|--|--|--------------------|
| Divorce | | Yes |
| Care of children | Guardianship and parental responsibilities | Custody |
| Time with children | Parenting time or contact | Access |
| Child support | Yes | Yes |
| Children's property | Yes | |
| Spousal support | Yes | Yes |
| Family property and family debt | Yes | |
| Protection orders | Yes | |
| Financial restraining orders | Yes | |

The choice of forum

In family law matters, choosing the *forum* of a court proceeding means making the choice to proceed in either the Provincial Court or the Supreme Court. The Provincial Court has certain limits to its authority and, as a result has limits on the kinds of claims it can hear. The Supreme Court has the authority to deal with every almost legal issue within British Columbia. It also has something called "inherent jurisdiction," meaning that the Supreme Court, unlike the Provincial Court, is not limited to the authority it is given by legislation. It is safe to say that, as far as family matters are concerned, the Supreme Court can deal with everything the Provincial Court can as well as everything it can't.

The process of each court is guided by each court's set of rules. The Supreme Court Family Rules ^[23] offer a much wider variety of tools and remedies than the Provincial Court Family Rules ^[24], particularly in terms of the information and documents each side can make the other produce in the course of a proceeding. For example, the Supreme Court rules allow a party to make the other party submit to an examination for discovery, or make a company or third party produce records. These disclosure mechanisms are not available in the Provincial Court.

You may want to think about the relative complexity of the two courts' sets of rules, particularly if you plan to represent yourself and not hire a lawyer. The Provincial Court's rules are written in plain language and are fairly straightforward. The Supreme Court Family Rules are much more complicated and aren't written in the most easy to understand language.

Finally, you may also want to think about the cost of proceeding in each court. The Provincial Court charges no filing fees and has a relatively streamlined procedure. The Supreme Court charges filing fees, and the extra tools and remedies available under the Supreme Court Family Rules are helpful but will add to the cost of bringing a proceeding to trial.

This chart shows which level of court can deal with which issue:

| | Provincial Court | Supreme Court |
|--|-------------------------|----------------------|
| <i>Divorce Act</i> | | Yes |
| <i>Family Law Act</i> | Yes | Yes |
| 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 |

While it is possible to start an action in the Provincial Court to deal with one or two issues (like parental responsibilities or child support) and later start an action in the Supreme Court to deal with other issues (like dividing family property or divorce) it's usually best to confine yourself to a single court to avoid overlaps and keep things as simple as possible.

Resources and links

Legislation

- *Divorce Act*
- *Family Law Act*
- Child Support Guidelines
- *The Constitution of Canada* ^[1]

Links

- CanLII ^[14]
- Decisions of the Provincial Court of British Columbia ^[6]
- Decisions of the Supreme Court of British Columbia ^[7]
- Decisions of the Court of Appeal for British Columbia ^[7]
- Decisions of the Supreme Court of Canada ^[8]
- WorldCat ^[9]
- Courthouse Libraries BC ^[5] (finding case law video tutorial)
- CanLII blog ^[4] (video tutorials on using CanLII)
- List of legal research lawyers ^[11]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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You & Your Lawyer

Lawyers are people with special legal training (and a law degree) who are licensed to practise law by their province's law society. The jobs of the Law Society of British Columbia ^[1] are to regulate who can be a lawyer and to protect the public by setting and enforcing standards of professional conduct. Since many people involved in a family law dispute haven't had to deal with lawyers before, this section is about your relationship with your lawyer.

This section provides an overview of the lawyer-client relationship. It discusses how to find and hire a lawyer, how your lawyer bills for his or her services, what you can do if you're not happy with your lawyer, and how you or your lawyer can end the lawyer-client relationship.

Introduction

All lawyers in British Columbia are members of the Law Society of British Columbia ^[1]. Many are also members of the Canadian Bar Association ^[2] and local bar associations like the Vancouver Bar Association ^[3], the Victoria Bar Association ^[4] or the Trial Lawyers Association of British Columbia ^[5]. The Law Society's primary purpose is to govern and regulate lawyers to protect the public interest. As officers of the court and as members of the Law Society, lawyers are held to a high standard of conduct.

Your lawyer's primary job is to protect and advance your legal interests. At the same time, your lawyer must follow this high standard of conduct and act at all times in an ethical manner. Lawyers' duties to their clients, to each other and to the courts are governed by:

- the *Legal Profession Act* ^[6],
- the Rules ^[7] of the Law Society of British Columbia, and
- the Law Society's Code of Professional Conduct ^[8].

Boiling all this down a bit, your lawyer performs two key roles. First, your lawyer is like a plumber: if you tell your plumber to install your sink, he or she installs your sink. On the other hand, if you tell your plumber to hook the hot water pipe up to the ice-making machine intake, you'd expect your plumber to give you some common sense advice about why that might be a bad idea. Second, your lawyer is like a champion: your lawyer is your sword and shield, protecting you from some of the more unpleasant and adversarial aspects of litigation while boldly pursuing your claim.

Both of these analogies are totally cheesy but apt. You should expect your lawyer to take the heat for you and fearlessly advance your claim. While you should expect your lawyer to do just what you tell him or her to do, you should also expect your lawyer to give you good advice if your instructions are not in your best interests, and perhaps even refuse to accept your instructions. You should especially expect your lawyer to tell you if what you want to do will be harmful to your case.

Some lawyers are also mediators, arbitrators, and parenting coordinators. Lawyers who act in these roles are not serving as advocates in a traditional lawyer-client relationship; their jobs are much different.

Lawyers who are family law mediators have special, additional training in mediation. Family law mediators do not represent you or your spouse; they are providing mediation services to the both of you, rather than advocacy services for just one of you. Lawyers who act as mediators are neither party's advocate.

Lawyers who are family law arbitrators have special, additional training in arbitration and have to meet other requirements imposed by the Law Society and the Family Law Act Regulation ^[9]. Family law arbitrators are like private judges; their job is to hear the evidence and arguments necessary to decide a problem and then decide the problem by making a decision. Lawyers who act as arbitrators are neither party's advocate; they are neutral decision makers.

Lawyers who are parenting coordinators are trained as mediators and arbitrators, and have a great deal of training on top of that. The sort of services parenting coordinators provide are a blend of mediation and arbitration, with a bit of counselling thrown in. Parenting coordinators help parents deal with parenting disputes when they arise and, if an agreement cannot be reached through a process that's a lot like mediation, then the parenting coordinator will make a decision resolving the issue through a process that's a lot like arbitration. Lawyers who act as parenting coordinators are neither party's advocate. If they're anyone's advocate, they're the children's advocate.

The website of the Law Society of British Columbia ^[10] is an extremely helpful resource for people who have hired a lawyer or people who are thinking of retaining a lawyer. It provides a lot of information about the lawyer-client relationship and about lawyers' ethical duties to their clients.

Finding and hiring a lawyer

Sometimes the best way to find a lawyer is the same way you find a family doctor or a school for your children: by word of mouth. Ask your friends, family and co-workers if they've ever used a family law lawyer, and, if so, how they liked that person. Did the lawyer return telephone calls promptly? Did the lawyer keep them up to speed on the progress of their file? Was the lawyer's bill reasonable? Did they feel comfortable with their lawyer? You can also ask your doctor, your accountant or your dentist if they can refer you to someone. Some of the other things you might want to think about when hiring a lawyer are described in the section on Separating Emotionally.

The Canadian Bar Association's Lawyer Referral Service ^[11] is another way to find a lawyer. This service keeps a roster of subscribing lawyers in your area, a list of the areas of law they practise and a list of the languages they speak. Call 604-687-3221 in Vancouver and the Lower Mainland or, elsewhere in British Columbia, call 1-800-663-1919.

Yet another way to find a lawyer is by contacting the Legal Services Society (LSS) for Legal Aid Intake Services ^[12]. LSS provides legal aid in British Columbia, and, if you meet their criteria, they will refer you to a lawyer and pay for the lawyer's services to boot. Be warned however, that since the provincial government's catastrophic reduction of funding to LSS in 2002, legal aid will generally only be available for people dealing with situations of family violence or where the abduction of children is a possibility. Go to LSS's website on how to apply for legal aid ^[13] for more information about their eligibility criteria.

If none of this works out, you can try finding a lawyer through the Yellow Pages or the internet, but only as a last resort. Typing "vancouver family lawyer" or "best divorce lawyer" into a search engine is a terrible way to find a lawyer; while you'll get a ton of results, you won't know anything about those lawyers except for the things they say about themselves on their websites. The same thing applies to picking a lawyer through a Yellow Pages ad.

Remember that not all lawyers practise family law, of course, and this is something you may want to take into consideration. Some lawyers focus exclusively on family law, so that family law is the whole of their practice; others practise family law along with other areas of the law. If a lawyer advertises in the Yellow Pages or online, the lawyer's ad or website will usually say exactly what area or areas of law he or she practises. You may wish to pay special attention to lawyers who tend to spend all or most of their time on family law matters.

The first interview

Once you've gathered the names of a few lawyers who sound promising, make an appointment to meet with each of them. A few lawyers will offer you some of their time for free or at a reduced rate for an initial interview. The lawyers you meet through the Lawyer Referral Service will charge a special reduced fee for a half-hour initial interview. Most lawyers however will bill for initial interviews at their usual hourly rate.

Do not assume that the lawyer will not charge for his or her time unless the lawyer specifically advertises that he or she offers free initial consultations. Expect a bill for the lawyer's time!

Use this first meeting as an opportunity to assess how you feel about each lawyer and how you relate to them; you needn't hire the first lawyer you meet. You are entitled to shop around before you choose the lawyer who is right for you. You can also use your first interview with each lawyer to get that lawyer's take on your problem. Tell him or her about your problem concisely, and let the lawyer ask questions which pull out the details of your problem.

Don't be shy about asking lawyers about their hourly rates, how they will bill you, and what sort of disbursements (a lawyer's out-of-pocket expenses for things like photocopying and filing fees) the lawyer will expect that you pay for. Ask what sort of retainer they will require, what their interest rate is on overdue accounts, and whether they will be charging you any additional fees based on their success or the complexity of your problem. Ask whether anyone else in his or her firm will be working on your file, whether you will be billed for their work, and maybe ask to meet them too.

(If you're meeting with a lawyer who also works as a family law mediator or family law arbitrator, and you're thinking of hiring him or her to act in that capacity, you don't want to give the lawyer too many details about your situation. Family law mediators and family law arbitrators must be neutral and impartial. Too much information from just one of you may make the lawyer unable to help resolve your dispute.)

For a summary guide to your first interview with a lawyer, see *How Do I Prepare for My First Meeting with a Lawyer?* It's located in the *How Do I?* part of this resource in the *Miscellaneous* section.

Hiring your lawyer

Once you've picked a lawyer you like and have decided to hire him or her, your lawyer will require you to sign a retainer agreement and give him or her a deposit towards your first of couple of bills. Hiring a lawyer is called *retaining* a lawyer. A *retainer agreement* is a contract between your lawyer and yourself that you each must sign, and which sets out the legal and financial aspects of your relationship to each other. Read the agreement carefully! If there are any terms you don't understand, be sure to ask your lawyer, and, likewise, if you object to any of the terms of the agreement, express your objection and ask how your concern might be addressed. A *retainer* is a sum of money you will likely be asked to give as a deposit against your lawyer's future services and fees.

Never hesitate to tell your lawyer about any concerns you have about his or her bills or services.

(A family law mediator will ask you to sign an Agreement to Mediate rather than the usual retainer agreement. The Agreement to Mediate will set out the details of the mediator's rate and expectations about payment, and how each mediation session will be paid for. The same thing applies to family law arbitrators. Parenting coordinators will want you to sign a Parenting Coordination Agreement, and will usually ask for both a retainer and a fee deposit.)

How your lawyer charges you

You should discuss with your lawyer, at the very first meeting, exactly how the lawyer will bill you for his or her time and for the expenses the lawyer incurs in working on your file. Most lawyers will bring this up on their own, but if your lawyer happens to forget to talk about it, you should bring it up. Don't be shy. You will, at a minimum, want to know what the lawyer's hourly rate is and what the lawyer's expectations are regarding payment of each account.

Your retainer

In British Columbia, family law lawyers cannot work on a contingency basis — for a percentage of the client's award or settlement — which is how some other lawyers, like personal injury lawyers, often get paid. Family law lawyers bill for their services by the hour, although some may bill on fixed, flat-rate for smaller tasks where the scope of the lawyer's services is clearly limited.

Family law lawyers will usually expect to be paid some money up front, called a retainer. While some family law lawyers will agree to be paid from the proceeds of the sale of an asset following trial, most often they'll expect to be paid by an initial retainer followed by additional retainer payments or a monthly billing process.

The amount you pay as your retainer is held by your lawyer in trust. Your lawyer will withdraw money from the retainer each time he or she bills you. After a couple of bills or more have been paid from the retainer, the retainer may be exhausted. At that point your lawyer will usually ask you for another retainer, or your lawyer may simply bill you directly each month. On the other hand, if your problem is resolved more quickly than was expected or if you fire your lawyer, you will be entitled to a refund of however much of the retainer is left over.

The terms of how your lawyer will bill you will be set out in your retainer agreement. This is one of the reasons why it is essential that you read the agreement carefully before you sign it. Note that lawyers' fees are subject to PST and GST. Mediators' fees and parenting coordinators' fees are subject to just GST.

Reviewing your lawyer's bill

Both you and your lawyer have the right to have the lawyer's bills reviewed for fairness under the *Legal Profession Act* ^[6] to fix a final amount owing. The fee review is performed by a registrar or master of the Supreme Court at a formal hearing in court.

At this hearing, the registrar will be presented with the lawyer's bills to you, and any other supporting documents, such as a time diary, a statement of the lawyer's charges to your bill by the amount of time spent on each task on a day-by-day basis, and the documents and correspondence that were generated over the course of the lawyer's services to you. Your lawyer will attempt to satisfy the registrar that his or her fees were reasonable and that the amounts billed for disbursements were reasonable. The registrar will look at the bills and apply a number of considerations in arriving at his or her decision, including:

- the value and importance of the results obtained,
- the complexity or novelty of the issues,
- whether the time spent was reasonable, and
- whether your lawyer's hourly rate was reasonable.

You will, of course, have the opportunity to present your side of the case and dispute your lawyer's bill as you see fit.

After hearing all the evidence, the registrar will issue a *Certificate of Fees* which sets out the amount of fees and disbursements that the registrar has approved as reasonable. That becomes the amount you owe to your lawyer for his or her services, and, in some cases, the amount of the refund your lawyer owes you. Most importantly, the Certificate of Fees has the same standing as a court judgment and can be used as such to enforce the amount owing to the lawyer or the

amount owed by the lawyer to you.

As an alternative to a review under the *Legal Profession Act*, the Law Society operates a Fee Mediation Program ^[14]. This is an informal process for dealing with fee disputes without having to go to court.

Tax deductions for legal fees

The portion of a lawyer's bill attributable to obtaining or enforcing an order for child support or spousal support is tax deductible. The cost of defending a claim for spousal support or child support is not deductible.

To claim this deduction, the lawyer must write a letter to the Canada Revenue Agency setting out what portion of his or her fees were attributable to advancing a spousal or child support claim. If you intend to ask your lawyer for a letter like this, you must tell your lawyer as soon as possible, preferably the moment the lawyer takes your case. Lawyers do not keep track of things like this automatically, mostly because it involves extra work and cost to the client that may outweigh the tax benefit.

If you don't ask your lawyer about this at the beginning of his or her retainer, it may be impossible to winnow out the parts of the lawyer's bills that were dedicated to support issues, and the cost of the time your lawyer spent reviewing your file. His or her bills to figure this out may cost more than the deduction you will get.

If you are dissatisfied

If you are concerned about how your file is being handled or have a complaint about your lawyer, you should first of all discuss the matter with your lawyer. This may not always be appropriate. You may wish to contact the Law Society before you speak with your lawyer. Most lawyers, however, are deeply concerned about the satisfaction of their clients, and will go out of their way to fix, or at least explain, any problem you might be experiencing.

The Law Society exists to govern the legal profession for the benefit of the public. It is not the lawyer's friend or ally. You have the right to bring a complaint to the Law Society about a lawyer's actions or lack of action. You can contact the Law Society at:

The Law Society of British Columbia
845 Cambie Street
Vancouver, British Columbia
V6B 4Z9
Telephone 604-669-2533 or 1-800-903-5300
Facsimile 604-669-5232

There is no charge to speak to one of the Law Society's complaints officers and you do not need to hire a lawyer to make a complaint or begin the complaints process.

Ending the lawyer-client relationship

You or your lawyer can end your working relationship; you can fire your lawyer and your lawyer can fire you. From a lawyer's point of view, neither event occurs particularly often, but it does happen.

Firing your lawyer

Clients usually want to fire their lawyers when they're unhappy with the service they're receiving. You can fire your lawyer simply by sending him or her a letter to that effect or giving your lawyer a call, though you will no doubt want to phrase a bit more nicely than "I'm firing you." The lawyer-client relationship is a business relationship, and you can

terminate this relationship any time you wish.

Of course, there will be some things left to deal with after you've given your lawyer the news.

First, you'll have to pay your outstanding account, if there is one. If you disagree with the amount charged, you can apply to the court to have your lawyer's bill reviewed, which is described in more detail above. On the other hand, if there's still money in your retainer, that's your money and you can ask to have it sent back to you.

Then there's the matter of your file. If your case is still on-going, you'll need to get your file. If you've hired another lawyer, your lawyer will normally just send it to your new counsel; if you haven't, you're entitled to ask that your lawyer send it straight to you. Of course, there may be a slight problem if you still owe money to your lawyer. If you still owe money, your lawyer is entitled to keep your file until his or her account is paid in full. In the right circumstances, your lawyer may agree to transfer your file to your new lawyer on the new lawyer's promise to make sure that the bill gets paid when the file concludes.

When your lawyer fires you

This really doesn't happen all that frequently. Most often, a lawyer will fire his or her client for one of the following reasons:

- an account is unpaid and there is a low likelihood that the account will get paid,
- the client refuses to give reasonable instructions or follow the lawyer's advice, or
- the trust aspect of the lawyer-client relationship has broken down.

If your lawyer fires you, he or she will normally do so in a letter detailing the reason why he or she can no longer act for you and highlighting any important dates that are upcoming in your case. Most lawyers will also recommend other lawyers you may wish to consider retaining in his or her place.

After you've been fired, the same concerns arise as if you'd fired your lawyer. The lawyer will be concerned about an outstanding account and you will want your file back, or at least transferred to a new lawyer. As far as your outstanding account is concerned, it's important to know that your lawyer can have his or her own bill reviewed under the *Legal Profession Act* to get a judgment about the amount owing; that's something both of you can do.

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation ^[9]
- *Legal Profession Act* ^[6]

Links

- Law Society of British Columbia ^[1]
- Canadian Bar Association ^[2]
- Vancouver Bar Association ^[3]
- Victoria Bar Association ^[4]
- Trial Lawyers Association of British Columbia ^[5]
- Law Society of BC Rules ^[7]
- Law Society's Code of Professional Conduct ^[8]
- Family Law Act Regulations Explained – Ministry of Justice website ^[15]

- CBABC Lawyer Referral Service ^[11]
- LSS Legal Aid Intake Services ^[12]
- LSS's website on how to apply for legal aid ^[13]
- BC Parenting Coordinators Roster Society ^[16]
- Mediate BC Website for Family Mediation Services ^[17]
- Law Society Fee Mediation Program ^[14]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Avoiding Court

Resolving Family Law Problems out of Court

Family law problems can be resolved in a bunch of different ways. Court is not the only option. Depending on your particular circumstances, you may never need to darken the doorway of a courtroom.

Almost every issue a couple faces when their relationship breaks down can be handled without litigation, as long as both people are able to discuss things and each is flexible enough to find compromise. The only reason why a couple must go to court is to get a divorce.

This chapter discusses how family law problems can be resolved without going to court. It begins with a brief overview of the different alternatives to court, including parenting coordination, and the different ways that settlements and agreements can be recorded. It also reviews what can happen when a party has a change of heart after an agreement has been reached. The other sections of this chapter discuss in more detail the different alternatives: collaborative processes, mediation, arbitration, and parenting coordination.

Introduction

The fundamental goal shared by all alternatives to litigation is to arrive at a settlement of the issues in dispute, particularly those that could have been fought about in court. As you might expect, reaching settlement can require a certain amount of flexibility and maturity. Most importantly, the people involved must understand that neither of them is going to get everything they want. Whatever a person's wish list might be going into negotiations, the end result always represents a compromise and some accommodation of the other person's goals, wishes and expectations.

It's not always possible to avoid court. Sometimes one or both people are so stubborn that they can't or won't compromise their position, and sometimes urgent court action is necessary to stop something bad from happening. But out-of-court alternatives always offer a cheaper, friendlier resolution to the legal problems that come up when a relationship ends. They are far less stressful and disruptive to the people involved and their children.

It is particularly important to negotiate a settlement when a couple have children. Where there are no children, a couple can walk away from their relationship and have nothing more to do with one another for the rest of their lives. However, where there are children, a couple can expect to be involved with each other, whether they like it or not, for the next five, twenty or forty years. Both parents will want to be at their child's high school graduation, both will want to attend parent-teacher meetings, and both will want to go to school concerts and sports days. The child will want both parents to be there too. No matter how tense or awkward the relationship between the parents is, they will both be involved in each other's lives until they die or their child predeceases them. As a result, maintaining a functioning relationship is an absolute necessity, and negotiation gives parents the best chance of doing just that.

For more information about parenting after a relationship has ended and how to put the children first in your dispute with the other parent, see the section on Parenting after Separation. For more information about the emotional issues that tend to come with the end of a long-term relationship and how to keep those issues from hopelessly complicating your dispute, see the section on Separating Emotionally.

The *Family Law Act* and alternatives to court

According to the Ministry of Justice's guide to the *Family Law Act* ^[1], the provincial *Family Law Act* was written to encourage people to resolve family law problems other than through court:

"Section 4 emphasizes that out-of-court dispute resolution processes and resolution through agreements are not simply add-ons to litigation but are the preferred option, with court as a valued, but last, resort.

"This focus on family dispute resolution signals an important shift from the *Family Relations Act*, which was criticized for being litigation-focused and for assuming that every dispute would end in a trial."

The act supports the resolution of family law disputes out of court by:

- requiring lawyers to explain the different dispute resolution processes to their clients (ss. 4 and 8),
- requiring the people involved in a family law dispute to make full disclosure of the information necessary to resolve the dispute, even when they're not in court (s. 5),
- providing for the use of parenting coordinators to resolve disputes about parenting once a final order or agreement about parenting arrangements and contact has been reached (ss. 15 to 19),
- including mediation and collaborative settlement processes as dispute resolution processes to which the court can refer people (ss. 1 and 224),
- changing the rules about arbitration to better accommodate the arbitration of family law disputes (ss. 305 to 313), and
- allowing the court to delay a proceeding while the parties attempt to resolve a family law dispute out of court (s. 223).

The act also allows the court to require people involved in a court proceeding to attempt to resolve their dispute out of court, and to attend counselling if the court is of the view counselling would be helpful:

224 (1) A court may make an order to do one or both of the following:

(a) require the parties to participate in family dispute resolution;

(b) require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.

(2) If the court makes an order under subsection (1), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, services or programs.

This is a dramatic change from the old *Family Relations Act*, which didn't deal with out-of-court dispute resolution options except in terms of how agreements could be enforced or set aside.

Alternatives to court

There really are only two ways to resolve a legal dispute without going to court: you can negotiate a settlement, or you can ask someone other than a judge to arbitrate the dispute and impose a resolution. Mediation and collaborative processes are types of negotiation. Parenting coordination is a hybrid process that uses elements of mediation and elements of arbitration.

Negotiation

Negotiation is a cooperative effort to resolve a dispute through discussion. Mediation and collaborative processes are nothing more than structured ways of handling this discussion; they are both processes of negotiation.

Couples can negotiate a dispute between themselves, with the help of a lawyer, or with the help of a judge at a settlement conference if a court proceeding has started. Negotiation boils down to this:

Pat: "I'll give you 60% of the house sale proceeds if you'll let me keep my Porsche Boxster."

Sandy: "Look, 60% is great, but I need some compensation for my interest in the Porsche. Why not give me 65% of the house and half of your hockey card collection."

Pat: "You know how important my hockey card collection is to me. Let me keep my hockey cards; I'll give you 60% of the house, and I'll sell the Porsche and give you half of what I get for it. Plus, I'll let you keep your Ford Pinto."

In a process of negotiation, each person gives a little and takes a little, all in the hope that at the end of the day they'll be able to come to an agreement on all of the issues that have cropped up because of the end of their relationship. If they reach a settlement, the parties almost always put the agreement in some written form; in fact, writing it down is really important. Without some record of the deal that was reached, there's no way to confirm what the deal was if people start remembering things differently.

For a quick introduction to how to start negotiations, see *How Do I Start Negotiations with My Spouse?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Collaborative processes

Collaborative settlement processes are a kind of structured negotiation in which the parties and their lawyers sign an agreement not to go to court and to work together as a team to find compromise and a settlement. The team can use counsellors to address the emotional and psychological issues related to the separation. Other specialists can be recruited to help with particular subjects, such as issues about the children or complicated financial problems, as the need arises.

There are collaborative practice groups all over British Columbia. More information about collaborative processes is discussed in this chapter's section on Collaborative Processes and on the following websites:

- Collaborative Divorce Vancouver^[2]
- the Collaborative Association^[3] in Metro Vancouver
- Victoria's Collaborative Family Law Group^[4]
- the Okanagan Collaborative Family Law Group^[5]
- the Collaborative Law Group of Nelson^[6]

For a quick introduction to how to start a collaborative process, see *How Do I Start a Collaborative Settlement Process with My Spouse?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Mediation

Mediation is another kind of structured negotiation in which the parties attempt to reach an agreement with the help of a mediator. A mediator is a neutral third party who guides the parties through their negotiations, helps to identify the parties' interests, and helps them to find compromise. The goal of mediation is to arrive at a settlement of some or all of the issues in dispute which both parties are as happy with as possible.

If they reach a settlement, the terms of the deal can be set out in a consent order, in a separation agreement, or in minutes of settlement, depending on the circumstances and the preferences of the parties.

Some lawyers also work as mediators. Lawyers who work as mediators are called "family law mediators." They have to have additional training in mediation, family violence, and power dynamics in dispute resolution processes. Lawyers who are family law mediators will usually advertise that they are both litigators and mediators. More information about the training requirements of family law mediators is available from the Law Society of British Columbia's page on Family Law Mediators^[7].

For a quick introduction to how to start mediation, see *How Do I Start Mediation with My Spouse?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Arbitration

Arbitration is a decision-making process that can be a lot like court. In arbitration, the parties hire an arbitrator to act as their personal judge. They agree that the arbitrator can make decisions about their dispute that they will be bound by, as if the decisions had been made by a judge in court. However, unlike court, arbitration is a completely private process and the people involved can proceed at their own pace.

Arbitration is a lot more formal than mediation, because the arbitration process can be very much like the court process. Each party presents evidence and arguments, and tries to persuade the arbitrator that their position is the right one. Mediation, on the other hand, is often more like a conversation, with no evidence apart from helpful things like financial statements and with no formal rules of procedure.

Arbitration is governed by the *Arbitration Act*^[8], and is, like mediation and collaborative processes, one of the dispute resolution processes that the court can refer people to under the *Family Law Act*.

Some lawyers also work as arbitrators. Lawyers who work as arbitrators are called "family law arbitrators." They have to have practised as a lawyer for at least ten years and have additional training in arbitration, family violence, and power dynamics in dispute resolution processes. Lawyers who are family law arbitrators will usually advertise that they are both litigators and arbitrators. More information about the training requirements of family law arbitrators is set out in the Law Society's Code of Professional Conduct^[9] in Appendix B, and the Law Society's Rules^[10] at Part 3, Division 3.

For a quick introduction to how to start arbitration, see *How Do I Start Arbitration with My Spouse?* It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.

Using mediation and arbitration together

Mediation has lots to recommend it. It's cooperative, it's based on discussion and compromise, and its goal is to reach a settlement by consensus. However, without that last ingredient, consensus, mediation will always fail. It sometimes makes sense to include a way of breaking an impasse, and that might mean giving the mediator the power to resolve a stalemate by imposing a decision like an arbitrator. This hybrid approach to mediation and arbitration is called "med/arb."

In a med/arb process, the parties sign an agreement that commits them to the mediation process and describes what will happen if agreement can't be reached. The agreement should say whether the mediator will use information from the mediation phase to make decisions in the arbitration phase, and how other evidence will be presented in the arbitration phase. It's really important to understand what will trigger the end of mediation and the beginning of arbitration, and whether the mediator will have the power to make decisions as an arbitrator on all of the issues or just some of them.

Parenting coordination

Parenting coordination is a hybrid dispute resolution process that relies on both mediation and arbitration, and is only used to deal with problems about the care of children after a parenting plan has been put in place under a court order or a separation agreement. Parenting coordination is a child-focused process in which a neutral third party, a parenting coordinator, helps parents implement the terms of their parenting plan. Parenting coordination is really only useful for parents who always seem to find themselves in conflict about parenting issues, despite their order or agreement.

In the parenting coordination process, the parents hire a parenting coordinator and sign a parenting coordination agreement that outlines their rights and responsibilities to each other and the scope of the parenting coordinator's services and authority. When a problem crops up, one of the parents will contact the parenting coordinator and the parenting coordinator will get to work. First, the parenting coordinator will try to work out a solution by finding consensus, like a mediator. However, if the parents can't be helped to reach an agreement, the parenting coordinator will impose a resolution to the dispute, like an arbitrator.

Parenting coordinators are family law lawyers and mental health professionals who are hired on a long-term basis, usually for six to 24 months. Lawyers who work as parenting coordinators have to have practised as a lawyer for ten years and have additional training in parenting coordination, arbitration, mediation, family violence, and power dynamics in dispute resolution processes. Lawyers who are parenting coordinators will usually advertise that they also provide those services.

More information about the training requirements of parenting coordinators is set out in the Law Society Rules ^[10], Part 3, Division 3. More information about parenting coordination is available at the website of the BC Parenting Coordinators Roster Society ^[11].

To find out more about parenting coordinators, see *How Do I Hire a Parenting Coordinator? It's located in the *How Do I?* part of this resource, within the section *Alternatives to Court*.*

Unbundling dispute resolution processes

The end of a relationship can be a messy business at times. In addition to the legal issues that sometimes come up, there are always emotional issues, and the emotional issues can sometimes cloud people's judgment. (This is one of the reasons why hiring a lawyer can be a good idea; the lawyer's job is to help you see the forest when all you can see is the tree in front of you.) Over time, the intensity of the emotional issues changes and, hopefully, mellows. This can have an effect on how the legal issues are managed; things that seemed terribly urgent or incapable of compromise become less urgent and more susceptible to alternatives.

At the same time, the people who used to be a couple are also moving forward with their lives and learning how to live independently and apart. They're setting up separate homes, and establishing separate bank accounts. Temporary parenting arrangements get sorted out, whether by habit, by agreement, or by court order, and temporary arrangements get worked out about how the family's income will be distributed to support two homes. This too has an effect on how the legal issues are managed.

As the circumstances and attitudes of the parties evolve, so should the approach being taken to the resolution of their dispute.

It seems to me that no one dispute resolution process is going to be appropriate throughout the life of a dispute, except perhaps litigation when the conflict between the parties is extreme or there are mental health or violence issues that need to be addressed. Except for unhappy situations like that, different dispute resolution processes will be appropriate for different issues at different times over the course of a dispute. Being sensitive to this can really pay off.

Say, for example, mediation has got you to the point where you agree on everything except for a technical issue, like someone's income or the best way to divide a family business. Rather than getting hung up the issue that you're stuck on, why not try something different? Agree that the issue will be dealt with through arbitration. Agree that the issue will be referred to a senior family law lawyer with special expertise in the area, and agree to be bound by the lawyer's recommended solution. Agree to seek the opinion of a non-lawyer expert. Or, if you must, agree to take that one issue to trial or ask a judge to give an opinion on the issue at a settlement conference.

There is a whole spectrum of processes that can be used to resolve some or all aspects of a family law dispute. Litigation, arbitration, mediation, collaborative processes, and negotiation are all important means of resolving disputes, and more than one process can be best suited for any given problem at any point over the course of a dispute. However, being creative can suggest further options like agreeing to be bound by the opinion of a respected lawyer or taking just one issue to a settlement conference. Don't get locked into the idea that only litigation or only mediation will work. Be willing to think outside the box.

Formalizing the settlement

It is always best to write out the terms of a deal when a deal is done. Writing the agreement out gives everyone a written record of their settlement, which they can refer to if there's a dispute about the agreement down the road.

Although it's true that oral agreements are just as binding as written agreements, it can be very difficult to prove the terms of an oral agreement, especially when a lot of time has passed since the agreement was originally made. On the other hand, when an agreement is written down, that written record is usually all the court will need to determine the terms of the agreement. Notes scribbled on a napkin, for example, might be a written agreement that the court will uphold. Letters exchanged in the negotiation process have also been found to record the terms of an agreement.

Lawyers and mediators always make a tremendous effort to record the terms of a settlement as clearly and comprehensively as possible, and will usually put the settlement into a formal document like a separation agreement, a memorandum of understanding, minutes of settlement, or a consent order.

Separation agreements

A separation agreement is a written contract entered into after the breakdown of a relationship. The contract is written to reflect the terms of the settlement reached between the parties, and includes a lot of extra language that describes the parties' relationship, summarizes the background of the settlement discussions, confirms that each party had legal advice about the agreement, and confirms that the parties intend to be bound by the contract.

Separation agreements are the product of negotiation, a collaborative settlement process, or mediation, and may deal with all or just some of the issues between the parties. A separation agreement can be used to record a settlement reached even after litigation has started.

Separation agreements are discussed in more detail in the chapter Family Law Agreements, in the section Separation Agreements.

Minutes of settlement

Minutes of settlement are used to create a quick record of an agreement and are not as comprehensive and detailed as separation agreements. Sometimes minutes are drafted by a mediator when the mediator isn't a lawyer or expects the lawyer for one of the parties to write a proper separation agreement. Sometimes minutes are used when a settlement has been reached on the brink of trial and there isn't enough time, or maybe enough energy, to draft a proper consent order. Typically, minutes of settlement are little more than an outline of the essential points agreed to, on the understanding that the terms will be elaborated and put into proper legal language later.

Minutes of settlement are the product of negotiation or mediation, and they usually deal with all of the issues between the parties. The terms of the minutes are usually used to draft a consent order or a separation agreement. When minutes are used for a consent order, they are usually attached to the back of the order.

Minutes of settlement are signed by the parties and their lawyers. Minutes of settlement can be enforced by the courts as a binding agreement between the parties, even without a judge approving the consent order or without the parties signing a separation agreement.

Memoranda of understanding

A memorandum of understanding describes the terms on which all or part of a dispute has been settled. Memoranda are even less formal than minutes of settlement, and may not even be signed by both parties or both lawyers. A memorandum may even take the form of a letter sent by one of the lawyers:

"I confirm that in our telephone conversation of earlier this afternoon, we agreed that the children would live mostly with Suman and that Harjit would have parenting time with the children on weekends, and that Harjit would pay child support to Suman in the amount of \$326.00 per month."

While memoranda of understanding can be enforced by the courts on their own, they are almost always put into a more formal document later on, either as a consent order or as a separation agreement.

Consent orders

Consent orders are orders that parties have agreed the court should make. The order is meant to reflect the terms of a temporary or a permanent agreement between the parties, on some or all of the issues, after litigation has started.

Sometimes, parties will come to an agreement before an action has started and want to put the agreement in the form of a court order rather than in the form of a separation agreement. This would really only make sense if there was some important legal reason to have the agreement put into an order, or if the court would be asked to make an order anyway, like a divorce order.

When the judge makes the consent order, the order is just as important and is just as binding as if it was an order made after a trial. Consent orders are notoriously difficult to appeal or change without proof of some sort of deception by the other side or a change of circumstances since the order was made.

Wait, I've changed my mind!

Generally speaking, it is *not* okay to change your mind after you've come to a settlement, especially right after you've reached the settlement. What you can do about it, if you can do anything about it, depends on whether the agreement has already been reduced to writing and signed.

After the agreement has been formalized

If you have a change of heart after a separation agreement has been signed, you can attempt to negotiate an amendment to the terms of the agreement. An amendment is another agreement, put into writing and executed just like the original separation agreement, and is usually described as an "amending agreement" or an "addendum agreement," or something similar. However, if the other side isn't prepared to change the agreement, you'll have little choice except to go to court and ask the judge to make an order different than the terms of the agreement. Be warned: this may be very difficult unless you can show that there was a significant flaw in how the agreement was reached or that there has been a serious and unexpected change in circumstances since the agreement was executed. You can't ask the court to make an order different from the agreement just because you've decided you don't like it. There must be an awfully good reason why the court should do anything different than what you agreed to.

If you have a change of heart after a consent order has been pronounced, you'll face exactly the same problem. You can try to negotiate the terms of a new order varying the consent order, which will be presented to the court also by consent in the same manner as the original consent order. Failing that, you'll have to apply to court to change the original consent order. You will have to prove that there has been a meaningful and unexpected change in circumstances since the order was made or that there was a significant flaw in how the agreement leading to the consent order was reached.

Amending separation agreements and asking the court to set them aside are discussed in more detail in the chapter Family Law Agreements, in the section Changing Family Law Agreements. Varying orders is discussed in more detail in the chapter Resolving Family Law Problems in Court, in the section Changing Final Orders in Family Matters.

It's important to know that if you disagree with an order or a separation agreement and just decide not to comply with the order or agreement, the other side can go to court to enforce the order or agreement. In the case of a court order, you could also be faced with an application for an order that you be found in contempt of court. Contempt is punishable by jail time, a fine, or both jail time and a fine. Note also that minutes of settlement and memoranda of understanding may be enforceable as binding agreements in the same way that separation agreements are enforceable.

The enforcement of orders is discussed in more detail in the chapter Resolving Family Law Matters in Court, in the section Enforcing Orders in Family Matters. The enforcement of agreements is discussed in the chapter Family Law Agreements, in the section Enforcing Family Law Agreements.

Before the agreement has been formalized

People sometimes have a change of heart between the time the deal is struck and the time the agreement is put into the form of a consent order or a separation agreement. If this happens, you have two options: live with the agreement, or attempt to get the other side to agree to change the agreement.

You must really think hard before bringing your complaint to the other side, because any attempt to renegotiate the deal can upset not only the terms that you want to change but also the terms that you're really quite happy with. As well, the agreement that you struck may be enforceable even before it is put into the form of a separation agreement or court order. Here are some things to think about:

- Is the thing you want to change something you can actually live with? Is changing that one thing worth the risk of losing the settlement altogether?
- Is it worth the additional legal fees it will cost to go back into the negotiation process and to draft a new agreement?
- Is it worth the chance of losing other aspects of the settlement that you're happy with but that the other side isn't too keen on?
- Is it worth the risk that the other side will start a court action to enforce the unsigned agreement? Is it worth the legal fees it will cost to defend an action to enforce the agreement?

Remember that the negotiation process is a process of give and take. It is almost a certainty that you are going to be unhappy with some aspects of the agreement, just as the other side is going to be unhappy with other aspects of the agreement. The two of you each gave things up and compromised your positions in reaching settlement. After all of the anxiety of the negotiation process and the pain of giving up on a hard-fought point, it is also almost a certainty that if one side wants to re-open an issue, the other side will want to re-open another issue.

Resources and links

Legislation

- *Family Law Act*
- *Arbitration Act* ^[8]

Links

- BC Parenting Coordinators Roster Society ^[11]
- Law Society of BC's webpage on Family Law Mediators ^[7]
- Mediate BC website for Family Mediation Services ^[12]
- Law Society's Code of Professional Conduct ^[13], Appendix B
- Law Society Rules ^[10], Part 3, Division 3

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [4] <http://www.collaborativefamilylawgroup.com>
- [5] <http://www.collaborativefamilylaw.ca>
- [6] <http://www.nocourt.ca>
- [7] <http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Family-Law-Mediators>
- [8] <http://canlii.ca/t/84gc>
- [9] <http://www.lawsociety.bc.ca/page.cfm?cid=2578&t=Code-of-Professional-Conduct-for-British-Columbia-%E2%80%93-Table-of-Contents>
- [10] <http://www.lawsociety.bc.ca/page.cfm?cid=334&t=Law-Society-Rules>
- [11] <http://www.bparentingcoordinators.com/>
- [12] <http://mediatebc.com/Mediation-Services/Family-Mediation-Services.aspx>
- [13] <http://www.lawsociety.bc.ca/page.cfm?cid=2578&t=BC-Code-Table-of-Contents>

Collaborative Processes

In collaborative settlement processes, the parties, their lawyers, and their counsellors work together as a team to find a resolution of the issues arising from the breakdown of the parties' relationship, and consult experts such as child specialists and financial specialists as the need arises. The collaborative process is meant to address both the legal and the emotional consequences of the breakdown of a relationship.

This section provides a brief introduction to collaborative settlement processes, a step-by-step overview of what happens, and a description of the roles played by each of the team members.

Introduction

The breakdown of a relationship is an extraordinarily difficult experience for everyone involved. Contrary to the impression you might form from much of the rest of this website, a couple's legal difficulties are only one part of the whole experience of ending a long-term relationship. The purpose shared by all collaborative processes is to provide a non-adversarial space for the parties to resolve their issues and emerge, at the end of the process, as emotionally- and psychologically-whole people.

Litigation, which used to be the primary mechanism for resolving family law disputes, is adversarial by nature. Rather than improving things, it usually aggravates the emotional difficulties couples face when their relationship breaks down, throwing gasoline rather than water on the fire. In collaborative processes, on the other hand, the parties agree that they will not go to court, and sign an agreement to that effect, and mental health professionals are included in the process as necessary.

Of course, not every couple is suited to a collaborative approach. This process requires honesty and good faith, both to oneself and to others. Sometimes the breakdown of a relationship is so full of anger and bitterness that no approach will work except for litigation. If each party isn't willing to use and embrace the collaborative process, it simply will not work.

Overview

The following discussion takes a general look at collaborative settlement processes. Since collaborative approaches are very much tailored to the unique circumstances of each couple, their preferences and those of their lawyers, you should read what follows with a grain of salt. This description may not represent how you or your collaborative lawyer will prefer to do things.

Finding a collaborative lawyer

The first step is for each spouse to find and hire a lawyer. You should look for a lawyer experienced in collaborative law, or, at a bare minimum, one who is open to the idea; most lawyers who practise collaborative law will expressly describe themselves as collaborative lawyers or collaborative practitioners in their promotional materials. The lawyers will then explain the collaborative process to their respective clients, and contact each other to prepare a collaborative process participation agreement.

A good place to start looking for a lawyer is the website of the collaborative law practice group nearest you, such as:

- Collaborative Divorce Vancouver ^[1],
- Collaborative Association in Metro Vancouver ^[2],
- Victoria's Collaborative Family Separation Professionals ^[3],
- Okanagan Collaborative Family Law Group ^[4], and
- Collaborative Law Group of Nelson ^[5].

A quick Google search ^[6] for "collaborative law bc" should net you some additional resources, including collaborative family law lawyers in your area.

Signing the participation agreement

The parties and their lawyers will then sign the participation agreement that commits them to working together, using non-adversarial problem-solving techniques and cooperative negotiation strategies, to reach a fair settlement without going to court. You are not in a collaborative process unless you and your lawyer have signed a participation agreement.

The participation agreement will contain a number of terms that are very important to understand. Among other things, most participation agreements require that:

- the parties are to discuss the issues in a frank and respectful manner, and not make unfounded accusations,
- while the collaborative process is underway, neither party will start proceedings in court,
- if litigation starts, both lawyers must withdraw and cannot continue to represent their clients,
- a lawyer must end the collaborative process if his or her client withholds or misrepresents information, and
- all communications generated during the process are to be kept strictly confidential.

Most participation agreements also say that there is no settlement until a separation agreement has been signed. This is to make sure that everyone is committed to the settlement and prepared to be bound by its terms.

Hiring the professional advisors

The parties and their lawyers will then start talking about whether any other help is likely to be needed, such as from counsellors or divorce coaches, child specialists (if there are children involved), or financial advisors (if there are complex financial issues). Child specialists and financial advisors are neutral in their approach and are not hired to represent or advocate for either party. Rather, their role is to help the process along by providing objective information, opinions and options about the subjects at issue.

Where the legal and emotional issues are straightforward, it's possible that no other professionals need to be hired. If something comes up during the process which suggests that it would be helpful to recruit a new team member, the professional can be hired then.

Making disclosure

The team then begins the process of making disclosure of all documents and information relevant to the issues between the parties. The collaborative process is not a poker game, with each spouse bluffing the other and trying to take advantage; this process is transparent and requires absolute and unswerving honesty. Relevant documents often include:

- current and historic statements for bank accounts, retirement savings accounts and investment accounts,
- current statements for loans, mortgages and credit cards,
- tax returns,
- corporate financial statements and corporate tax returns, and
- confirmation of income.

The parties produce their documents and information to each other on the understanding that the information (except for certain legal documents such as financial statements) and the content of the negotiations will never be used in court, but will remain private and confidential among those involved in the collaborative process.

Starting discussions

Once full disclosure has been made, the parties then begin to talk about what their personal interests and expectations are, and about what potential settlements might look like. This can be a short process or a long process, depending on the complexity of the emotional issues and the distance between the outcomes each party hopes to achieve. It may be necessary to delay things to get financial advice or for a property or business to be valued, to get some counselling, or to get an opinion from the child specialist.

Discussions between the parties and their lawyers will continue until a resolution is reached with which both parties are as happy as possible. You can expect that this will be a process of mutual compromise, and that the ultimate resolution will reflect neither party's original position.

Along the way, depending on the nature of the issues, one or more temporary agreements may be reached. These are not meant to be a final determination of the issues, rather they are temporary, stop-gap solutions intended to deal with problems like the sale of the family home, the parties' time with the children over holidays, and so forth. These interim agreements will all be replaced by the final agreement.

You may want to have a look at "Tips for successful mediation" in the section on Family Law Mediation in this chapter. It has information about communication skills that can be helpful during the negotiation process.

Signing the final agreement

The terms of the settlement will be put into a formal separation agreement by one of the lawyers. The parties and the other lawyer will all be asked for comment. Changes and adjustments will be made before the separation agreement is signed.

The collaborative process normally ends with the signing of the final agreement. However, until and unless the participation agreement is cancelled or set aside, the lawyers will remain bound by the terms of the agreement and cannot start a court proceeding on things covered by the separation agreement, even to enforce the agreement.

Read the Separation Agreements section in the Family Agreements chapter for a discussion about separation agreements and their effect.

The team

The collaborative team includes the parties' lawyers, who are family law lawyers with special training in collaborative processes. It may also include mental health professionals, usually psychologists or registered clinical counsellors, who work as the parties' divorce coaches. Where appropriate, a financial specialist and a child specialist may also be part of the team. All team members work cooperatively with each other and the parties, and sometimes the parties' children.

The degree to which each of these professionals may become involved will depend on the particular circumstances of each couple. For some couples, the child specialist will become the key team member, for others it may be their divorce coaches. A financial specialist may be unnecessary when the financial issues are straightforward, but when they are particularly complicated, the financial specialist may be critical to the success of the collaborative process.

The lawyers

The role of the lawyers in the collaborative process is to advance the needs and protect the interests of their respective clients. The lawyers advise their clients on their legal rights and obligations, and provide them with information about the law, and the probable long- and short-term results of any particular decision.

However, in the collaborative approach to dispute resolution, the lawyers are also part of a team that is collectively dedicated to finding a comprehensive settlement. As a result, the parties' lawyers can be expected to behave in a much more transparent manner and work in a manner that is geared towards both parties' success.

The counsellors

The divorce coaches are psychologists and registered clinical counsellors, and are useful whether the parties are married or not. (Frankly "divorce coach" is a rather in accurate name for these team members.) They help guide their clients through the emotional turbulence of the breakdown of their relationship, and assist each party to maintain a relatively objective view of the situation. They may also help their clients develop their views on the issues and help them develop more effective communication strategies.

The divorce coaches will talk to each other and to the lawyers during the collaborative process, and share their respective clients' experiences and concerns. The divorce coaches may also work together, sometimes in joint sessions with the parties, to develop strategies and solutions for the benefit of everyone.

The financial advisor

This financial advisor is a neutral party in the process, someone without any loyalty to either party, who is able to look at things objectively and impartially. His or her job is to present options to help the parties deal with the financial aspects of their relationship and their short- and long-term needs.

The child specialist

This child specialist is another neutral party. His or her job is to represent the interests of the children, without any duty of loyalty to either parent. While all of the team members are of course concerned about the best interests of the children, the purposes of the child specialist are to ensure that the children remain a primary concern, to help the parties develop a proper parenting plan, and to identify and address issues regarding the children's future care.

Resources and links

Legislation

- *Family Law Act*

Links

- BC Collaborative Roster Society ^[7]
- Collaborative Divorce Vancouver ^[1]
- Collaborative Association in Metro Vancouver ^[2]
- Victoria's Collaborative Family Law Group ^[3]
- Okanagan Collaborative Family Law Group ^[4]
- Collaborative Law Group of Nelson ^[5]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [5] <http://www.nocourt.ca>
- [6] <http://www.google.com/search?q=collaborative+law+bc>
- [7] <http://www.bccollaborativerostersociety.com>

Family Law Mediation

Mediation is a process in which the two sides of a dispute work with a neutral third party, a mediator, to reach an agreement that deals with all or some of the issues in dispute. Mediation is not couples counselling; it is a legal process intended to help resolve a dispute without going to court. Mediators are usually trained professionals, and lawyers who are family law mediators are specially accredited by the Law Society of British Columbia ^[1].

This section provides a brief overview of mediation, a description of the mediation process, some tips for making the most of mediation, and an introduction to the mediation services offered through the provincial government.

Introduction

At its heart, mediation is a cooperative, managed process of negotiation. Both parties must be willing to work together and each must be prepared to give a little and take a little. Because the mediation process is based on a cooperative effort to achieve a common goal, a settlement of the legal issues, there is usually a lot less of the bitterness and acrimony that can accompany litigation. Mediation is also much, much cheaper than litigation.

A couple can start mediation as an alternative to court or as a settlement process after a court proceeding has started. The result of a successful process of mediation is usually a separation agreement. If litigation has started, a settlement can be recorded as either a *separation agreement* or as an order that the parties agree the court will make, called a *consent order*. If a couple are married, a consent order may make sense since they'll require an order for their divorce anyway.

Normally, just the people involved in the dispute attend mediation with their mediator, but they can bring their lawyers along as well. The mediator's job is to facilitate the parties' negotiations, to provide a neutral third-party perspective, and to help ensure that any settlement is reasonably fair to all concerned, including the children of the relationship. As a mediator myself, I often appreciate having the lawyers present; it makes my job easier if I can rely on the lawyers to explain the law or to point out why a particular position is ill-advised.

The mediator has no stake in how the mediation turns out, and should have no bias in favour of either party and no special connection with either party. The mediator's position as a neutral third party is probably the mediator's most important role. It allows the mediator to be absolutely frank with each of the parties, and to point out when a party's expectations for an issue are unrealistic. Someone involved in mediation is a lot more likely to accept that his or her position is unreasonable when a mediator says so, rather than the other party.

The mediation process

The first step is for each party to hire a lawyer. Even if you don't intend on hiring the lawyer for the whole mediation process or have the lawyer present at the mediation, it can be critical to meet with a lawyer before the process begins to get some proper legal advice about the law that applies to your situation, and a sense of the general range of likely outcomes and the options available to you.

If you plan on retaining the lawyer for the mediation process, the lawyer will have the names of three or four mediators with whom he or she prefers to work. Mediate BC ^[2], formerly the BC Mediation Roster Society, maintains a list of many, but not all, of the people who are trained as mediators in this province. Their website can help you find a mediator and offers more information about the mediation process. Many family law lawyers, who may or may not be members of Mediate BC, are also accredited family law mediators; lawyers who work as mediators will usually say so in their advertising.

Getting organized

If mediation is being undertaken as an alternative to litigation rather than to achieve a settlement in the middle of the litigation process, the mediator may ask everyone to come to an initial meeting in order to assess the dynamic between the parties, explain the process of mediation, talk about the exchange of documents, and discuss costs. Some mediators prefer to arrange separate, individual interviews with the parties, while others will ask the parties to each fill out a questionnaire, and others will be happy with a couple of telephone calls.

Next, the parties and the mediator will agree to a schedule of meetings, the ground rules for these meetings, and the objects or goals of the process. Sometimes the decisions as to ground rules and goals are left to the parties themselves; it is their process, after all, not that of the mediator. If the parties are using lawyers, this step may be left out since ground rules aren't required or because the lawyers will be able to agree on the ground rules between themselves. Whether there are multiple meetings or not depends largely on the parties and the number of issues outstanding. Often a single half- or full-day meeting will produce a settlement.

Exchanging information

The parties will then begin to assemble the documents required to explain their separate financial situations. Often this will consist only of completing a financial statement. A financial statement is a useful court form that sets out each party's income and expenses, and assets and debts.

Supporting documents will have to be gathered as well, which will usually consist of things like:

1. income tax returns,
2. paystubs or other proof of income,
3. property assessments or appraisals, and,
4. corporate financial statements and tax returns.

It is critical that both parties are honest and forthcoming about their finances; nothing will damage the mediation process more than the discovery that someone is hiding information or acting in bad faith.

These documents will then be exchanged between the parties in preparation for the first mediation session. Based on the documents disclosed and the issues on the table, additional documentation may be required to be produced and exchanged. A party who is self-employed may have to produce corporate financial statements and corporate tax returns in addition to the usual materials. The extent of any additional materials will depend entirely on the circumstances of each couple and their children.

As well, the parties may need further additional input and information from people such as child psychologists, accountants, and the like. If these people are needed to help settle matters, there may be an additional waiting period while these experts conduct their investigations and prepare their reports.

Exchanging briefs

Where the parties are represented by lawyers, the mediator may ask the lawyers to prepare *mediation briefs*. Mediation briefs are summaries of the parties' relationship and each party's position and, when a position is legally complex or technical, an explanation of the law or facts supporting that position. The lawyers will give copies of their briefs to each other and to the mediator ahead of the first mediation session.

Mediating the dispute

Once all the information, reports, and briefs have been gathered and exchanged, and everybody has had a chance to digest everything, the parties, the lawyers and the mediator will meet at one or more mediation sessions. The mediator will first welcome everyone to the table, and ask the parties to sign a mediation agreement before anything else happens. The mediation agreement sets out the terms of the mediation sessions, requires the parties not to use the discussions held during mediation in any litigation, and describes the terms on which the mediator will be paid.

After the mediation agreement has been signed, each mediator will have his or her own preferred way of doing things. Most will ask someone to provide a general overview of the relationship and describe what exactly is at issue. Each party will have the opportunity to state their position on things. If lawyers are being used, they will inevitably do most of the talking, but the parties themselves will have ample opportunity to speak their minds... and you really should, it's your dispute!

Once this initial exchange of positions is complete, the mediator may keep everyone in the same room or may split the parties into separate rooms. If the parties are kept together, the mediator will press on and work on the problem, issue by issue. The mediator will keep some control over how the discussion flows, tamp the emotions down when things get heated, and keep everyone focused on their interests and the law rather than their emotions and the grievances of the past. If the parties are split into separate rooms, the mediator will alternate working with each party and will shuttle between each of the rooms. You may hear people describe this style of mediation as *shuttle mediation*.

Assuming the mediation process is successful, the mediator will often prepare a list describing how each issue has been resolved, called *minutes of settlement*. The minutes are usually rather informal and are meant to record the bare bones of the settlement in the expectation that a more complete document, like a separation agreement or a consent order, will be prepared in the future. The parties and sometimes their lawyers will be asked to sign the minutes to acknowledge the settlement that was reached.

Formalizing the settlement

The final stage involves the putting the terms of the agreement into more formal language in a legal document that both parties, or, depending on the type of document, their lawyers will sign. Typically, a settlement will be recorded as a separation agreement or, if there is an existing court proceeding or the parties need to get divorced, an order that the parties agree the court should make.

If a party changes his or her mind before the separation agreement or consent order is filed, the minutes of settlement can be enforced in court as evidence of the deal reached between the parties. In fact, in certain circumstances the mediator's notes alone may stand as proof of the parties' agreement. As long as it is plain what has been agreed to and that the intentions of the parties were finally settled, the minutes or the mediator's notes can be used as evidence of a binding agreement.

Note that if you are relying on a mediated settlement in court, it is important that the settlement be conclusive and leaving nothing else for further negotiation or confirmation. In the 2005 British Columbia Supreme Court case of *S.A.A. v. P.W.J.A.* ^[3], 2005 BCSC 603, the court held that the parties couldn't rely on an agreement that was "subject to

confirmation" as a final, binding agreement. In that case, the agreement was subject to the wife producing financial information which, when produced, did not confirm the information provided at mediation.

Tips for successful mediation

In mediation, as in all other forms of negotiation, the goal is to produce a fair agreement in an efficient and cooperative way. There are lots of things you can do that will hinder this process, and other things you can do that will help. The following are a few tips on how to make mediation work for you.

Remember that the more you argue about a particular position of yours, the more you wind up being stuck with that position. Many people find that after they've argued a particular point to death, they're stuck with it because they can't back down without losing face. Try to focus on interests rather than on positions, and to always ask yourself "Why not?" when you hear what the other side has to say.

One of the most important skills you can bring to your mediation session is the ability to actively listen to what the other side is saying. Active listening involves paying close attention to what the other side is saying, and restating his or her position to ensure that you know what the other side means and to ensure that the other side recognizes that you're hearing what he or she is saying. Phrases like "What I hear you saying is..." and "If I understand you correctly, what you're saying is..." can be extremely helpful. At the same time, you must also take some care in how you choose to express yourself. Instead of saying "You did..." or "You're a...", try something like "When you did that I felt..." or "I feel that..." This may all seem a bit flaky, but believe it or not it works.

You must be able to talk directly about a problem in an assertive, direct manner. Talk about the issues; don't skirt around them, no matter how uncomfortable or awkward you might feel. Take care in how you express yourself, but when you're in a private session with the mediator, don't mince words.

Things to do

The following points boil down to just a few central ideas: respect yourself and the other side; be flexible and avoid taking absolute positions; and, be honest and open. When you go into the mediation session, try to have a few options prepared, a few other alternatives that you might be happy with, rather than a single fixed, rigid goal.

- Be honest. Trust is essential to the mediation process.
- Be empathetic. Use phrases that indicate you understand and respect how the other party is feeling and thinking, like "I understand how you're feeling..." or "I appreciate the effort you've put into this..."
- Ask for a break when you're feeling too wound up or upset to continue, rather than abandoning the session.
- Dress comfortably and be prompt.
- If you disagree with something, say so. You must respect, and express, your own thoughts, opinions and feelings.
- Bring the documents you were asked to bring. If you don't, matters will only be delayed and the other side may be irritated by the inconvenience.
- Watch your body language! Making disgusted grunts, rolling your eyes, or slamming your fist on the table won't help anything.

Things not to do

Suspicion and dishonesty will damage the mediation process, sometimes beyond repair. If the mediator doesn't believe you and the other party doesn't believe you, it might be impossible to arrive at a negotiated settlement. Likewise, bitterness, jealousy and resentment can also be triggers that undermine each party's faith in the other and make resolution by a judge at a trial inevitable.

- Try to avoid letting your emotions get tangled up with your analysis of the problem at hand.
- Don't hide information, financial or otherwise, on the assumption that the other party won't find out. They usually do, and if they do the process is likely at an end.
- Don't raise your voice or make comments that are hurtful.
- Don't interrupt. Wait until each person has stopped speaking before you interject, no matter how upset you might feel with what he or she is saying.
- Negotiations are stressful, but don't use drugs or alcohol to calm your nerves. Drugs and alcohol will impair your judgment and reduce your ability to be objective and bargain in your own best interests.
- Don't feel that you must give an instant answer when you can't. Take a few moments or a few minutes to compose your reply; no one will begrudge a considered response.
- Don't make personal attacks or threats.
- Don't play on the other person's sense of guilt or otherwise be emotionally manipulative.

Government mediation services

The provincial government offers mediation for family law disputes through the Family Mediation Practicum Project ^[4] and its successor the Regional Mentoring Program ^[5], both of which are operated by Mediate BC ^[6]. There are also family justice counsellors ^[7] with the Provincial Court, and they work in Family Justice Centres ^[8] across BC. Other agencies and organizations may provide mediation services, however make sure that they can help with family law disputes before trying to get help.

Regional Mentoring Program

Mediate BC's Regional Mentoring Program ^[5] was introduced in April 2012 and pairs a highly qualified mentor mediator with a mediator in training to mediate family disputes. The mediators provide legal information, and also provide support in developing options to resolve disputes, including property division.

To reach Mediate BC's family mediation services about this program call:

Phone: 604-684-1300 ext. 23

Toll-free: 1-855-660-8406

Family justice counsellors

Mediation is available from family justice counsellors through those Provincial Court registries that are designated as Family Justice Centres ^[8]. Family justice counsellors are fully trained mediators, certified by Family Mediation Canada ^[9], who work with separated parents to assist in resolving disputes over the care of children, child support, and spousal support. Family justice counsellors can't deal with property issues and they usually can't help with support when someone's income is not straightforward.

Clicklaw's website includes a current list of Family Justice Centres ^[8].

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation ^[10]
- Notice to Mediate Regulation ^[11]

Links

- Mediate BC Website for Family Mediation Services ^[2]
- Family Mediation Practicum Project ^[4]
- Regional Mentoring Program ^[5]
- Provincial Court family justice counsellors ^[7]
- Family Justice Centres ^[8]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [8] <http://www.clicklaw.bc.ca/helpmap/service/1019>
- [9] <http://www.fmc.ca/>
- [10] <http://www.canlii.org/en/bc/laws/regu/b-c-reg-347-2012/latest/b-c-reg-347-2012.html#sec4subsec1>
- [11] <http://canlii.ca/t/85bd>

Family Law Arbitration

Arbitration is a dispute resolution process in which the parties hire a neutral third party, a family law arbitrator, to make a decision resolving their dispute that they agree they will be bound by. While the job of a mediator is to help two people work towards a solution that they make for themselves, the arbitrator's job is to act like a judge and impose a resolution, after hearing the evidence and listening to the arguments of each party.

This section provides an introduction to arbitration and discusses when to use arbitration in a family law dispute. It also provides some suggestions about how to find a family law arbitrator.

Arbitration in British Columbia

Arbitration has rarely been used in family law matters in British Columbia, probably because most lawyers figured that if they have to have somebody impose a decision in a case, it might as well be a judge. In British Columbia, arbitration was most often used in a labour law context; in other regions, such as Ontario, the arbitration of family law disputes is commonplace. The new *Family Law Act*, however, makes a number of changes to the provincial law that improve the usefulness of arbitration in family law disputes.

Arbitration has a number of advantages as a way of resolving family law problems:

1. it allows a couple to hand-pick the particular person who will make decisions about the issues they cannot agree on, which means that they might pick an arbitrator who has a special expertise in, for example, the care of children, tax problems, or property issues,
2. it allows the couple to pick the particular rules that will apply to the hearing and decision-making process,
3. the arbitration process is private and closed to the public, and
4. the result of the process is an award that is just as binding as a court order and is enforceable just like a court order.

As well, it's often faster to arrange a date for an arbitration than for a court hearing. Although short trials of two or three days can be booked within six or eight months, it can take a year or longer to get a date for longer trials because the court is so busy. An arbitration can be booked as soon as everyone has the free time in their calendars.

The arbitration process

When a couple agrees to arbitrate their dispute — you can't force someone into arbitration, it has to be voluntary — they first pick their arbitrator and then meet with the arbitrator to discuss the process leading to the arbitration hearing and pick their rules. Most of the time, the rules that people select are the more important parts of the Supreme Court Family Rules^[1] relating to evidence, experts, and procedure at trial.

Next, the parties will exchange the documents and information that are relevant to their dispute. If child support is an issue, for example, financial statements might be prepared and documents like income tax returns, T4 slips and paystubs might be exchanged.

If the parties cannot agree on how a child should be cared for, they might hire a psychologist to prepare a report on the parenting arrangements that will work best for the child, called a *needs of the child assessment*, or they might hire a third-party lawyer or a social worker to talk to the child and prepare a *views of the child report*. The nature of the documents that are important and the extent of the disclosure that is required will change, depending on the circumstances and how the parties decide to approach their dispute. There's more information about needs of the child assessments and views of the child reports in the introduction section of the Children chapter.

Once the documents have been exchanged and any reports have been prepared, the parties will attend one or more hearings with their arbitrator. These hearings take place in the arbitrator's office and are usually less formal than court hearings; there can be as much flexibility to the arbitration process as the parties and the arbitrator will agree to.

At these hearings, each party presents their evidence, which may include witnesses who give testimony or may be limited to documents and affidavits. Each party then makes arguments to show the arbitrator why he or she should make a particular decision.

After the hearing process is over, the arbitrator will provide a written decision, called an *award*, summarizing the evidence, resolving all of the issues, and explaining why the arbitrator resolved the issues in the way he or she resolved them.

The Arbitration Act

The arbitration of family law disputes in British Columbia is governed by the provincial *Arbitration Act* ^[2], formerly known as the *Commercial Arbitration Act*. The highlights of the act are these:

Section 1: An *arbitrator* is defined as a person who resolves a dispute referred to him or her by the parties. An *arbitration agreement* is an agreement between two or more persons to have their dispute resolved by arbitration.

Section 2: The act applies to commercial arbitration agreements and "any other arbitration agreement," such as family law arbitration agreements. When making decisions about children, the arbitrator must consider only the best interests of the children.

Section 9: An arbitrator can make interim awards on any subject at issue, such as interim awards regarding the care of children, child support, and spousal support.

Section 14: The final decision of an arbitrator is binding on the parties, subject to the reversal of the arbitrator's decision if the process or decision is procedurally defective, under s. 30, or if the decision is appealed to the court, under s. 31.

Section 23: "An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in s. 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis." Awards that are inconsistent with the *Family Law Act* are not enforceable.

Section 29: Awards in family law disputes can be enforced without leave of the court.

Section 30: The court can vary an award for the same reasons that it can vary a court order.

Section 31: Awards in family law disputes can be appealed.

Faith-based arbitration

Under the *Arbitration Act*, the parties can choose their own rules to govern the arbitration process. Nothing in the act says that those rules cannot be religious rules. Judaism and Islam each have religious laws that can apply to family law issues for members of those faiths. Members of the orthodox Jewish community may use the Beth Din to settle personal disputes. Muslims can use Sharia law to the same end.

Whatever rules a couple chooses, however, the result of the arbitration process must not be contrary to the laws of British Columbia. Section 23(2) says this:

Despite any agreement of the parties to a family law dispute, a provision of an award that is inconsistent with the *Family Law Act* is

not enforceable.

This means, for example, that child support must be paid to the person who has the child most of the time by the person who has the child for the least amount of time, and the amount that person pays cannot be too different from what the Child Support Guidelines require.

Note that if the parties to faith-based arbitration wish to obtain a divorce, they must still begin a court proceeding in the Supreme Court of British Columbia for a divorce order. A religious divorce, such as the Jewish Get, is not a legal divorce.

Parenting coordination

The *Arbitration Act* also applies to parenting coordination. In this dispute resolution process, the arbitrator, called a *parenting coordinator*, tries to first settle a parenting dispute through a settlement process like mediation. If the parents cannot find consensus, the parenting coordinator acts sort of like an arbitrator and makes a written decision, called a *determination*, resolving the dispute. The parenting coordinator's authority to resolve these dispute comes from the arbitration agreement the parents will sign, in this case called a *parenting coordination agreement*.

As with faith-based arbitration, or any other kind of family law arbitration for that matter, the parenting coordinator cannot make determinations that are contrary to the law in British Columbia, including the federal *Divorce Act* or the provincial *Family Law Act*. The court will not uphold determinations that are contrary to the law in this province.

Parenting coordinators are also restricted in the scope of the things they can make decisions about. Under s. 6(3) and (4)(a)(ix) of the Family Law Act Regulation ^[3], parenting coordinators can make determinations about parenting arrangements, contact with a child, and other issues agreed to by the parties and the parenting coordinator. However, regardless of whatever the parties and the parenting coordinator may have agreed to, a parenting coordinator cannot make decisions about:

- subjects that are excluded by an order or a parenting coordination agreement,
- changes to the guardianship of a child,
- changes to the allocation of parental responsibilities,
- giving parenting time or contact to a person who does not have parenting time or contact,
- substantial changes to parenting time or contact, or
- the relocation of a child.

There's a lot more information about parenting coordination in the next section in this chapter.

When to use arbitration

Only a few circumstances make arbitration a necessary choice over mediation, collaborative settlement processes, or court. Typically, a couple will choose arbitration if:

- they wish the laws of their religion or another set of principles to apply to the proceedings,
- their positions are too far apart to make negotiation or mediation a reasonable choice and must have a decision made for them, but don't want to go to the expense, anxiety and acrimony typically involved in litigation,
- they want to resolve their dispute discreetly and privately, and don't want to risk things being made public,
- the issues are complex and require a decision-maker who is a specialist in the area, or
- they want their dispute resolved more quickly than the court schedule will allow.

How to find a family law arbitrator

This is the hard part about arbitrating family law disputes, as there aren't too many arbitrators who specialize in family law issues. Your first and best bet is to contact organizations that specialize in training or setting practice standards for family law arbitrators, such as:

- The Family Law Arbitrators Society
- The Arbitrators Association of British Columbia ^[4]
- The BC Arbitration & Mediation Institute ^[5]

As an alternative, you could try calling a family law lawyer or two and asking if he or she knows and could recommend anyone who arbitrates family law disputes. Finally, you could call the Canadian Bar Association's Lawyer Referral Service ^[6]. Although the service can't recommend one family law arbitrator over another, they will be able to give you some names.

Resources and links

Legislation

- *Arbitration Act* ^[2]
- *Divorce Act*
- *Family Law Act*
- Family Law Act Regulation ^[3]
- Child Support Guidelines

Links

- The Arbitrators Association of British Columbia ^[4]
- The BC Arbitration & Mediation Institute ^[5]
- CBABC Lawyer Referral Service ^[6].
- BC Parenting Coordinators Roster Society ^[7]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 18, 2013.

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- [6] <http://www.clicklaw.bc.ca/helpmap/service/1044>
- [7] <http://www.bcparentingcoordinators.com/>

Parenting Coordination

Parenting coordination is a child-focused dispute resolution process for separated families. Parenting coordination deals with parenting disputes arising after an agreement or order has been made about parental responsibilities, parenting time or contact. Parenting coordinators are experienced family law lawyers, mediators and arbitrators, counsellors, social workers and psychologists.

This section provides a provides a brief introduction to parenting coordination, an overview of the process, and links to some additional resources on parenting coordination.

Introduction

Parenting coordination uses aspects of mediation and arbitration to resolve disputes about parenting, once the parties have reached a final order or agreement dealing with parenting arrangements and contact. Parenting coordination is only useful for parents who seem to always find themselves arguing about parenting despite their order or agreement. Parenting coordination is not for people who don't argue about parenting or who are able to resolve their disagreements without intervention.

Parenting coordinators are family law lawyers, mediators and arbitrators, counsellors, social workers and psychologists with special training in mediation, arbitration, parenting coordination, family violence, communication skills development, and high-conflict family dynamics, as required by the Family Law Act Regulation ^[1]. Parenting coordinators are hired on a long term-basis, for renewable terms of between six months to two years.

Once a parenting coordinator has been retained, either parent may ask the parenting coordinator to resolve a dispute. The parent with the concern will contact the parenting coordinator and explain the problem and his or her preferred solution. The parenting coordinator will discuss the problem with the other parent to get his or her perspective on the issue and will then work with both parents to find a resolution everyone can agree to. However, if the parents can't reach agreement or if the issue is very urgent, the parenting coordinator may arbitrate the dispute and impose a resolution. This process repeats whenever a new issue arises that needs to be resolved.

Parenting coordinators and the parenting coordination process are governed by the *Family Law Act*, the Family Law Act Regulation ^[1] and the codes of conduct and practice standards established by any practice group a parenting coordinator may belong to, such as the BC Parenting Coordinators Roster Society ^[2].

What parenting coordination deals with

Parenting coordination addresses how final orders and agreements about parental responsibilities, parenting time and contact are interpreted and implemented. Although parenting coordinators also have the authority to make minor, usually temporary, changes to those orders and agreements, parenting coordinators do not have the ability to make changes about important issues like guardianship or the allocation of parental responsibilities.

Parenting coordinators can also deal with minor, often temporary, issues that aren't covered by an order or agreement, like:

- the arrangements for a special event,
- the distribution of a child's clothing and toys between homes,
- where a child will go to school,
- the child's need for counselling, therapy, or tutoring, and
- the child's participation in sports and other extracurricular activities.

Parenting coordination also tries to address some of the problems that contribute to the parties' disagreements. This might include helping the parties to work on how they communicate with each other or how they manage conflict, or it might include helping the parties better understand how their children experience their conflict.

What parenting coordination might deal with

Parenting coordination usually does not deal with child support or children's special expenses. However, if the parents and the parenting coordinator agree, the parenting coordinator may assist the parents with things like:

- reviews of child support, where the review is required by an order or agreement,
- deciding which expenses qualify as a special expenses, and
- determining the amount of each parent's contribution to the children's special expenses.

Many parenting coordinators won't address these issues. The parenting coordinators most likely to agree to address issues like these are parenting coordinators who are also family law lawyers.

What parenting coordination won't deal with

Parenting coordinators cannot assist with any subjects that are expressly excluded by an order or a parenting coordination agreement. As well, parenting coordinators cannot deal with:

- the division or possession of property or the division of debt,
- appointing or removing a guardian of a child,
- changes to the allocation of parental responsibilities between guardians,
- giving parenting time or contact to a person who does not have parenting time or contact,
- substantial changes to parenting time or contact, and
- the relocation of a child.

Parenting coordinators should not help with a person's entitlement to receive spousal support, problems with the payment of spousal support, or changing an order or agreement about spousal support.

The parenting coordination process

Parenting coordinators are hired by the agreement of the parties or a court order. Orders for the appointment of a parenting coordinator can be made under s. 15 of the *Family Law Act* with or without the agreement of the parties. An agreement or order appointing a parenting coordinator should specify who is being appointed; a list a of parenting coordinators is available at the website of BC Parenting Coordinators Roster Society ^[3].

Signing the parenting coordination agreement

First, the parties and their parenting coordinator will sign a parenting coordination agreement that talks about the scope of the parenting coordinator's services and authority, how parenting problems will be addressed, and how the parties will manage the parenting coordinator's fees. In general, the parenting coordinator's fees will be split equally between the parties, unless they agree otherwise or unless the parenting coordinator has a good reason to assign responsibility for a certain amount of fees to a particular person.

It is always helpful if the key terms of the parenting coordination agreement are set out in the order or agreement appointing the parenting coordinator, including:

- the scope of the issues the parenting coordinator may address, and any specific issues the parenting coordinator must address,

- a description of the dispute resolution process, including the parenting coordinator's capacity to arbitrate a dispute in the event that consensus cannot be reached,
- confirming that the parenting coordination process is not confidential,
- the length of the parenting coordinator's retainer, and
- the circumstances in which the parenting coordinator can withdraw or be terminated from a case.

Many parenting coordinators use the signing of their parenting coordination agreements as an opportunity to have the parties execute releases and authorizations allowing the parenting coordinator to speak to people like the children's doctors, counsellors, and teachers. Section 16 of the *Family Law Act* says this:

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.

The retainer and deposit

The parents must each then pay their share of the parenting coordinator's retainer. As with a lawyer, the retainers paid to the parenting coordinator are security for the parenting coordinator's future bills. When such bills are issued, parenting coordinators will pay themselves by drawing on parties' retainers.

Some parenting coordinators will also ask for an additional retainer, called a deposit. This money is held in reserve to enable the parenting coordinator to finish dealing with a problem in the event that a party's retainer runs out in the middle of a dispute and the party refuses to replenish his or her retainer.

The introductory meeting

Next, the parenting coordinator will meet separately with each party to explain the parenting coordination process in more depth and take a detailed history of the parties' relationship and proceedings in court. Depending on the age of the children, the parenting coordinator may want to meet the children as well.

Once these introductory matters have been taken care of, either party can bring a parenting problem to the parenting coordinator when a problem arises. Parenting coordinators will often deal with dozens of these disputes during their retainer.

Dealing with disputes

Where there is a problem, the parenting coordinator will listen to the party raising the issue and then contact the other party to get his or her take on things. Depending on the nature of the parties and the nature of the problem, the parenting coordinator may:

- meet with the parties separately or together about the issue,
- interview the children to get their input on the issue,
- speak to the children's counsellors, doctors, teachers, instructors, or coaches, and
- speak to any other third party who may have helpful information about the issue.

The consensus-building phase

Except in cases of real urgency, the parenting coordinator will try to resolve the dispute by attempting to help the parties reach their own agreement on this issue, much in the manner of a mediator. This process can take time and requires lots of communication. As a result, when an issue is genuinely urgent, the consensus-building phases may be shortened or skipped altogether.

Most parenting coordinators will do everything possible to help the parties reach a settlement of a parenting dispute. Imposing a resolution on a dispute should be a last resort only.

The determination-making phase

When settlement is impossible, or if a problem is urgent and must be dealt with quickly, the parenting coordinator will make a decision, called a *determination*, resolving the problem, much in the manner of an arbitrator. The parenting coordinator will warn the parents when it becomes necessary to make a determination, and, depending on the time available, will make sure that each party has provided all of the information and arguments they wish to provide and has had the opportunity to address the information and arguments provided by the other party.

The parenting coordinator's determination will be given to the parties in writing, even if the parenting coordinator first made his or her determination orally. This is a written statement of the determination and the reasons for that determination.

Enforcing a determination

Parenting coordinators' determinations may be enforced by filing them in court, either under Rule 12 of the Provincial Court Family Rules ^[4] or Rule 2-1.1 of the Supreme Court Family Rules ^[5].

Concluding the retainer

At the end of the parenting coordinator's term, all parties — the parents and the parenting coordinator — must agree in order to renew the parenting coordination agreement. If the agreement isn't renewed, the parenting coordination process is concluded.

Under s. 15(6) of the *Family Law Act*, a parenting coordination agreement can be terminated before the end of a parenting coordinator's term in one of three circumstances:

- (a) in the case of an agreement, by agreement of the parties or by an order made on application by either of the parties;
- (b) in the case of an order, by an order made on application by either of the parties;
- (c) in any case, by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is acting under an order, to the court.

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation ^[1]
- *Arbitration Act* ^[6]
- Supreme Court Family Rules ^[7]
- Provincial Court Family Rules ^[4]

Links

- BC Parenting Coordinators Roster Society ^[2]
- Association of Family and Conciliation Courts ^[8]
- AFCC's Guidelines for Parenting Coordination ^[9] (PDF)

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [3] <http://www.bcparentingcoordinators.com/member-roster/>
- [4] <http://canlii.ca/t/85pb>
- [5] <http://canlii.ca/t/8mcr>
- [6] <http://canlii.ca/t/84gc>
- [7] <http://canlii.ca/en/bc/laws/regu/bc-reg-169-2009/latest/bc-reg-169-2009.html>
- [8] <http://www.afccnet.org/>
- [9] <http://www.afccnet.org/Portals/0/AFCCGuidelinesforParentingcoordinationnew.pdf>

Going to Court

Resolving Family Law Problems in Court

The process of starting a court proceeding and bringing it through to a trial can be complicated. This chapter discusses the process for starting and replying to proceedings in the Provincial Court and the Supreme Court.

This section provides a thumbnail sketch of the basic court process common to all non-criminal proceedings. Other sections in this chapter provide more detail about starting a proceeding, replying to a proceeding, attending case conferences, making applications for temporary and urgent orders, enforcing orders, and changing final orders.

Hold on for a minute, do you really have to go to court?

Sometimes, you really have no choice except to start a court proceeding. But you should think twice before you do and make sure that litigation is your only choice.

The end of a relationship, especially a long relationship, is an emotionally charged, stressful moment. Court is not the only way there is to solve a problem, even though it might be really tempting to drop the bomb and hire the most aggressive lawyer you can find. Before you decide to go to court, think about these things first:

Your future relationship with your ex. Right now you might hate your ex and want to rip his or her eyes out. You might not feel that way in a year or two. If you don't have children, it might be entirely possible for you to simply walk out of each other's lives and into the sunset. If you do have children, you don't have that option. Your relationship as partners might be over, but your relationship as parents will continue forever.

Your children, and your relationship with your children. Your children will be aware that there is a conflict between you and your ex, an understanding that will differ depending on the children's ages. When parents are engaged in a court proceeding, it can be tremendously difficult to shield the children from the litigation, and from your emotional reactions to the litigation. It can also be difficult to refrain from using the children as weapons in the litigation. This will always affect the children adversely and often in ways you don't expect.

Your own worries and anxieties. Litigation is always an uncertain affair. No one, not even your lawyer, will guarantee that you will be completely successful about any particular issue. At the end of the day, fundamental decisions will be made by a complete stranger — the judge — about the things that matter the most to you, and his or her decision is not something you can predict with absolute certainty. On top of that, litigation, especially when you're doing it yourself, is extremely stressful. The documents and processes will be new to you, and each court appearance will be a fresh cause of anxiety and uncertainty.

Your pocket book. The only time litigation isn't expensive is when you do it yourself. If you opt to hire a lawyer, be prepared to pay and to pay a lot. Sometimes a lawyer can help you get things done quickly and with a minimum of fuss and bother, but if emotions are running high, you stand to pay a whopping legal bill, especially if you go all the way through to trial.

There are other ways of solving your problem than litigation. Going to court is only one of the ways to bring your dispute to an end. Other, less confrontational and less adversarial approaches include: negotiation, mediation, and collaborative settlement processes. All of these other approaches generally cost a lot less, and, because they are cooperative in nature,

they'll give you the best chance of maintaining a working relationship with your ex after the dust has settled. These options are discussed in more detail in the chapter Resolving Family Law Problems out of Court.

Now, in fairness, there are times when going to court may be your only choice. It may be critical to start a court proceeding when:

- there is a threat or a risk of child abduction,
- there has been physical, verbal or sexual abuse in the relationship, whether to you or to your children,
- threats to your physical safety, or to the safety of your children, have been made,
- there is a threat or a risk that your ex will damage, hide or dispose of property,
- there is an urgent need to immediately secure some financial help, or
- negotiations have failed and, despite your best efforts, you and your ex can't agree on how to solve your differences.

If none of these apply to you, your dispute — no matter how ugly it might seem to you — can always be resolved by negotiation or mediation rather than going to court. Even a court proceeding for a divorce order, which is the only other time when a court proceeding is absolutely necessary, can be done in a cooperative, non-confrontational manner.

Think twice before deciding that court is your only option.

For more information about the emotions that surround the end of a long-term relationship, and how these emotions can affect the course of litigation, read the section Separating Emotionally in the chapter Separation & Divorce. You should also track down and read a copy of *Tug of War*^[1] by Mr. Justice Brownstone from the Ontario Court of Justice. He gives a lot of practical advice about the family law court system, when it works best and when it doesn't work at all.

You might also want to read a short note I've written for people who are representing themselves in a court proceeding, "The Rights and Responsibilities of the Self-Represented Litigant" (PDF).

An overview of court procedure for civil claims

If you need the court to make an order about something, you must start a court proceeding. That's the only way to get a court order. The kind of court you need to go to is *civil court*, the kind of trial court that deals with claims between people and companies. The other kind of trial court is *criminal court*, the court that deals with criminal offences.

Before going further, it'll help to learn some of the terminology.

A few definitions

Claimant. The person or people who start a court proceeding in the Supreme Court are the claimants. In the Provincial Court, this person is the applicant. In family law proceedings, there is usually only one claimant. In this section, "claimant" refers to claimants and applicants.

Respondent. The person or people against whom a court proceeding is brought are the respondents. In family law proceedings, there is usually only one respondent.

Parties. The claimant and the respondent are the parties to the court proceeding.

Claim. The document that is filed to start a court proceeding in the Supreme Court is a Notice of Family Claim or a Petition. In the Provincial Court, proceedings are started with an Application to Obtain an Order or an Application to Change or Cancel an Order. In this section, "claim" refers to all of these documents.

Reply. A respondent who objects to all or some of the orders sought by the claimant in the Supreme Court will file a Response to Family Claim and sometimes a Counterclaim. In the Provincial Court, the respondent will file a Reply. In this section, "reply" refers to all of these documents.

Pleadings. The basic documents that frame a legal dispute are called the pleadings. In most Supreme Court family law proceedings, the pleadings are the Notice of Family Claim, the Response to Family Claim, and also usually a Counterclaim. In most Provincial Court proceedings, the pleadings are the Application to Obtain an Order and the Reply.

Court procedure in a nutshell

Court proceedings in the Provincial Court and the Supreme Court, other than criminal proceedings, work more or less like this:

- **The claimant starts the proceeding.** The person who wants a court order, the claimant, starts a court proceeding by filing a claim in court and serving the filed claim on the respondent. The claimant says what orders the claimant wants the court to make.
- **The respondent files a reply.** The respondent has a certain amount of time after being served to respond to the court proceeding by filing a reply in court. The reply says which orders the respondent agrees to and which he or she objects to. The respondent may ask the court for other orders; if other orders are needed, the respondent will file a claim of his or her own, called a counterclaim. The reply and any counterclaim must be delivered to the claimant.
- **The claimant files a reply.** The claimant has a certain amount of time after being served to respond to any claim made by the respondent by filing a reply in court. The claimant's reply says which orders the claimant agrees to and which he or she objects to. The claimant's reply must be delivered to the respondent.
- **The parties exchange information.** Next, the parties gather the information and documents they need to explain why they should have the orders they are asking for. Because trials are not run like an ambush, the parties must also exchange their information and documents. This way everyone knows exactly what is going on and how strong each person's case is.
- **Each party is examined out of court.** After the documents have been exchanged, in Supreme Court proceedings each party will schedule an examination of the other party. An examination is an opportunity to ask questions about the facts and the issues out of court so that everyone knows the evidence that will be given at the trial. This is also an opportunity to ask for more documents.
- **Go to trial.** Assuming that settlement isn't possible, the only way to resolve the court proceeding is to have a trial. At the trial, each of the parties will present their evidence and explain to the judge why he or she should make the orders asked for. The judge may make a decision resolving the decision on the spot; most often, however, the judge will want to think about the evidence and the parties' arguments and will give a written decision later.

And that's pretty much it.

While working through this process, it is sometimes important to ask for *interim orders*. These are temporary orders that might be necessary to get a court proceeding through to a trial or to take care of a short-term need. In a case involving a car accident, for example, an interim order might be needed to make someone be checked by a doctor or to make someone produce financial information. In family law cases, people often ask for interim orders to deal with the payment of child support or spousal support, to determine how the children will be cared for, or to protect property or a person.

The process for interim orders is a miniature version of the larger process for getting a claim to trial.

- **The applicant starts the application.** The person who wants the interim order, the *applicant*, starts the application process by filing an application and an affidavit in court, and serving the filed application and affidavit on the other party, called the *application respondent*. An affidavit is a written statement of the facts that are important to the application.
- **The application respondent files a reply.** The application respondent, the person who is responding to the application, has a certain amount of time after being served to respond to the application by filing a reply and an

affidavit in court. The reply says which orders the person agrees to and which are objected to; the affidavit describes any additional facts that are important to the application. The reply and affidavit must be delivered to the applicant.

- **The applicant files a new affidavit.** The applicant has a certain amount of time after being served with the application respondent's materials to file a new affidavit in court. The new affidavit describes any additional facts that are important to the application. The new affidavit must be delivered to the application respondent.
- **Go to the hearing.** Assuming that settlement isn't possible, the only way to resolve the application is to have a hearing. At the hearing, each of the parties will present the evidence set out in his or her affidavits and explain to the judge why he or she should make the orders asked for. Most of the time the judge will make a decision resolving the decision on the spot; sometimes, however, the judge will want to think about the evidence and the parties' arguments, and will give a written decision later.

There are lots of details we've skipped over, including details about important things like experts, case conferences, and the rules of evidence, but this about it. These details are governed by each court's set of rules. The rules of court are very important!

You can probably guess that this can be a long and involved process, and that if you have a lawyer representing you, it'll cost a lot of money to wrap everything up. In the Lower Mainland, for example, it can be possible to get trial dates for short family law trials in as little as six months, but most of the time it takes a year or more to get from the start of a proceeding to trial.

Resources and links

Legislation

- Provincial Court Family Rules ^[2]
- *Provincial Court Act* ^[3]
- Supreme Court Family Rules ^[4]
- *Supreme Court Act* ^[5]
- Court of Appeal Rules ^[6]
- *Court of Appeal Act* ^[7]
- *Court Rules Act* ^[8]

Resources

- Provincial Court Practice Directions ^[9]
- Supreme Court Family Practice Directions ^[10]
- Supreme Court Administrative Notices ^[11]
- Court of Appeal Practice Directives ^[12]
- *Tug of War* ^[11] by Mr. Justice Brownstone
- "The Rights and Responsibilities of the Self-Represented Litigant" (PDF).

Links

- Courts of British Columbia website ^[13]
- Provincial Court website ^[14]
- Supreme Court website ^[15]
- Supreme Court Trial Scheduling ^[16]
- Court of Appeal website ^[17]
- Guidebooks from the BC Supreme Court website ^[18]
- Justice Education Society's Court Tips for Parents (videos) ^[19]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 18, 2013.

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- [2] <http://canlii.ca/t/85pb>
- [3] <http://canlii.ca/t/jj7h>
- [4] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/169_2009_00
- [5] <http://canlii.ca/t/51x8q>
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- [7] <http://canlii.ca/t/51tr9>
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- [9] <http://www.provincialcourt.bc.ca/types-of-cases/family-matters/chief-judge-practice-directions>
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- [18] http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/guidebooks.aspx
- [19] <http://www.supremecourtbc.ca/family/tips-for-parents>

Starting a Court Proceeding in a Family Matter

If you need the court to make an order about anything, from the care of children to the payment of spousal support to the division of property, you must begin a court proceeding. There are certain steps you must take, certain fees you must pay and certain forms you must fill out before the court will hear your claim. Although the staff at the court registries are friendly and very helpful, it is your job to prepare these materials, gather your evidence, and take the steps necessary to bring your case before a judge.

This section reviews the processes for starting a proceeding in the Supreme Court and the Provincial Court. For a more complete picture of the court process, read this section together with the section on [Replying to a Court Proceeding](#).

The Supreme Court

To start a proceeding in the Supreme Court, the main document you will have to prepare is a Notice of Family Claim in Form F3, a special form prescribed by the Supreme Court Family Rules ^[1]. (This document is one of the basic legal documents in a court proceeding known as pleadings.) This is the document that says who you are suing and the orders you want to the court to make.

Family law proceedings are governed by the Supreme Court Family Rules ^[1]. It's important that you have a working knowledge of the rules about how court proceedings are started; as your proceeding progresses, you'll also need to learn the rules about judicial case conferences, disclosure, interim applications, and trials.

The primary rules about Notices of Family Claim and the management of court proceedings are:

- Rule 1-1: definitions
- Rule 3-1: starting a court proceeding
- Rule 4-1: Notices of Family Claim and service requirements
- Rule 4-3: replying to a Notice of Family Claim
- Rule 5-1: financial disclosure
- Rule 6-3: personal service
- Rule 7-1: judicial case conferences
- Part 9: disclosure and discovery of documents
- Part 10: interim applications and chambers procedure
- Rule 11-4: discontinuing a court proceeding
- Part 13: expert witnesses
- Rule 11-3: summary trial procedure
- Rule 14-7: trial procedure
- Rule 15-2.1: guardianship orders

Links to and examples of the Notice of Family Claim and other court forms can be found in [Supreme Court Forms & Examples](#). For a quick introduction to how to start a proceeding, see [How Do I Start a Family Law Action in the Supreme Court?](#) It's located in the section *Starting an Action* in the *How Do I?* part of this resource.

Quick Tips: Starting an action in the Supreme Court

The following tips are located in the section *Starting an Action* in the *How Do I?* part of this resource:

- **Can't pay your court fees:** If you can't afford pay court fees, you can apply for indigent status. If you are granted indigent status the court fees will be waived for all or part of your court proceeding. To find out more, see [How Do I Apply for Indigent Status in the Supreme Court?](#)
- **Guide to personal service:** For a quick summary of what's involved in personal service, see [How Do I Personally Serve Someone with Legal Documents?](#)
- **Can't personally serve the respondent:** If it is impossible to personally serve the Notice of Family Claim on the respondent, you can ask the court to be allowed to use a substitute form of personal service. To find out what's involved, see [How Do I Substitutionally Serve Someone with Legal Documents?](#)
- **Not sure where your ex is:** If you're not sure where your ex lives in order to start a court proceeding, see [How Do I Find My Ex?](#)
- **Need to change something in the Notice of Family Claim:** To find out what happens when you want to change something in your Notice of Family Claim, see [How Do I Change Something in My Notice of Family Claim?](#)
- **Want the court action to stop:** To find out if you can stop a family law action in the Supreme Court once you've started it, see [How Do I Stop a Family Law Action in the Supreme Court?](#)

Preparing, filing and serving the notice of family claim

The claimant, the person starting the court proceeding, must fill out a Notice of Family Claim and file the claim in court. The Notice of Family Claim provides: the claimant's name and address; the name and address of the person against whom the claim is made, the *respondent*; the basic history of the parties' relationship; and, an outline of the orders the claimant would like the court to make.

The court form that must be used use is Form F3, set out in the Supreme Court Family Rules ^[1]. This is a special form of claim used only in family law cases. Additional pages that require more detailed information must be added to the Notice of Family Claim when the claimant seeks orders about:

- divorce,
- the care of children and child support,
- spousal support,
- the division of property and debt, and
- other orders, like protection orders or orders for the change of a person's name.

The Notice of Family Claim must be filed in the court registry and be personally served on the respondent. If you are asking for a divorce order, you'll have to fill out a Registration of Divorce Proceeding form when you file your Notice of Family Claim. It costs \$200 to file a Notice of Family Claim, or \$210 if the claim includes a claim for a divorce.

"Personal service" essentially means physically handing the Notice of Family Claim to the respondent. The *Divorce Act* and Rule 6-3(2) of the Supreme Court Family Rules ^[1] say that a claimant cannot serve a respondent him- or herself. You must either pay a process server to do it or enlist the help of a friend over the age of majority. Although this ought to go without saying, don't use one of your children to serve your ex.

Deadline for reply

The respondent has 30 days to file a Response to Family Claim after being served with the claimant's Notice of Family Claim. If the respondent doesn't do this, the claimant may be able to apply for the orders asked for in the Notice of Family Claim as a *default judgment*, a final order made in default of the respondent's reply.

You should be aware that in most cases the courts are fairly lenient towards people who miss filing deadlines. A claimant should not expect to win on a technicality like this. If a respondent files his or her Response to Family Claim late, the court will usually give the respondent an extension of time and overlook the missed due date. However, if the respondent just ignores you and ignores your claim, at some point the court will make the order you're asking for.

The next steps

If the respondent has chosen to file a Response to Family Claim, he or she has decided to oppose your claim. This doesn't mean that you're necessarily going to wind up in a trial, but it does mean that, at least for now, the respondent disagrees with some or all of the orders you're asking for. One of three things is going to happen in your court proceeding:

1. You'll settle your disagreement out of court, and come up with either a separation agreement or an order that you both agree the court should make, called a consent order.
2. You'll not be able to agree, and the intervention of the court at a trial will be required.
3. After some initial scuffles, neither you nor the respondent will take any further steps in the court proceeding and the proceeding will languish.

Whether you're off to trial or a settlement can be reached, the steps until trial are usually these:

1. Exchange Financial Statements. Financial Statements are required whenever the division of property or the payment of support is at issue. Financial Statements are prepared in Form 8. Financial Statements must be exchanged before the first judicial case conference, and updated statements will be required throughout the case and before trial. These are discussed in more detail further on in this section.

2. Have a judicial case conference (JCC). A JCC is necessary before most interim applications can be brought. JCCs are informal, off-the-record meetings between the parties, their lawyers and a judge intended to talk about areas of agreement and disagreement, and set dates and deadlines for the remaining steps in the litigation. JCCs are discussed in more detail further on in this section.

3. Make interim applications as needed. In almost all cases, parties need the court to decide certain issues on a temporary basis until the trial can be heard. Typically, people need a set of rules to guide them until the claims at issue in the court proceeding are finally determined. The most common interim applications in family law cases involve financial and personal restraining orders, the care and control of the children, and the payment of child support and spousal support. This chapter discusses the process for bringing interim applications in the section Interim Applications in Family Matters.

4. Disclose documents and information. The rules of court require each party to produce to the other all documents that are relevant to the issues in a court proceeding. This can include things like bank statements, report cards, medical records, school reports, and income tax returns. Each party must list these documents in a formal List of Documents, and keep their List of Documents updated when new documents are found or become available.

5. Examine each other out of court. The parties may, if they wish, question each other outside of court, in a formal setting before a court reporter. This is called an *examination for discovery*. Examinations for discovery, also called *discoveries*, are helpful to get each person's views of the evidence and the issues on the record. Discoveries are almost always held after Financial Statements have been prepared and documents

have been exchanged.

6. Have a settlement conference. The rules of court allow a party to schedule a settlement conference before a judge ahead of trial. At this hearing, the parties will explain their positions and areas of disagreement to the judge, and hopefully negotiate a settlement. These conferences can be very helpful; the judge will serve as a mediator and help the parties work towards a settlement. The judge may also express his or her opinion about the strengths and weaknesses of each party's position, which also encourages settlement.

7. Have a trial management conference (TMC). A TMC is a formal hearing before a judge designed to fix the schedule of events at the trial and resolve as many disputes about evidence before trial as possible. Among other things, the judge will ask about the witnesses each party intends to present, the completeness of the disclosure made to date, expert's reports and expert witnesses, and anything else that can be dealt with to help make sure the trial will go ahead and be completed within the time available. A TMC is generally not an opportunity to engage in settlement discussions, although the judge at the TMC can order that a settlement conference happen.

8. Go to trial. At the end of the day, if you can't agree on a resolution you will wind up at trial. At the trial, each side will call their witnesses to give evidence, cross-examine the witnesses of the other party, and give their argument as to why the judge ought to decide the case in their favour. The judge will hear all the evidence and the arguments, and reach a decision in the form of *reasons for judgment*. The lawyers, or the court clerk in the absence of lawyers, will prepare a final order based on the reasons for judgment.

This description of the steps involved is just a rough sketch of the lengthy process of bringing a court proceeding to a conclusion. Not every proceeding will need to use all of these steps (some people may not need to have examinations for discovery and others won't see the point of holding a settlement conference, for example), and some steps may need to be repeated more than once. As well, the actual trial process is much, much more complex than my brief description.

Financial statements

If a court proceeding involves a claim for spousal support, child support, the division of property or the division of debt, each party must prepare and file a Financial Statement. A Financial Statement sets out a person's income, expenses, assets and liabilities and is sworn on oath or affirmation, just like an affidavit, before a lawyer, notary public, or registry clerk.

Financial Statements are very important in family law proceedings. The portions about income are critical for determining child support and spousal support, and, unless there are appraisals or other documents that establish value, the portions about assets and debts may be used to determine the value of an asset and the amount owing on a debt. As well, since Financial Statements are sworn statements, someone making a Financial Statements can find his or her credibility being challenged if the numbers don't make sense, if they are overblown or understated, if they omit critical information, or if they are outright fabrications.

Each party must attach to their Financial Statements a number of important documents:

1. the last three years' worth of tax returns (what's required is the complete income tax and benefit return, not tax return "summaries" or "informations"),
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing his or her earnings to date, or if the party isn't working, then his or her most recent WCB statement, social assistance statement, or EI statement,
4. business records like financial statements and corporate income tax returns, if the party has a company, and

5. the most recent BC Assessments for all real property.

The form you must use is Form F8, set out in the Supreme Court Family Rules ^[1].

Judicial case conferences

Judicial case conferences are relatively informal, off-the-record, private meetings between the parties, their lawyers and a judge in a courtroom. JCCs must be held in all family law court proceedings where the parties can't agree, and, in most cases, they must be held before any interim applications can be heard.

JCCs can be extraordinarily helpful in helping everyone understand the issues and the dispute. Cases sometimes settle at JCCs, and even if a complete settlement can't be reached, problems about time with the children and support can usually be resolved on a temporary basis. This is a lot less expensive than making an interim application!

This chapter has more information about JCCs in the section Case Conferences in a Family Law Matter.

The Provincial Court

To start a proceeding in the Provincial Court, the main document you have to prepare is an Application to Obtain an Order in Form 1, a special form prescribed by the Provincial Court Family Rules ^[2]. This is the document that says who you are suing and what you are suing for.

Family law proceedings are governed by the Provincial Court Family Rules. It's important that you have a working knowledge of the rules about how court proceedings are started; as your proceeding progresses, you'll also need to learn the rules about Family Case Conferences, disclosure, interim applications, and trials. The primary rules about Applications to Obtain an Order and the management of court proceedings are:

- Rule 1: definitions
- Rule 2: Applications to Obtain an Order and service requirements
- Rule 3: replying to an Application to Obtain an Order
- Rule 4: financial disclosure
- Rule 6: the first and subsequent appearances in court
- Rule 7: family case conferences
- Rule 11: trial procedure
- Rule 12: interim applications
- Rule 14: consent orders
- Rule 18: orders
- Rule 18.1: guardianship orders
- Rule 21: Parenting After Separation program

Links to and examples of the Application to Obtain an Order and other court forms can be found in Provincial Court Forms & Examples. For a quick introduction to how to start a proceeding, see How Do I Start a Family Law Action in the Provincial Court? It's located in the section *Starting an Action* in the *How Do I?* part of this resource.

Limitations of the Provincial Court

The Provincial Court is designed for people who are not represented by a lawyer. There are no filing fees in this court, the forms are a lot easier to prepare, the rules of court are simpler, and the court registry will sometimes take care of things like drafting court orders. The main disadvantage of bringing your case to the Provincial Court is that the authority of the court is limited. The Provincial Court can only hear applications under the *Family Law Act* on certain subjects, including:

- guardianship,
- parental responsibilities and parenting time,
- contact with a child,
- child support, and
- spousal support.

The Provincial Court cannot hear your application if you are applying for orders under the federal *Divorce Act* or for orders relating to the division of property and debt under the *Family Law Act*.

Preparing, filing and serving the application to obtain an order

Most court proceedings are started in the Provincial Court by filing an Application to Obtain an Order in Form 1. (Court proceedings can also be started with an Application to Change or Cancel an Order in Form 2 where there is already a court order or separation agreement in place.) The person beginning the action, the *applicant*, fills out the Application to Obtain an Order and provides certain information, including: the applicant's name and address; the name and address of the person against whom the application is being made, the *respondent*; a list of the orders the applicant is asking the court to make; and, a very brief statement of the relevant facts.

The Application to Obtain an Order must be filed in the court registry and be personally served on the respondent. No fee is charged to file the Application to Obtain an Order.

Personal service means physically handing the Application to Obtain an Order to the respondent. Rule 2(3) of the Provincial Court (Family) Rules ^[2] says that an applicant cannot personally be the one who serves a respondent. You must either pay a process server to do it or enlist the help of a friend over the age of majority. Don't use one of your children to serve your ex.

If you're not sure where your ex lives, see How Do I Find My Ex? It's located in the section *Marriage, Separation & Divorce* in the *How Do I?* part of this resource.

Deadline for reply

The respondent has 30 days to fill out and file a court form called a Reply after being served with the applicant's Application to Obtain an Order. If the respondent doesn't do this, the applicant may be able to apply for the orders asked for in the Application to Obtain an Order as a *default judgment*, a final order made in default of the respondent's reply.

You should be aware that in most cases the courts are fairly lenient towards people who miss filing deadlines. An applicant should not expect to win on a technicality like this. If a respondent files his or her reply late, the court will usually give the respondent an extension of time and overlook the missed due date. However, if the respondent just ignores you and ignores your claim, at some point the court will make the order you're asking for.

The next steps

In certain registries of the Provincial Court, the parties must meet with a family justice counsellor, and, if children are involved, attend a Parenting After Separation ^[3] program before you can take any further steps in your case. This may apply even if you are seeking a default judgment. The court clerk at the court registry will tell you what is needed. If necessary, the court clerk will refer you to the family justice counsellor and tell you where the Parenting After Separation program is offered. You will have to file a certificate that you've completed the program.

The steps that follow the commencement of a proceeding in the Provincial Court are a shorter, more streamlined version of the Supreme Court process. There are fewer hoops to jump through, but also fewer means to extract information and documents from the other side.

1. Meet with a family justice counsellor and take the Parenting After Separation program. Family justice counsellors can provide information that may help to resolve the court proceeding; they can also serve as mediators if both parties are prepared to try mediation. The Parenting After Separation program is very useful to take, and you should seriously consider taking the course even if it isn't required in your court registry. The program is available online ^[4]. The online course does not replace the need to attend an in-person course if that is otherwise required.

2. Exchange Financial Statements. Financial Statements are required whenever the payment of child support or spousal support is an issue. Financial Statements are prepared in Form 4.

3. Have a family case conference (FCC). An FCC is a hearing similar to the judicial case conference required by the Supreme Court. It is an informal, off-the-record meeting between the parties, their lawyers and a judge to talk about the facts and issues, and set dates and deadlines for the remaining steps in the court proceeding. Although FCCs are very helpful and often result in settlement, FCCs only address issues about the care of children and are not mandatory unless you have been referred to an FCC by a judge. If you think an FCC will help resolve your case, ask for one!

4. Make interim applications as needed. In almost all family law proceedings, the parties need the court to decide certain issues on a temporary basis until the trial can be heard. Typically, people need orders about things like where the children will live and whether support should be paid until trial. The most common applications in family law involve restraining orders, orders about the care of children, child support, and spousal support. This chapter discusses the process for bringing interim applications in the section Interim Applications in Family Matters.

5. Have a trial preparation conference (TPC). A TPC is a formal hearing before a judge designed to fix the schedule of events at the trial and resolve as many disputes about evidence before trial as possible. Among other things, the judge will ask about the witnesses each party intends to present, whether documents have been exchanged, and anything else that can be dealt with to help make sure the trial will go ahead and be completed within the time available. A TPC is generally not an opportunity to engage in settlement discussions.

6. Go to trial. At the end of the day, if you can't reach a settlement, you will have to have a trial. At the trial, each side will call their witnesses to give evidence, cross-examine the witnesses of the other party, and give their argument as to why the judge should make the orders they are asking for. The judge will hear all the evidence and the arguments and reach a decision in the form of *Reasons for Judgment*. Where neither party is represented by a lawyer, the court clerk will draft a final order based on the judge's reasons for judgment.

Financial Statements

If a Provincial Court proceeding involves spousal support or child support, each party must prepare and file a Financial Statement. A Financial Statement sets out a party's income, expenses, assets and liabilities and is sworn on oath or affirmation, just like an affidavit, before a lawyer, notary public, or registry clerk.

Each party must attach to their Financial Statements the following documents:

1. the last three years' worth of tax returns (what's required is the complete income tax and benefit return, not tax return "summaries" or "informations"),
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing his or her earnings to date, or if the party isn't working, then his or her most recent WCB statement, social assistance statement, or EI statement, and
4. business records like financial statements and corporate income tax returns, if the party has a company.

The form you must use is Form 4, set out in the Provincial Court (Family) Rules ^[2].

Family case conferences

Family case conferences (FCCs) are relatively informal, off-the-record, private meetings between the parties, their lawyers and a judge in a courtroom to explore settlement options. FCCs are not mandatory and there is no requirement that an FCC must be heard before any interim applications.

FCCs can be extraordinarily helpful in helping everyone understand the issues and the dispute. Cases sometimes settle at FCCs, and even if a complete settlement can't be reached, problems about time with the children and support can usually be resolved on a temporary basis. This is a lot less expensive than making an interim application if you have to hire a lawyer.

This chapter discusses FCCs in more detail in the section Case Conferences in a Family Law Matter.

Resources and links

Legislation

- *Provincial Court Act* ^[5]
- Provincial Court Family Rules ^[2]
- *Supreme Court Act* ^[6]
- Supreme Court Family Rules ^[7]
- *Court Rules Act* ^[8]

Resources

- Provincial Court Practice Directions ^[9]
- Supreme Court Family Practice Directions ^[10]
- Supreme Court Administrative Notices ^[11]
- Supreme Court Trial Scheduling ^[12]

Links

- Provincial Court website ^[13]
- Supreme Court website ^[14]
- Legal Services Society Family Law in BC website: How to start a family law case (Supreme Court) ^[15] and How to get a final family order (Provincial Court) ^[16]
- Justice Education Society Website for BC Supreme Court ^[17]
- Parenting After Separation Program ^[3]
- Online Parenting After Separation Course ^[4]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 18, 2013.

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- [4] <http://parenting.familieschange.ca>
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- [16] <http://www.familylaw.lss.bc.ca/guides/final/cantAgree/provincial/apply/steps.php>
- [17] <http://www.supremecourtbc.ca>

Replying to a Court Proceeding in a Family Matter

If a court proceeding has been started against you, you have two choices: do nothing or reply to the proceeding and defend yourself. If you agree with the orders the other party is asking for, doing nothing is the cheapest and quickest way to handle the matter. On the other hand, if you only partly agree or completely disagree you must reply to the claim or you risk losing by default.

This section discusses the process for replying to a court proceeding in the Supreme Court and the Provincial Court. For a more complete picture of the court process, read this section together with the section on Starting a Court Proceeding.

The Supreme Court

If you are being sued in the Supreme Court, you are the *respondent* in a court proceeding that has been started by the *claimant*. If you disagree with any of the orders the claimant is asking for, you must prepare a Response to Family Claim. You can also prepare a Counterclaim if there is an order you would like to ask for. These documents, together with the claimant's Notice of Family Claim, are called pleadings.

The primary Supreme Court Family Rules ^[1] about Responses to Family Claim and Counterclaims, replying to a court proceeding and trials are:

- Rule 1-1: definitions
- Rule 3-1: starting a court proceeding
- Rule 4-3: Responses to Family Claim
- Rule 4-4: Counterclaims
- Rule 5-1: financial disclosure
- Rule 6-2: ordinary service
- Rule 7-1: judicial case conferences
- Part 9: disclosure and discovery of documents
- Part 10: interim applications and chambers procedure
- Rule 11-4: discontinuing a court proceeding and withdrawing a Response to Family Claim
- Part 13: expert witnesses
- Rule 11-3: summary trial procedure
- Rule 14-7: trial procedure
- Rule 15-2.1: guardianship orders

Links to and examples of the Response to Family Claim, Counterclaim and other court forms can be found in Supreme Court Forms & Examples. For a quick introduction to how to reply to a proceeding, see How Do I Respond to a Family Law Action in the Supreme Court? It's located in the section *Defending an Action* in the *How Do I?* part of this resource.

Quick Tips: Defending an action in the Supreme Court

The following tips are located in the section *Defending an Action* in the *How Do I?* part of this resource:

- **Can't pay your court fees:** If you can't afford to pay court fees, you can apply for indigent status. If you are granted indigent status the court fees for all or part of the proceeding will be waived. To find out more, see *How Do I Apply for Indigent Status in the Supreme Court?*
- **Need to change something in the Response to Family Claim or Counterclaim:** To find out what happens when you need to change something, see *How Do I Change Something in My Response to Family Claim or Counterclaim?*
- **Want the court action to stop:** You might want to stop defending the claim or stop your counterclaim if, for example, you have reached a settlement. To find out how to do this, see *How Do I Stop Defending a Family Law Action in the Supreme Court?*

Preparing, filing and serving your response

You must file a Response to Family Claim at the court registry within 30 days of being served with the claimant's Notice of Family Claim.

The Notice of Family Claim sets out the basic history of the parties' relationship and an outline of the orders the claimant would like the court to make. Your Response to Family Claim says which of the claimant's claims you agree with and which you oppose, and which of the facts set out in the Notice of Family Claim are inaccurate.

The form you must use is Form F4, set out in the Supreme Court Family Rules ^[1]. This is a special form of response used only in family law cases.

The Response to Family Claim must be filed in the court registry and be served on the claimant by ordinary service. It costs \$25 to file a Response to Family Claim. Ordinary service means sending a copy of the filed response to the claimant at any of the addresses for service identified in the Notice of Family Claim.

Preparing, filing and serving a counterclaim

If there are any orders you would like to ask for, you may file a Counterclaim at the court registry within 30 days of being served with the claimant's Notice of Family Claim. Your Counterclaim describes the orders you would like the court to make.

It can be very important to file a Counterclaim if you want the court to make an order on different terms or about a different issue than the claims made in the Notice of Family Claim. Think of it like this: your Response to Family Claim is your defence to the claims made by the claimant in his or her Notice of Family Claim. Your Response to Family Claim doesn't ask for anything; it just says what you do and don't agree with. Unless a Counterclaim is filed, the only person asking for any orders is the claimant. If you are successful in your defence, there may be no claims left for the court to make an order about.

The form you must use is Form F5, set out in the Supreme Court Family Rules ^[1]. This is a special form of counterclaim used in family law cases. Additional pages that require more detailed information must be added to the Counterclaim when you are asking for orders about:

- divorce,
- children, including child support,
- spousal support,
- the division of property and debt, and
- other orders, like protection orders or orders for the change of a person's name.

The Counterclaim must be filed in the court registry and be served on the claimant by ordinary service. It costs \$200 to file a Counterclaim.

Deadline for reply

The claimant has 30 days to file a *Response to Counterclaim* in Form F6 after being served with the respondent's Counterclaim. Very few people bother to file a Response to Counterclaim. Many would only go to the trouble of preparing a response if there was something unusual or unexpected in the Counterclaim.

The next steps

Although you've decided to defend the claimant's claims, you're not necessarily going to wind up in a trial. One of three things is going to happen in your court proceeding:

1. You'll settle your disagreement out of court, and come up with either a separation agreement or an order that you both agree the court should make, called a consent order.
2. You'll not be able to agree, and the intervention of the court at a trial will be required.
3. After some initial scuffles, neither you nor the claimant will take any further steps in the court proceeding and the proceeding will languish.

Whether you're off to trial or a settlement can be reached, the steps until trial are usually these:

1. Exchange Financial Statements. Financial Statements are required whenever the division of property or the payment of support is at issue. Financial Statements are prepared in Form 8. Financial Statements must be exchanged before the first judicial case conference, and updated statements will be required throughout the case and before trial. These are discussed in more detail further on in this section.

2. Have a judicial case conference (JCC). A JCC is necessary before most interim applications can be brought. JCCs are informal, off-the-record meetings between the parties, their lawyers and a judge intended to talk about areas of agreement and disagreement, and set dates and deadlines for the remaining steps in the litigation. JCCs are discussed in more detail further on in this section.

3. Make interim applications as needed. In almost all cases, parties need the court to decide certain issues on a temporary basis until the trial can be heard. Typically, people need a set of rules to guide them until the claims at issue in the court proceeding are finally determined. The most common interim applications in family law cases involve financial and personal restraining orders, the care and control of the children, and the payment of child support and spousal support. This chapter discusses the process for bringing interim applications in the section Interim Applications in Family Matters.

4. Disclose documents and information. The rules of court require each party to produce to the other all documents that are relevant to the issues in a court proceeding. This can include things like bank statements, report cards, medical records, school reports, and income tax returns. Each party must list these documents in a formal List of Documents, and keep their List of Documents updated when new documents are found or become available.

5. Examine each other out of court. The parties may, if they wish, question each other outside of court, in a formal setting before a court reporter. This is called an *examination for discovery*. Examinations for discovery, also called *discoveries*, are helpful to get each person's views of the evidence and the issues on the record. Discoveries are almost always held after Financial Statements have been prepared and documents have been exchanged.

6. Have a settlement conference. The rules of court allow a party to schedule a settlement conference before a judge ahead of trial. At this hearing, the parties will explain their positions and areas of disagreement to the judge, and hopefully negotiate a settlement. These conferences can be very helpful; the judge will serve as a mediator and help the parties work towards a settlement. The judge may also express his or her opinion about the strengths and weaknesses of each party's position, which also encourages settlement.

7. Have a trial management conference (TMC). A TMC is a formal hearing before a judge designed to fix the schedule of events at the trial and resolve as many disputes about evidence before trial as possible. Among other things, the judge will ask about the witnesses each party intends to present, the completeness of the disclosure made to date, expert's reports and expert witnesses, and anything else that can be dealt with to help make sure the trial will go ahead and be completed within the time available. A TMC is generally not an opportunity to engage in settlement discussions, although the judge at the TMC can order that a settlement conference happen.

8. Go to trial. At the end of the day, if you can't agree on a resolution you will wind up at trial. At the trial, each side will call their witnesses to give evidence, cross-examine the witnesses of the other party, and give their argument as to why the judge ought to decide the case in their favour. The judge will hear all the evidence and the arguments, and reach a decision in the form of *reasons for judgment*. The lawyers, or the court clerk in the absence of lawyers, will prepare a final order based on the reasons for judgment.

This description of the steps involved is just a rough sketch of the lengthy process of bringing a court proceeding to a conclusion. Not every proceeding will need to use all of these steps (some people may not need to have examinations for discovery and others won't see the point of holding a settlement conference, for example), and some steps may need to be repeated more than once. As well, the actual trial process is much, much more complex than my brief description.

Financial statements

If a court proceeding involves a claim for spousal support, child support, the division of property or the division of debt, each party must prepare and file a Financial Statement. A Financial Statement sets out a person's income, expenses, assets and liabilities and is sworn on oath or affirmation, just like an affidavit, before a lawyer, notary public, or registry clerk.

Financial Statements are very important in family law proceedings. The portions about income are critical for determining child support and spousal support, and, unless there are appraisals or other documents that establish value, the portions about assets and debts may be used to determine the value of an asset and the amount owing on a debt. As well, since Financial Statements are sworn statements, someone making a Financial Statements can find his or her credibility being challenged if the numbers don't make sense, if they are overblown or understated, if they omit critical information, or if they are outright fabrications.

Each party must attach to their Financial Statements a number of important documents:

1. the last three years' worth of tax returns (what's required is the complete income tax and benefit return, not tax return "summaries" or "informations"),
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing his or her earnings to date, or if the party isn't working, then his or her most recent WCB statement, social assistance statement, or EI statement,
4. business records like financial statements and corporate income tax returns, if the party has a company, and
5. the most recent BC Assessments for all real property.

The form you must use is Form F8, set out in the Supreme Court Family Rules ^[1].

Judicial case conferences

Judicial case conferences (JCCs) are relatively informal, off-the-record, private meetings between the parties, their lawyers and a judge in a courtroom. JCCs must be held in all family law proceedings where the parties can't agree, and, in most cases, they must be held before any interim applications can be heard.

JCCs can be extraordinarily helpful in helping everyone understand the issues and the dispute. Cases sometimes settle at JCCs, and even if a complete settlement can't be reached, problems about time with the children and support can usually be resolved on a temporary basis. This is a lot less expensive than making an interim application!

This chapter has more information about JCCs in the section Case Conferences in a Family Law Matter.

The Provincial Court

If a court proceeding has been started against you in the Provincial Court, you are the *respondent* in the proceeding. The person who started the court proceeding is the *applicant*. If you agree with the orders the applicant is asking for, doing nothing is the quickest way to handle things. On the other hand, if you only partly agree or if you completely disagree with what the applicant is asking for, you must prepare a Reply.

The primary Provincial Court (Family) Rules ^[2] about Replies, defending a court proceeding and trials are:

- Rule 1: definitions
- Rule 3: Replies
- Rule 4: financial disclosure
- Rule 6: the first and subsequent appearances in court
- Rule 7: family case conferences
- Rule 11: trial procedure
- Rule 12: interim applications
- Rule 14: consent orders
- Rule 18: orders
- Rule 18.1: guardianship orders
- Rule 21: Parenting After Separation program

Links to and examples of the Reply and other court forms can be found in Provincial Court Forms & Examples. For a quick introduction to how to reply to a proceeding, see How Do I Respond to a Family Law Action in the Provincial Court? It's located in the section *Defending an Action* in the *How Do I?* part of this resource.

Limitations of the Provincial Court

The Provincial Court is designed for people who are not represented by a lawyer. There are no filing fees in this court, the forms are a lot easier to prepare, the rules of court are simpler, and the court registry will sometimes take care of things like drafting court orders. The main disadvantage of proceeding in the Provincial Court is that the authority of the court is limited. The Provincial Court can only hear applications under the *Family Law Act* on certain subjects, including:

- guardianship,
- parental responsibilities and parenting time,
- contact with a child,
- child support, and
- spousal support.

The Provincial Court cannot hear claims under the federal *Divorce Act*. It cannot hear claims under the *Family Law Act* for orders relating to the division of property and debt.

Preparing, filing and delivering the reply

If you decide to defend yourself, you must complete a form called a Reply and file it within 30 days of the date you were served with the Application to Obtain an Order. There is no fee to file a reply.

In your reply, you can do one or more of the following things:

- agree to some or all of the orders the applicant is asking for,
- object to some or all of the orders the applicant is asking for, and
- apply for any orders you would like the court to make.

The form you must use is Form 3, set out in the Provincial Court Family Rules ^[2]. The reply must be filed in the court registry and the court clerk will take care of delivering your reply to the applicant.

Deadline for the applicant's reply

The applicant has 30 days to file a Reply in Form 3 after being served with the respondent's Reply if the respondent's Reply asks for any orders. Very few applicants bother to file a Reply of their own. Many applicants only go to the trouble of preparing a Reply if there was something unusual or unexpected in the respondent's Reply.

The next steps

In certain registries of the Provincial Court, the parties must meet with a family justice counsellor, and, if children are involved, attend a Parenting After Separation ^[3] program before you can take any further steps in your case. This may apply even if you are seeking a default judgment. The court clerk at your court registry will tell you what is needed. If necessary, the court clerk will refer you to the family justice counsellor and tell you where the Parenting After Separation program is offered. You will have to file a certificate that you've completed the program.

The steps that follow the commencement of a proceeding in the Provincial Court are a simplified version of the Supreme Court process. There are fewer hoops to jump through, but also fewer means to extract information and documents from the other side.

1. Meet with a family justice counsellor and take the Parenting After Separation Program. Family justice counsellors can provide information that may help to resolve the court proceeding; they can also serve as mediators if both parties are prepared to try mediation. The Parenting After Separation program is very useful to take, and you should seriously consider taking the course even if it isn't required in your court registry. The program is available online ^[4]. The online course does not replace the need to attend an in-person course if that is otherwise required.

2. Exchange financial statements. Financial statements are required whenever the payment of child support or spousal support is an issue. Financial statements are prepared in Form 4.

3. Have a family case conference (FCC). This is a hearing similar to the judicial case conference required by the Supreme Court. It is an informal, off-the-record meeting between the parties, their lawyers and a judge to talk about the facts and issues, and set dates and deadlines for the remaining steps in the court proceeding. Although FCCs are very helpful and often result in settlement, FCCs only address issues about the care of children and are not mandatory unless you have been referred to an FCC by a judge. If you think an FCC will help resolve your case, ask for one!

4. Make interim applications as needed. In almost all family law proceedings, the parties need the court to decide certain issues on a temporary basis until the trial can be heard. Typically, people need orders about things like where the children will live and whether support should be paid until trial. The most common applications in family law involve restraining orders, orders about the care of children, child support, and spousal support. The process for bringing interim applications is discussed in detail in this chapter in the section on Interim Applications in Family Matters.

5. Have a trial preparation conference (TPC). A TPC is a formal hearing before a judge designed to fix the schedule of events at the trial and resolve as many disputes about evidence before trial as possible. Among other things, the judge will ask about the witnesses each party intends to present, whether documents have been exchanged, and anything else that can be dealt with to help make sure the trial will go ahead and be completed within the time available. A TPC is generally not an opportunity to engage in settlement discussions.

6. Go to trial. At the end of the day, if you can't reach a settlement, you will have to have a trial. At the trial, each side will call their witnesses to give evidence, cross-examine the witnesses of the other party, and give their argument as to why the judge should make the orders they are asking for. The judge will hear all the evidence and the arguments and reach a decision in the form of *reasons for judgment*. Where neither party is represented by a lawyer, the court clerk will draft a final order based on the judge's reasons for judgment.

Financial Statements

If a court proceeding involves spousal support or child support, each party must prepare and file a Financial Statement. A Financial Statement sets out a party's income, expenses, assets and liabilities and is sworn on oath or affirmation, just like an affidavit, before a lawyer, notary public, or registry clerk.

Each party must attach to their Financial Statement the following documents:

1. the last three years' worth of tax returns (what's required is the complete income tax and benefit return, not tax return "summaries" or "informations"),
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing his or her earnings to date, or if the party isn't working, then his or her most recent WCB statement, social assistance statement, or EI statement, and
4. business records like financial statements and corporate income tax returns, if the party has a company.

The form you must use is Form 4, set out in the Provincial Court Family Rules ^[2].

Family case conferences

Family case conferences are relatively informal, off-the-record, private meetings between the parties, their lawyers and a judge in a courtroom to explore settlement options. FCCs are not mandatory and there is no requirement that an FCC must be heard before any interim applications.

FCCs can be extraordinarily helpful in helping everyone understand the issues and the dispute. Cases sometimes settle at FCCs, and even if a complete settlement can't be reached, problems about time with the children and support can usually be resolved on a temporary basis. This is a lot less expensive than making an interim application if you have to hire a lawyer.

This chapter discusses FCCs in more detail in Case Conferences in a Family Law Matter.

Resources and links

Legislation

- *Provincial Court Act* ^[5]
- Provincial Court Family Rules ^[2]
- *Supreme Court Act* ^[6]
- Supreme Court Family Rules ^[7]
- *Court Rules Act* ^[8]

Resources

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- Supreme Court Family Practice Directions ^[10]
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- Justice Education Society website for BC Supreme Court ^[17]
- Parenting After Separation program ^[3]
- Online Parenting After Separation Course ^[4]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 17, 2013.

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- [3] http://www.familylaw.lss.bc.ca/resources/fact_sheets/parent_after_separation.php
- [4] <http://parenting.familieschange.ca>
- [5] <http://canlii.ca/t/jj7h>
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- [17] <http://www.supremecourtbc.ca>

Case Conferences in a Family Law Matter

A case conference is a meeting between the parties, their lawyers (if they have them), and a judge, usually for a purpose relating to the administration or the settlement of a court proceeding. *Trial management conferences* in the Supreme Court and *trial preparation conferences* in the Provincial Court are all about getting a proceeding ready for trial, and are held towards the end of a proceeding. *Judicial case conferences* in the Supreme Court and *family case conferences* in the Provincial Court are held early in a proceeding and are about settling issues that can be agreed on, getting interim arrangements in place for support and the care of the children, and planning the next few steps in the proceeding.

This section discusses judicial case conferences and family case conferences, their limitations and their uses, and provides some tips about how you can get the most out of your time and the judge's time at a case conference.

Resolving a court proceeding without a trial

There are many reasons why it's important that family law court proceedings are resolved by agreement. From the court's point of view, settlement frees up valuable court and administrative resources that can be applied to other cases and lessens the likelihood that the proceeding will require ongoing court hearings in the future. From the point of view of the parties, the people involved in the family law case, settlement is cheap, helps to protect the children from ongoing conflict, and gives everyone involved the best chance of having a tolerable relationship with each other as time goes on.

Lawyers also have an interest in settling matters, for all of the same reasons why settlement is important to the courts and to the parties. In addition, lawyers have a professional and an ethical duty to promote settlement wherever possible, providing that a proposed settlement is not an unreasonable compromise of our clients' interests. This is written into our Code of Professional Conduct ^[1].

The laws and rules of court for family law proceedings have evolved to provide additional opportunities for settlement and steer people away from trial and out of court. In fact, s. 4 of the provincial *Family Law Act* says that the purposes of the part of the act on dispute resolution are to:

- (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;
- (c) to encourage parents and guardians to
 - (i) resolve conflict other than through court intervention, and
 - (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.

Rule 7-1 of the Supreme Court Family Rules ^[2], requires the parties to a family law court proceeding to attend a judicial case conference early in the proceeding, and Rule 7-2 allows the parties to schedule a settlement conference with a judge. Under Rule 7-1(15)(a), one of the purposes of a JCC is to:

- identify the issues that are in dispute and those that are not in dispute and explore ways in which the issues in dispute may be resolved without recourse to trial

Rule 7 of the Provincial Court Family Rules ^[3] allows a judge to require the parties to attend a family case conferences for the same sort of purpose, and Rule 7(4)(a) allows the judge hearing the FCC to attempt to mediate a resolution of the proceeding.

In general, if you can resolve a court proceeding without going to trial, you should. However, the settlement, whether it's reached with the help of a judge or not, must be fair and reasonable. (It's always a relief to settle a court proceeding, but if the settlement is unfair a return to court is inevitable!) Case conferences can really help to move a difficult case toward resolution, but the judge cannot force you to accept a settlement. You must agree that a proposed settlement is reasonable and agree to end the court proceeding on the terms of that settlement.

Judicial case conferences

Judicial case conferences in the Supreme Court, usually referred to as JCCs, are relatively informal, off-the-record, private meetings between the parties, their lawyers and a master or judge in a courtroom. JCCs must be held in all contested family law court proceedings, and, in most cases, they must be held before any interim applications can be heard.

Financial statements must be exchanged by the parties before each JCC. They must also be filed in court in advance of the JCC to give the judge the chance to read through them first.

Avoiding a judicial case conference

Rule 7-1(2)^[4] of the Supreme Court Family Rules says that:

Subject to subrules (3) and (4), unless a judicial case conference has been conducted in a family law case, a party to the family law case must not serve on another party a notice of application or an affidavit in support.

Subrule (3) sets out the exceptions to this requirement:

1. when an application is being made for an order restraining either or both parties from disposing of property,
2. when an order will be made with the agreement of both parties, and
3. when the application is being made without notice being given to the other side (sometimes called an *ex parte application* or a *without notice application*).

Subrule (4) sets out some further exceptions to the general rule about JCCs and interim applications. However, if you need to ask for an exception under this subrule, you'll have to make an application to the court for an order granting the exception:

On application by a party, the court may relieve a party from the requirements of subrule (2) if

(a) it is premature to require the parties to attend a judicial case conference,

(b) it is impracticable or unfair to require the party to comply with the requirements of subrule (2),

(c) the application referred to in subrule (2) is urgent,

(d) delaying the application referred to in subrule (2) or requiring the party to attend a judicial case conference is or might be dangerous to the health or safety of any person, or

(e) the court considers it appropriate to do so in the circumstances.

In other words, if your application is urgent you can ask for permission to have your application heard before the first JCC. If your application falls into one of the exceptions set out in Rule 7-1(3), you don't need the court's permission. If

your application doesn't fall into either category, you've got little choice but to have a JCC before you can bring your application.

Applications to be exempt from the JCC requirement are made by filing a special form of Requisition without an appearance in court.

Scheduling a judicial case conference

To set a date for a JCC, first contact the court registry and get their available dates. (JCCs are given a lot of priority by the registry staff, and you should be able to book a hearing date within a month or two.) In most cases, you will want to give these dates to the other side and select a date that you are both available for. It's just common courtesy to select a date that's convenient for everyone, plus you will want the other side to be able to attend the conference.

Once you have an agreeable date, call the registry back and tell them which date you've picked. They will then ask you to fill out and file a Notice of Judicial Case Conference in Form F19 setting that date. You must then serve a copy of your filed Notice of Judicial Case Conference on the other side, along with a copy of your financial statement, by ordinary service.

For a summary of how to schedule a JCC, see *How Do I Schedule a Judicial Case Conference for Hearing?* It's located in the *How Do I?* part of this resource, in the section *Other Litigation Issues*.

The purposes of judicial case conferences

The basic purposes of a JCC are to review the claims each side is making, determine where there is agreement, and see whether there is anything other than a trial that will resolve the claims in dispute. JCCs are relatively informal affairs, and most of the time everyone sits at a large table with the judge or master who is hearing the JCC. JCCs are private. Only the parties and their lawyers are allowed to be there. They are also held on an off-the-record basis, so that nothing said in the JCC can be used against anyone later on.

Different judges and masters will handle JCCs in different ways. Some judges and masters are very hands-on; others take a more distant, judicial approach. Some are very keen to try to settle a dispute, and will work almost like a mediator; others are content to leave areas of disagreement alone and focus on getting a resolution in place on the areas of agreement instead. Some judges and masters will provide an informal opinion about the likely result in a particular case; others won't. There are no guarantees that a JCC will be run in a particular way.

However, JCCs are very useful in almost all cases. Some cases will even settle at a JCC, with no need for further litigation. The court's powers at JCCs are set out at Rule 7-1(15)^[4] and are very broad. The court may:

- (a) identify the issues that are in dispute and those that are not in dispute and explore ways in which the issues in dispute may be resolved without recourse to trial;
- (b) make orders to which all the parties consent;
- (c) mediate any of the issues in dispute;
- (d) with the consent of the parties, refer any issues to mediation with a private mediator;
- (e) refer the parties to a family justice counsellor, or to a person designated by the Attorney General to provide specialized support assistance, if the court has received written advice from the regional manager that the family justice counsellor or designated person is

readily available to the parties;

(f) direct a party to attend the Parenting after Separation program operated by the Family Justice Services Division (Justice Services Branch), Ministry of Attorney General;

(g) make orders respecting amendment of a pleading, petition or response to petition within a fixed time;

(h) make orders requiring that particulars be provided in relation to any matter raised in a pleading;

(i) make orders respecting discovery of documents;

(j) make orders respecting examinations for discovery;

(k) direct that any or all applications must be made within a specified time;

(l) reserve a trial date for the family law case or reserve a date for a trial that is restricted to issues defined by the parties;

(m) set a date for a trial management conference under Rule 14-3;

(n) make any orders that may be made at a trial management conference under Rule 14-3 (9);

(o) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;

(p) without limiting any other orders respecting timing that may be made under this subrule, make orders respecting timing of events;

(q) adjourn the judicial case conference;

(r) direct the parties to attend a further judicial case conference at a specified date and time;

(s) make any procedural order or give any direction that the court considers will further the object of these Supreme Court Family Rules.

At the JCC, each side will have the opportunity to tell their story and explain why they want what they're asking for. Most of the time, the lawyers for each party will state their understanding of the facts and why their clients should have what they're looking for, and the clients will be asked if they have anything to add. Frankly, JCCs usually work best when the parties are able to express their own views and concerns freely.

It is important to remember that while the judge or master may (and should!) push the parties to agree about certain things, they don't have to agree. The judge or master cannot make any orders, except for procedural orders, that the parties don't agree with. If you're not happy with a potential order that's being discussed, you must say so!

Potential outcomes

It is possible for some or all issues to be settled at a JCC. Where there are areas of agreement — which could concern anything, from a temporary parenting schedule, to a protection order, to the sale of the family home — the judge or master will make that order. Areas that can't be agreed upon will be left for further negotiation and further litigation.

Even if nothing can be agreed upon, the judge or master will usually make a series of orders about the next procedural steps in the litigation. Typically, these will include:

- scheduling an application for hearing,
- setting dates for the exchange of documents and lists of documents,
- setting dates for examinations for discovery,
- scheduling a settlement conference,
- resolving issues about experts and custody and access reports,
- setting the dates for the trial management conference and the trial, and
- scheduling the dates for any further JCCs.

At the end of the conference, the court clerk will print out a case management plan that will show the orders that have been agreed to, the issues still in dispute, and any schedule for the next steps in the litigation. Most of the time, both parties and their lawyers will sign the case management plan; no one needs to sign a case management plan where nothing was agreed to.

Family case conferences

There are two big differences between judicial case conferences in the Supreme Court and family case conferences in the Provincial Court. First, FCCs aren't mandatory and you only get to have an FCC if a judge orders that you have one. Second, the judge at an FCC has the discretion to make orders without the consent of a party. Otherwise FCCs are pretty much just like JCCs.

Applying for a family case conference

Under Rule 7(1) ^[3] of the Provincial Court Family Rules, a judge may order the parties to attend an FCC where the case involves contested claims about guardianship or for parental responsibilities, parenting time or contact. An application for an FCC can be made at a first appearance or at any subsequent appearance, or by Notice of Motion like any other interim application.

It is fairly easy to get an order that an FCC be heard as the court will usually agree that an FCC is a good idea. The court will not be interested in granting an FCC if:

- it's obvious that you've asked for the FCC to obstruct the hearing or trial or an interim application,
- there's already been an FCC heard in your case and there's nothing to suggest that a new FCC will have a better chance of success, or
- there is an urgent reason for the case to head to trial without further delay.

Scheduling a family case conference

FCCs are booked by the judicial case manager, and if you get an order for an FCC, the judge will adjourn your case to the judicial case manager to get a date set up. Like JCCs, it is good idea to pick a date on which everyone is available to attend.

The judicial case manager will fix the date for the FCC on the spot and give you a slip with the date and time on it.

For a summary of how to schedule a case conference, see *How Do I Schedule a Family Case Conference for Hearing?* It's located in the *How Do I?* part of this resource, in the section *Other Litigation Issues*.

The purposes of family case conferences

The primary purpose of an FCC is to reach a settlement of any disputed parenting issues. Although Rule 7^[3] limits the circumstances in which an FCC can be ordered to parenting issues, it doesn't say that no other issues can be discussed at an FCC, and the judge may be prepared to deal with support issues as well.

FCCs are relatively informal affairs, and most of the time everyone sits at a large table with the judge who is hearing the FCC. FCCs are private; under Rule 7(2) only the parties and their lawyers are allowed to be there. Under Rule 7(3), the judge may give permission for other people, including the parties' child, to attend. FCCs are held on an off-the-record basis, so that nothing said in the FCC can be used against anyone later on.

Although different judges will handle FCCs in different ways, most of the time the judge will act like a mediator. Some judges will handle the FCC in a reserved, judicious manner. Others are more hands-on and will do everything they can to help the parties settle their issues, including:

- scheduling a series of FCCs,
- speaking directly to the children,
- ordering or recommending views of the child reports, and
- asking important third parties, like a new spouse or a half-sibling, to attend a future FCC.

At the FCC, each side will have the opportunity to tell their story and explain why they want what they're asking for. Most of the time, the lawyers for each party will state their understanding of the facts and why their clients should have what they're looking for, and the clients will be asked if they have anything to add. Frankly, FCCs usually work best when the parties are able to voice their own views and concerns freely.

Cases often settle at FCCs. In order to maximize the chances of settlement, it is critical that you get proper legal advice about your situation and options before you go to the FCC if you don't have a lawyer. If you do have a lawyer, you should speak to him or her about the range of potential results and areas where you might want to compromise your position.

Potential outcomes

It is possible for some or all issues to be settled at a FCC. Where there are areas of agreement, the judge will make that order. Issues that can't be agreed upon will be left for further negotiation and further litigation.

Rule 7(4)^[3] lists the things a judge can do at a FCC:

The judge at the family case conference may do one or more of the following:

- (a) mediate any of the issues in dispute;
- (b) decide any issues that do not require evidence;

- (c) with consent of the parties, refer any issues to mediation with a private mediator;
- (d) if the regional manager has advised the court in writing that the person or program is readily available to the parties, refer the parties to a family justice counsellor or to a person designated by the Attorney General to provide specialized maintenance assistance;
- (e) adjourn the case for purposes of mediation under paragraph (c) or a referral under paragraph (d);
- (f) make an order to which all of the parties consent;
- (g) direct that any or all applications must be made within a set time;
- (h) direct the parties to attend a further family case conference, setting a date for that conference;
- (i) set a date for a trial preparation conference under rule 8;
- (j) make any order that may be made at a trial preparation conference under rule 8 (4);
- (k) if the judge does not set a date for a further family case conference or for a trial preparation conference, set a trial date for the matter or set a date for a trial that is restricted to issues defined by the parties;
- (l) make an interim or final order requested in an application, reply or notice of motion;
- (m) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;
- (n) make any other order or give any direction that the judge considers appropriate.

Although that last item, "make any other order or give any direction that the judge considers appropriate," sounds pretty all-encompassing and all-powerful, in practice the court rarely makes orders that one or more parties oppose.

Resources and links

Legislation

- *Provincial Court Act* ^[5]
- Provincial Court Family Rules ^[3]
- *Supreme Court Act* ^[6]
- Supreme Court Family Rules ^[7]
- *Court Rules Act* ^[8]

Resources

- Provincial Court Practice Directions ^[9]
- Supreme Court Family Practice Directions ^[10]
- Supreme Court Administrative Notices ^[11]
- Supreme Court Trial Scheduling ^[12]

Links

- Provincial Court website ^[13]
- Supreme Court website: Litigants' Guide to Judicial Case Conferences ^[14]
- Legal Services Society: Judicial Case Conferences in Supreme Court ^[15]
- Legal Services Society: How to deal with a JCC ^[16]
- Legal Services Society: Family Case Conferences in Provincial Court ^[17]
- Legal Services Society: Family Case Conference Checklist ^[18]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

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- [3] <http://canlii.ca/t/85pb>
- [4] <http://canlii.ca/en/bc/laws/regu/bc-reg-169-2009/latest/part-2/bc-reg-169-2009-part-2.html>
- [5] <http://canlii.ca/t/jj7h>
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- [17] http://www.familylaw.lss.bc.ca/resources/fact_sheets/Family_Case_Conferences_Provincial_Court.php
- [18] http://www.familylaw.lss.bc.ca/resources/fact_sheets/familyCaseConferenceChecklist.php

Interim Applications in Family Matters

Once a court proceeding has started, it's usually necessary to get one or more short-term orders about important issues like where the children will live or whether spousal support ought to be paid. Issues like these can't wait until trial and need to be dealt with immediately, although they'll only be dealt with on a temporary, interim basis pending trial. To get short-term orders like these, you must make an *interim application* in court.

This section provides an introduction to interim applications, discusses the process for making and defending interim applications in the Supreme Court and in the Provincial Court, and reviews some of the basic facts that should be discussed for a variety of common interim applications.

Introduction

Interim applications are applications for temporary, short-term orders made before trial. Interim orders are only good until they are varied following another interim application or until a final order is made at trial or following settlement.

Interim orders can be very useful to establish some basic ground rules between separated people, and although these rules can be established fairly quickly, they are not intended to be permanent. In *M.(D.R.) v. M.(R.B.)* ^[1], 2006 BCSC 1921, a case from the Supreme Court of British Columbia, the judge had this to say about interim orders:

"Interim orders are only intended to be short-term, and their purpose is to bridge the gap between the time that a court action is started, and when the court can fully consider the issues raised and make a decision on the merits.

"Interim proceedings are summary in their nature and provide a rough justice at best. Interim proceedings cannot be bogged down and traditionally have never been bogged down with the merits of the [underlying] case."

The purposes of interim applications

Interim applications are particularly common in family law proceedings, sometimes because someone's behaviour is out of control, sometimes because decisions need to be made about where the children will live, and sometimes to get some support flowing. Interim applications are most often made to answer questions like these:

- Where will the children live most of the time?
- What time will each parent have with the children?
- Should child support be paid?
- Should spousal support be paid, and, if so, how much should be paid?
- Should only one spouse have the right to live in the family home?
- Should the property be frozen until it is divided by a final order or agreement?
- Is a protection order necessary?

Interim orders that are designed to govern how the parties will relate to each other often come in the form of restraining orders and protection orders. Restraining orders require someone to not do a specific thing, such as:

- not disposing of property,
- not racking up debt,
- not talking to the children about the issues in the court proceeding, or
- not going to a particular place.

Protection orders are designed for the protection of a family member, and also require someone to not do a specific thing, such as:

- not communicating with the family member,
- not going to a place where the family member goes to school or works,
- not possessing weapons, or
- not stalking or harassing the family member.

Other types of interim order deal with procedural matters that have to do with the administration and management of the court proceeding, rather than with the relationship between the parties and their children. These can be useful to:

- set deadlines for the exchange of financial documents, such as bank statements and tax returns, documents relating to the children like report cards and education assessments, or court documents like Financial Statements and Lists of Documents,
- force someone to submit to a medical or psychiatric examination,
- authorize the preparation of a needs of the child assessment or views of the child report, or
- fix dates for hearings like trial management conferences and settlement conferences.

Pretty much anything can be dealt with at an interim application, except for things that are final in nature, like an order for divorce or an order dividing the family property and family debt. The one thing all interim orders have in common is that they are only temporary and will expire the moment the case is settled or finishes at trial.

Making interim applications

The process of bringing or defending an interim application, whether you're in the Supreme Court or the Provincial Court, is a miniature version of the process for starting or defending a court proceeding and works more or less like this:

1. The person making the application, the *applicant*, prepares the formal court documents that start the application, and delivers those documents to the person who will be defending the application, the *application respondent* or the *respondent*.
2. The application respondent has a certain amount of time to reply to the application, and does so by preparing other formal court documents and delivering those to the applicant.
3. The applicant may prepare a reply to the application respondent's reply.
4. On the date of the hearing, the applicant argues why the order sought should be made, the application respondent argues why the order sought shouldn't be made, and the judge or master who hears the application makes a decision one way or the other (or, often, a bit of both ways).

The requirements, deadlines, and court forms for each of these steps are governed by the rules of the particular court you are in. The rules also set out how the application is set for hearing and heard, and the nature of the court's the authority to decide the issues before it. It is very important to understand how the rules about interim applicaitons work.

The Supreme Court

Interim applications are only brought after a court proceeding has started. The purpose of these applications is usually to provide a legal structure to the parties' relationship with each other and with their children. A typical interim application might be made to establish how the parties will share parental responsibilities or parenting time with the children, to arrange for the payment of spousal support or child support on an interim basis, or to freeze the family property, for example.

The main Supreme Court Family Rules ^[2] about the application process are:

- Rule 1-1: definitions
- Rule 5-1: financial disclosure
- Rule 6-2: ordinary service
- Rule 7-1: judicial case conferences
- Part 10: interim applications and chambers procedure
- Rule 10-2: where applications are heard
- Rule 10-3: chambers procedure
- Rule 10-4: affidavits
- Rule 10-6: normal application process
- Rule 10-9: urgent applications
- Rule 15-1: court orders
- Rule 16-1: costs
- Rule 21-2: time

For a summary of the application process, see *How Do I Make an Interim Application in a Family Law Matter in the Supreme Court?* in the *How Do I?* part of this resource. Links to and examples of the court forms used in the process can be found in *Supreme Court Forms & Examples*.

When to make an application

Generally speaking, interim applications are only brought after the respondent has had a chance to file his or her Response to Family Claim and a judicial case conference has been held. Applications can be brought earlier than this — sometimes on the same day that the court proceeding is started — when there is a very urgent problem that needs to be resolved immediately, as might be the case if a parent is threatening to leave the country with the children or torch the family home.

Rule 7-1(3) ^[2] of the Supreme Court Family Rules sets out the exceptions to the requirement that a JCC be held before any applications can be brought:

1. when an application is being made for an order restraining either or both parties from disposing of family assets,
2. when the order will be made with the agreement of both parties, or,
3. when the application is being made without notice being given to the other side (sometimes called an *ex parte application*).

If you must bring an application before the JCC but your application doesn't fit into one of the exceptions described in Rule 7-1(3), you must ask the court for permission to have your application heard before the JCC under Rule 7-1(4). To ask for permission, you must file a Requisition in Form F17 with a signed letter explaining why your application should be heard before the JCC. Once the first JCC has been held, interim applications can usually be made at any time.

This chapter discusses JCCs in more detail in the Case Conferences section.

Making an application

To start an interim application, you must prepare a Notice of Application and an affidavit in support of your application. Unless your application is being brought without notice to the other party, the *application respondent*, you must deliver these documents to the other party's address for service by ordinary service under Rule 6-2^[2]. You can do this by sending them to the application respondent's current address for service, which will usually be set out in his or her Notice of Family Claim or Response to Family Claim.

The Notice of Application and any supporting affidavits must be served on the application respondent at least eight business days before the date you have picked for the hearing of the application, except in cases of urgency or where the application is to be heard without notice to the application respondent. The timelines for interim applications are discussed in more detail below.

The Notice of Application

The Notice of Application describes:

1. the orders and declarations the applicant is asking for (also called the *relief* the applicant is asking for),
2. the facts supporting the application,
3. the legal grounds on which the application is made,
4. the affidavits or other evidence which the applicant relies on in support of the relief sought,
5. the amount of time the applicant thinks it will take for the application to be heard, and
6. the date picked by the applicant for the hearing of the application.

The form you must use is Form F31, which you can download in an editable format in Supreme Court Forms & Examples. The cost to file an application is \$80.00.

Supporting affidavits

An affidavit is a written summary of relevant facts and information, given under oath or affirmation.

The affidavits filed with the Notice of Application should describe the important facts that relate to the relief sought in the application. These affidavits may be brand new or they may have been prepared earlier for a previous application. The form you must use is Form F30, which you can download in an editable format in Supreme Court Forms & Examples.

The process for drafting affidavits and the rules about the content of affidavits are discussed in *How Do I Prepare an Affidavit?* It's located in the *How Do I?* part of this resource under *Affidavits*.

Replying to an application

You must reply to an interim application if you object to any of the orders the applicant is asking for. If you agree with all of the orders sought by the applicant, you don't need to do anything. For a summary of this process, see *How Do I Reply to an Interim Application in a Family Law Matter in the Supreme Court?* It's located in the *How Do I?* part of this resource, in the section *Interim Applications*.

To reply to an interim application, you must prepare a court form called an Application Response and an affidavit in support of your position. These documents must be filed in court and served on the applicant at least five business days after the date you were served with the application materials. The timelines for interim applications are discussed below in more detail.

You must serve your documents on the applicant by ordinary service. You can do this by sending them to the applicant's current address for service, which will usually be set out in his or her Notice of Family Claim or Response to Family

Claim. How to serve documents is discussed in *How Do I Personally Serve Someone with Legal Documents?* It's located in the *How Do I?* part of this resource under *Starting an Action*.

You may, at any time after being delivered with a Notice of Application, decide to file an application of your own for whatever interim orders you think are necessary. You can make this application, called a *cross-application*, by Notice of Application. Depending on the circumstances and the timing of the cross-application, the parties will often agree to have the two applications heard at the same time.

The Application Response

The Application Response describes:

- the orders sought by the applicant which the application respondent agrees to,
- the orders that the application respondent opposes,
- the orders to which the application respondent neither opposes nor consents (this is called *taking no position* on an order),
- the facts supporting the application respondent's position,
- the legal grounds on which any opposed orders are opposed,
- the affidavits or other evidence which the application respondent relies on in opposing the application, and
- the amount of time the application respondent thinks it will take for the application to be heard.

The form you must use is Form F32, which you can download in an editable format in *Supreme Court Forms & Examples*. There is no fee to file an application response.

Supporting affidavits

An affidavit is a written summary of relevant facts and information, given under oath or affirmation.

The affidavits filed with the Application Response should give evidence that helps to explain why the application is opposed. These affidavits may be brand new or they may have been prepared for a previous application. The form you must use is Form F30, which you can download in an editable format in *Supreme Court Forms & Examples*.

The process for drafting affidavits and the rules about the content of affidavits are discussed in *How Do I Prepare an Affidavit?* It's located in the *How Do I?* part of this resource under *Affidavits*.

Responding to the Application Response

The applicant may prepare an affidavit responding to the affidavits provided by the application respondent. This new affidavit must be limited to talking about new issues raised by the Application Response and supporting affidavits filed by the application respondent; it is not an opportunity to give facts or raise issues that ought to have been raised in the applicant's first affidavit.

The applicant must file any responding affidavits in court and serve them on the application respondent by 4:00pm on the day that is one full business day before the date set for the hearing. The filed affidavit must be served on the application respondent by ordinary service. The timelines for interim applications are discussed below in more detail.

Although the application respondent does not have a right to reply to a responding affidavit under the rules, you should not count on the court refusing to allow the application respondent to file and make arguments based on a new affidavit.

A short note about time estimates

Time estimates are very important in interim applications before the Supreme Court. The length of time an application will take to be heard determines the time when the application will be heard on the date of the hearing and how the hearing date is set.

An application that will take longer than two hours must be scheduled with the trial coordinator at the court registry, and a hearing date may not be available for several weeks. Applications that will take less than two hours are heard on a day picked by the applicant, although it's always best if the applicant picks the date in consultation with the application respondent.

Note that the shorter an application is, the more likely it is to be heard sooner rather than later on the day of hearing. There could be three applications set to be heard in chambers on a particular day or there could be 30. The court clerk will generally sort the applications in order of the time estimates, so that a five-minute application will be heard fairly quickly, while a ninety-minute application might not be heard until much later in the day.

The Application Record

The applicant must prepare the Application Record for the application. An Application Record contains documents relating to the application plus an index, in a bound format for the benefit of the judge or master who is hearing the application. When both parties have an application scheduled to be heard on the same day, they must cooperate and prepare a joint Application Record.

The applicant must file the Application Record plus an extra copy of the Notice of Application in court by 4:00pm on the day that is one full business day before the date set for the hearing. The extra Notice of Application should be marked to indicate which claims the applicant will be asking the court to hear. The applicant must serve a copy of the index of the Record on the application respondent by ordinary service by the same deadline. The timelines for interim applications are discussed below in more detail.

If you file your record after the deadline of 4:00pm on the day that is one business day before the hearing date, the registry will not put your application on the list for the hearing date. This can be a bit challenging, because I've seen some pretty long lineups at the registry counter at 3:45pm, and I suggest you give yourself plenty of time to file your Application Record and get to the registry early.

Under Rule 10-6(14)(a) ^[2], the materials in the Application Record need to be "securely bound," which usually means that they are assembled in a three-ring binder, although any other kind of secure binding will do, including running a couple of hex bolts through the left-hand margin. The contents of the Application Record are listed in Rule 10-6(14)(b) and should be sorted, separated by tabs, in the following order:

1. the index to the Application Record,
2. the Notice of Application (Tab 1),
3. the Response to Application (Tab 2), and
4. the affidavits both parties will rely on at the hearing, each separated by a tab (Tab 3, Tab 4 and so on).

(A "tab" is a piece of heavier paper with a little tab that sticks out on the right-hand side with a number written on them; these are sometimes called *tab dividers* or *index dividers* by stores like Staples and Office Depot. Legal supply stores sell tabs that are numbered from 1 to 200. Avery sells a "table of contents divider" that goes from 1 to 8; Sparco sells index dividers that go from 1 to 31.)

Following these documents, Application Records may also include things like written arguments and a draft of the order sought. Certain things may not be included in the Application Record, such as affidavits of service, copies of legislation and copies of cases.

Under Administrative Notice 7 ^[3], you are required to tape a cover page to the front cover of the binder with the names of the parties and the file number of the action. The cover page should state:

1. The court file number, court registry, and the names of the parties, the way these appear at the top of all other court documents.
2. The title of the document (usually just "Application Record").
3. The claimant's address for delivery, telephone number and fax number.
4. The respondent's address for delivery, telephone number and fax number.
5. The name of the party filing the Application Record, the place, date and time of the hearing, and the time estimate for the hearing.

The hearing

The chambers courtroom will open at 9:45am. Everyone who is going to be heard that day will line up to the front of the courtroom and sign in with the court clerk, identifying themselves by their names and their number on the court list. The court list will be posted somewhere outside the courtroom, and another copy is usually available in the courtroom. All the applications that are going to be heard that day are listed on this list, but in no particular order. Limited parts of the court lists are posted online for that day only on Court Services Online ^[4].

The judge or master will enter the courtroom at 10:00am and will expect to begin hearing applications right away — don't forget to stand when the judge or master enters the courtroom! The court clerk will call each application by its number on the court hearing list and by the last names of the parties involved.

When a case is called by the court clerk, the parties will walk up to the front of the court and identify themselves to the judge — for example, "I am Barbara Brown, and this is my application" or "I am Lucy Chiu, and I am responding to the application." A discussion of courtroom etiquette and protocol is available in the *How Do I?* part of this resource under *Courtroom Protocol*. You may wish to review *How Do I Conduct Myself in Court at an Application?*

The applicant will address the judge first, and present his or her case, explaining:

- what orders the applicant is asking the judge to make,
- why the judge can make the orders the applicant is asking for, and
- the facts that explain why the application has been made and why the judge should make the orders asked for.

The application respondent will then present his or her side of the case and explain:

- which orders the application respondent agrees to and might agree to on conditions,
- which orders the application respondent opposes, and
- the facts that explain why the judge shouldn't make the orders the applicant is asking for.

The applicant will then have a chance to briefly answer the application respondent's argument. The application respondent may have the opportunity to address the applicant's answer, but not every judge or master will permit this. As well, the judge or master may ask the applicant and application respondent questions during their presentations to clarify things.

After the judge or master has heard everyone's arguments, the judge or master will give his or decision. Sometimes the judge or master will ask the parties to come back later for the decision. This called a *reserved decision*.

After the hearing

It is usually the job of the applicant's lawyer to turn whatever the judge or master has decided into a written order. If the applicant doesn't have a lawyer, the lawyer for the application respondent will take care of it. If neither party has a lawyer, a court clerk will usually prepare and enter the order.

The registry staff will *enter* the order in the court's book of orders by checking the draft order prepared by the lawyer against the notes the court clerk made during the hearing. Assuming the registry approves of the form of the draft order and it matches the clerk's notes, the order will be signed and stamped by the registry and added to the book of orders.

It is important to know that although the entered, stamped order is the *official* order of the court, the order is binding on both parties from the moment the judge or master makes the order, and each party must start behaving according to the terms of the order right away, whether it takes a day or a month to enter the order.

Timelines

The rules about the timelines for chambers applications can be complicated, and may change depending on whether the application is for an interim order, a final order, or an order changing a final order.

Making an application

The applicant must file and serve the Notice of Application and supporting materials:

- For interim applications, within *eight business days* of the date picked for the hearing.
- For summary trial applications, within *12 business days* of the hearing.
- For applications to change a final order, within *21 business days* of the hearing.

Replying to an application

The application respondent must file and serve the Application Response and supporting materials:

- For interim applications, within *five business days* of being served with the Notice of Application.
- For summary trial applications, within *eight business days* of being served.
- For applications to change a final order, within *14 business days* of being served.

Responding to an application response

The applicant must file and serve any new supporting materials, usually limited to new affidavits:

- By 4:00pm on the business day that is one full business day before the hearing date.

Application records

The applicant must file the Application Record in court, along with an extra copy of the Notice of Application, and deliver a copy of the index to the Application Record on the application respondent:

- By 4:00pm on the business day that is one full business day before the hearing date.

Sample timelines

In this sample timeline for an ordinary interim application, the hearing is on Thursday the week after the Monday on which the application materials were filed and served. This sample shows the minimum timelines required by Rule 10-6^[2] of the Supreme Court Family Rules; nothing stops you from agreeing to a more generous set of due dates.

| Monday | Tuesday | Wednesday | Thursday | Friday |
|---|--|--|--|---|
| Applicant files and serves application materials on the application respondent. | <i>First business day after service.</i> | <i>Second business day after service.</i> | <i>Third business day after service.</i> | <i>Fourth business day after service.</i> |
| <i>Fifth business day after service.</i> Application respondent files and serves reply materials. | <i>Sixth business day after service.</i> | <i>Seventh business day after service.</i> Applicant files and serves responding affidavits, files Application Record and serves Application Record index by 4:00pm. | <i>Eighth business day after service.</i> <i>One business day before the date of the hearing.</i> | DAY OF HEARING |

In this example, the application respondent's materials are due on Monday on the second week, one week after the date of service, and the applicant must file and serve any responding affidavits, file the Application Record and serve the Application Record index on the application respondent by 4:00pm the next Wednesday. The hearing is on Friday in the second week.

This next sample timeline shows what happens when there's a holiday between the date the applicant serves the interim application materials and the date of the hearing; all of the steps after the holiday get bumped back by one day.

| Monday | Tuesday | Wednesday | Thursday | Friday |
|--|---|---|--|--|
| Applicant files and serves application materials on the application respondent. | <i>First business day after service.</i> | <i>Second business day after service.</i> | <i>Third business day after service.</i> | <i>Fourth business day after service.</i> |
| HOLIDAY. | <i>Fifth business day after service.</i> Application respondent files and serves reply materials. | <i>Sixth business day after service.</i> | <i>Seventh business day after service.</i> Applicant files and serves responding affidavits, files Application Record and serves Application Record index by 4:00pm. | <i>Eighth business day after service.</i> <i>One business day before the date of the hearing.</i> |
| DAY OF HEARING. | | | | |

A short note about courtesy

The Supreme Court Family Rules ^[2] allow an applicant to simply set the hearing date without consulting the application respondent. Although this gives the applicant the right to pick a date unilaterally, it's usually better for everyone if the hearing date can be agreed upon by both parties. If the date you've picked isn't good for the application respondent, you can expect the application respondent to show up on the hearing date and ask the court for a delay your application, called an *adjournment*.

If the application respondent is successful in getting the adjournment, which will usually be the case if you've been unreasonable or the application respondent has a genuinely good reason for needing the adjournment, you'll have wasted all the time and anxiety you spent preparing for the application, only to have to take another day off work and do it all again some other day.

It can be tough to call your ex (or his or her lawyer) to negotiate a hearing date, especially since you're likely fairly annoyed at having to make your application in the first place. However, if the subject of the application is important enough for you to pay the fee and jump through all the hoops, it's got to be important enough that you'll want to avoid delays and adjournment applications. If you can make the call, try to reach an agreement on:

- the date when you'll have the application materials to the application respondent,

- the date when the application respondent will get his or her reply materials to you, and
- the date of the hearing.

The Provincial Family Court

Interim applications are brought only after a court proceeding has been started. The person bringing the application, the *applicant*, must file a Notice of Motion in court, and then serve a court-stamped copy of the Notice of Motion to the *respondent*, the person against whom the application has been brought. The respondent is not required to file anything in reply to the application.

Most often, applications in the Provincial Court are based on oral evidence, evidence giving by witnesses who have sworn or affirmed that they will tell the truth, rather than affidavits. Although the exchange of affidavits is not a mandatory part of the process, many judges appreciate the convenience of having the evidence written out in affidavits.

The principle Provincial Court Family Rules ^[5] that relate to Notices of Motion and the application process are:

- Rule 1: definitions
- Rule 5: court procedures for courthouses that are designated as "family justice registries"
- Rule 12: interim applications
- Rule 13: affidavits
- Rule 18: orders
- Rule 20: general rules about court procedures
- Rule 21: parenting after separation program

For a summary of the process, see [How Do I Make an Interim Application in a Family Law Matter in the Provincial Court?](#)

When an application can be brought

Generally speaking, interim applications are only brought after the respondent has had a chance to file his or her Reply to the applicant's Application to Obtain an Order, but they can be brought earlier, sometimes on the same day that the action is started, when there is a very urgent problem that needs to be resolved immediately, as might be the case if the respondent was threatening to leave the country with the children.

The precise rules about when an application can be brought depend on whether or not the registry your court proceeding is in is a registry subject to the Parenting After Separation program ^[6] under Rule 21 and, if so, whether it is also a family justice registry subject to Rule 5. The court clerk will tell you whether or not your registry is a designated registry for the Parenting After Separation program and whether it is also a family justice registry.

Family justice registries

Rule 5 of the Provincial Court Family Rules ^[5] applies to those registries of the Provincial Court that have been designated as family justice registries. Under this rule, the parties to a court proceeding are required to jump through a number of hoops before they can first appear in court:

1. Rule 5(3) requires the court clerk to refer the parties to a family justice counsellor before the clerk can schedule the parties' first appearance in court.
2. Rule 5(4) requires the parties to each meet separately with a family justice counsellor, who may refer the parties to other services or may try to mediate a resolution to the parties' dispute.
3. Rule 5(6) says that the parties to a court proceeding cannot meet with a judge until they have met with a family justice counsellor.

4. Rule 5(8) says that if a party is asking for a protection order or "urgent and exceptional circumstances exist," the court may exempt the party from all or part of the rule.

Registries designated as family justice registries must also apply Rule 21, the Parenting After Separation rule, where a court proceeding involves orders about the care of children or child support. Rule 21 sets out a few more hoops to jump through, but the Parenting After Separation program^[6] is a very useful program that you should consider taking whether you're at a registry subject to Rule 21 or not. Here are the highlights of Rule 21:

- Rule 21(8) says that the registry cannot set a first appearance until one or both parties have filed a certificate of attendance at a Parenting After Separation program.
- Rule 21(9) says that both parties must attend the program and file a certificate of attendance before the registry can set a first appearance.
- Rules 21(4) and (5) set out some exceptions to the rule if there is a consent order, if the program isn't offered in their community, if the party doesn't speak the language the program is offered in, or if the party has completed the program in the last two years.
- Rule 21(7) allows the court to exempt someone from completing the program where urgent circumstances exist.

Rules 5 and 21 have been applied very strictly in the registries to which they apply, which has led to some fairly unusual results, such as parents who have been separated for many years being required to take the Parenting After Separation program and other parents being required to take the program three or four times. However, most parents, once they have complied with Rules 5 and 21, can follow the standard rules for bringing on interim applications, described below.

Family case conferences

Family case conferences are similar in many ways to the judicial case conferences common in the Supreme Court. The big difference between the two is that it's not mandatory that an FCC be held before an interim application can be brought. You needn't wait for your FCC before you bring on an interim application unless a judge tells you that you must.

This chapter discusses both FCCs and JCCs in the Case Conferences section.

Making an application

To make an interim application, the applicant must file four copies of the Notice of Motion in the court registry. The form is simple to complete and has check boxes that can simply be ticked off to indicate the sort of order that you want the court to make.

The registry will stamp all of the copies and keep the top sheet. You must then serve the respondent with his or her copy at least *seven days* before the date the application is set to be heard. The hearing date will usually be fixed according to the court's calendar, as most Provincial Court registries have certain days set aside for hearing interim applications in family law cases.

The form you must use is Form 16, which comes from the courthouse printed in quadruplicate or can be downloaded in an editable format in Provincial Court Forms & Examples. There is no charge to file a Notice of Motion.

Defending an application

If you have been served with a Notice of Motion, you may answer the application with a Reply in Form 3 if you wish. The Provincial Court does not have a specific form for responding to Notices of Motion, nor do the rules have any particular provision about how Notices of Motion are to be addressed. Most registries will accept a Form 3 Reply, even though that form is the form usually used for responding to Applications to Obtain an Order rather than to Notices of Motion. There are no rules about when the applicant be served with a response.

For a summary of the process, see *How Do I Reply to an Interim Application in a Family Law Matter in the Provincial Court?* It is located in the *How Do I?* part of this resource, under *Interim Applications*.

The hearing

On the date set for hearing, show up at court at the appointed time. It's especially important for the respondent to attend court because of Rule 12(4), which says that if a respondent doesn't come to court on the date set for the hearing of an interim application, the court may hear the application in the respondent's absence and make the order requested by the applicant.

Let the court clerk know which matter you are involved with and what your name is. When your case is called by the clerk, walk up and stand to either side of the centre podium. The judge will ask you to identify yourself and will ask the applicant what his or her application is all about.

The applicant will make his or her case, and will have the opportunity to call evidence. Most evidence is given orally, on oath or affirmation, rather than in affidavit format. Affidavits can be used, but for some reason this is rarely the case. Most judges would prefer to have an affidavit, and if you can prepare one, you should. The respondent will have a chance to challenge the applicant's witnesses and cross-examine them, or may make an affidavit in reply to the applicant's affidavit.

Once the applicant's case is done, the respondent may present his or her own case, and call witnesses to give evidence just the way the applicant did. Likewise, the applicant will be able to cross-examine the respondent's witnesses.

After the evidence from both sides has been given, the applicant will have the opportunity to summarize his or her case and argue why the judge should make the order asked for. The respondent will be able to reply to the applicant's argument, after which the applicant may have the opportunity to make a reply to the respondent's reply.

Once everyone is done, the judge will give his or her judgment on the application. The judge may give his or her decision right away, or the judge may need to think about things for awhile. This is called a *reserved judgment*, and the judge will usually give his or her decision in a written form later.

Remember to stand whenever the judge speaks to you, if you can stand. A discussion of courtroom etiquette and protocol is available in the *How Do I?* part of this resource under *Courtroom Protocol*. You may wish to review *How Do I Conduct Myself in Court at an Application?*

After the hearing

If the parties to the hearing were represented by lawyers, the applicant's lawyer will usually draft an order based on the judge's decision. If there were no lawyers present, the court clerk will draft the order.

While it is usual for there to be a delay between the making of an order and the formal entry of the order, remember that the judge's order is binding on you from the moment it leaves the judge's lips, whether you have a paper copy of the order or not.

Common interim applications

The following discussion reviews the basic facts that will usually need to be proven for some of the most interim applications in family law court proceedings. This is only a rough guide; the particular facts that are important will change from case to case.

Care of children

Important factors

When making the first application about custody and access under the *Divorce Act*, or about parenting arrangements and contact under the *Family Law Act*, important facts will usually include:

- the children's names, birth dates and ages,
- where the children go to school and what grade they're in,
- any important health or educational concerns,
- the occupation of each parent,
- each parent's usual work schedule,
- how the parents shared the parenting of the children while they were together,
- who was responsible for arranging things like visits to the doctor and dentist,
- who was responsible for looking after school issues, like parent-teacher meetings and making sure homework was done,
- how the parents have shared the parenting of the children since they separated,
- the quality of the parents' ability to talk to each other and cooperatively make decisions about the children after separation, and
- a description of any actual problems with a parent's capacity to care for the children.

Changing orders and agreements about the care of children

If the application is to change an *order* about the care of the children, the important facts will also include the facts that address the legal test that must be met to change an order:

- what is the change in the child's needs or circumstances since the original order was made, and
- how has this change affected the best interests of the children?

Other important facts might include:

- how the original order has worked out,
- if the parents followed the terms of the order, and
- if the order met the children's needs and if not, why not.

If the application is to set aside an *agreement* about the care of the children, important facts will include the facts that address the legal test that must be met to set aside an agreement:

- why the agreement is not or is no longer in the best interests of the children.

Other important facts might include:

- how the agreement has worked out,
- if the parents followed the terms of the agreement, and
- if the agreement met the children's needs and if not, why not.

Child support

Important factors

The important facts that go into most applications for child support are:

- the children's names, birth dates and ages,
- how the children's time is divided between the parents,
- whether some or all of the children are stepchildren to the person who is to pay child support,
- whether some or all of the children are receiving child support from another parent,
- the nature of each parent's employment, and
- each parent's income from their employment and any other source.

Basic financial information

Applications about child support typically require that each parent cough up certain documents in order to establish his or her income, in addition to a sworn Financial Statement. The most common of these documents for people who are *employees* are:

- the last three years of personal income tax returns,
- all notices of assessment or reassessment received in relation to the last three tax years, and
- a recent paystub showing earnings-to-day or a letter from the employer confirming the terms of a party's income.

People who have income from *EI*, *WCB*, *CPP*, or *social assistance*, will also have to produce their three most recent statements or cheque stubs from their payments.

People who are *self-employed* in an unincorporated business will also have to produce:

- statements of professional or business income,
- a statement showing a breakdown of all payments to non-arm's-length parties like relatives, children, or new spouses, and
- balance sheets, if available.

People who are *self-employed* by an incorporated business will also have to produce:

- corporate financial statements for the three most recent fiscal years,
- corporate tax returns for the three most recent fiscal years, and
- a statement showing a breakdown of all payments to non-arm's-length parties like relatives, children, or spouses.

Changing child support orders and agreements

If the application is to change an *order* about the child support, important facts will include the facts which address the threshold legal tests:

1. has there been a change that would cause a different amount of support to be paid under the Child Support Guidelines, usually a change in someone's income,
2. has there been a change in the needs and circumstances of the child,
3. whether you have discovered new evidence about income or a person's ability to earn income since the last hearing, or
4. whether you have discovered proof that someone's financial disclosure was incorrect or inadequate at the last hearing.

Other important facts usually include:

- each party's present income,
- the child's continuing entitlement to receive child support, and

- updated information concerning any special expenses.

If the application is to set aside an *agreement* about the child support, important facts will include the facts which address the threshold legal test:

- what amount of support should be court order, and
- why should the court make a different order than what was agreed to?

Spousal support

Important factors

When making the first application for spousal support, the important facts will include:

- the date the parties began to live together and the date they married,
- the date of separation,
- the parties' ages, including the proposed recipient's age at the date of separation,
- each party's present health,
- any factors limiting a party's ability to obtain employment,
- the parties' present employment circumstances,
- the parties' employment history during marriage, including any periods of unemployment,
- each party's present income and the sources of that income,
- a description of the each party's living expenses after separation,
- any career sacrifices made during the relationship,
- the parties' education and training history, prior to and during the marriage,
- a description of any education and training taken after separation, especially any education geared to finding employment,
- the ages and school status of the children at the date of separation, and
- the arrangements that have been made for the care and control of any children.

Basic financial information

All applications about spousal support typically require that each spouse cough up certain documents to prove his or her income, in addition to a sworn Financial Statement. The most common of these documents for people who are *employees* are:

- the last three years of personal income tax returns,
- all notices of assessment or reassessment received in relation to the last three tax years, and
- a recent paystub showing earnings-to-day or a letter from the employer confirming the terms of a party's income.

People who have income from *EI*, *WCB*, *CPP*, or *social assistance*, will also have to produce their three most recent statements or cheque stubs from their payments.

People who are *self-employed* in an unincorporated business will also have to produce:

- statements of professional or business income,
- a statement showing a breakdown of all payments to non-arm's-length parties like relatives, children, or new spouses, and
- balance sheets, if available.

People who are *self-employed* by an incorporated business will also have to produce:

- corporate financial statements for the three most recent fiscal years,

- corporate tax returns for the three most recent fiscal years, and
- a statement showing a breakdown of all payments to non-arm's-length parties like relatives, children, or spouses.

Changing spousal support orders or agreements

If the application is to change an *order* about spousal support, important facts will include the facts necessary to address the threshold legal tests to change an order:

1. has there been a change in the means or needs of either spouse since the last order was made,
2. whether you have discovered new evidence about income or a person's ability to earn income since the last hearing, or
3. whether you have discovered proof that someone's financial disclosure was incorrect or inadequate at the last hearing.

Other important facts usually include:

- each party's present income,
- each party's income at the time of the most last order,
- the steps the recipient has taken to become financially self-sufficient,
- education or training taken by the recipient since the order was made,
- any employment taken by the recipient since the order or agreement was made,
- any changes in the employment circumstances of the payor,
- whether the recipient has remarried or is in a new unmarried spousal relationship, and
- whether the payor has acquired new family support obligations since the order was made.

If the application is to set aside an *agreement* about spousal support, important facts will include the facts necessary to address the two threshold legal tests to set aside an agreement. Under the first test, you could include facts that might show that there were problems when the agreement was negotiated:

- a party failed to disclose relevant income, property or debt,
- one party took advantage of the other party's vulnerability or ignorance,
- a party didn't understand the nature of the agreement,
- the agreement is unconscionable, or
- a party did not sign the agreement voluntarily.

Under the second test, which you might use if you cannot show that there were problems when the agreement was negotiated, you could include facts that show the agreement is *significantly unfair* and talk about:

- how long it has been since the agreement was signed,
- any changes in the needs or circumstances of either party,
- the parties' intention to have a final deal when the agreement was signed,
- how important the agreement was to each party in planning their lives and arranging their affairs, and
- how closely the agreement meets the objectives that the court considers when it makes an order for spousal support.

Protection orders and restraining orders

The court can make a variety of orders where someone is in need of protection, depending on what the circumstances are and which order makes the most sense. More information about these orders can be found in the section Family Violence in the chapter Other Family Law Issues.

The court can also make orders designed to protect assets from being sold, hidden, or used as collateral for a loan. More information about these orders can be found in the section Protecting Property & Debt in the chapter Property & Debt.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Provincial Court Act* ^[7]
- Provincial Court Family Rules ^[5]
- *Supreme Court Act* ^[8]
- Supreme Court Family Rules ^[9]
- *Court Rules Act* ^[10]

Resources

- Provincial Court Practice Directions ^[11]
- Supreme Court Family Practice Directions ^[12]
- Supreme Court Administrative Notices ^[3]
- Supreme Court Trial Scheduling ^[13]
- Court Chambers Lists Website ^[4]

Links

- Provincial Court website ^[14]
- Supreme Court website ^[15]
- Justice Education Society: Court tips for parents representing themselves (video) ^[16]
- Legal Services Society Family Law in BC Website: How to get an interim family order when parties don't agree (Supreme Court) ^[17]
- Legal Services Society Family Law in BC Website: How to get an interim family order when parties agree (Supreme Court) ^[18]
- Supreme Court Information Packages ^[19]
- Supreme Court: Chambers Application Package (Word DOC) ^[20]
- Parenting After Separation Program ^[6]
- Legal Services Society Family Law in BC Website: How to fill in a Financial Statement (Supreme Court) ^[21]
- Legal Services Society Family Law in BC Website: How to fill in a Financial Statement (Provincial Court) ^[22]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

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Enforcing Orders in Family Matters

Having an order in a family law court proceeding is one thing; whether or not the terms of that order are followed is another. Although most people are prepared to follow the court orders they are bound by, when someone fails to honour his or her obligations, steps must be taken to secure compliance and enforce the order.

The section provides a brief comment on the enforcement of orders generally, and discusses the enforcement of orders for spousal and child support, including the role of the Family Maintenance Enforcement Program (FMEP), and the enforcement of orders for parenting time and contact. This section also looks at contempt of court applications.

Some preliminary comments

You sometimes hear people complaining about how the court didn't help them do this or that, or how the court failed to protect their children or their car or their chihuahua. A popular misunderstanding about the court system is that it monitors and enforces its own decisions. It doesn't. That's up to you.

In a very narrow sense, the job of the court is to hear the court proceedings brought before it and to make decisions about what is fair and appropriate in the circumstances of each proceeding. The person who begins the court proceeding, the *claimant*, is responsible for managing his or her case and ultimately convincing the judge why the orders he or she is asking for are fair and appropriate. The person against whom the proceeding is brought, the *respondent*, is responsible to defending him- or herself and explaining why the orders the claimant wants are unfair and inappropriate. The job of the judge is to manage the trial, listen to the parties and their evidence, and then decide what a fair and appropriate result is.

The judge's decision is a *court order*. It is binding on the parties and they risk being held in contempt of court if they do something different than what the order requires.

Once the decision is made, the judge's job is over and it is each party's responsibility to see to it that the order is followed. The court is not responsible for supervising its own orders and monitoring people to make sure that they're obeying each term of every order it makes. If the respondent notices that the claimant isn't living up to a term of an order, the respondent is responsible for enforcing the order, whether the steps taken to enforce the order include asking the court to find the claimant in contempt, garnishing the claimant's wages, or something else altogether. The claimant has the same rights against the respondent.

It is not the court's job to enforce its orders, it's *yours*. It's up to you to do something about it when someone fails to live up to an order.

The Supreme Court has the power to punish for *contempt of court*, disobedience of its orders or directions, and this is one way you can seek to have your order enforced. Once you bring an application to court for a finding that the person breaching the order be "found in contempt," the court can punish that person by a fine, by jail time, by both a fine and some time in jail, or by something more creative. Again, it is your responsibility to make this application; the court won't do it for you.

Both the Supreme Court and the Provincial Court have the ability to enforce orders under laws like the *Family Law Act*, the *Family Maintenance Enforcement Act* ^[1] and the *Court Order Enforcement Act* ^[2]. Enforcement under these laws requires making an application to court. This too is your responsibility.

It is true that the court system can be complex and challenging. That isn't an excuse for you not to take the steps that are required to enforce an order, and it doesn't give anyone an excuse to complain that the system didn't help them out. If you are finding it difficult to enforce an order, you should seriously consider hiring a lawyer to handle the matter for you, get some legal advice from a legal clinic or apply to a group like Access Pro Bono ^[3] to see if they can introduce you to a lawyer who may be able to handle your case for free.

Enforcing orders for child support and spousal support

When a person obliged to pay child support or spousal support, the *payor*, stops making those payments, a debt begins to accumulate in favour of the person entitled to the payments, the *recipient*. This debt is known as the payor's *arrears of support*.

Orders made under the federal *Divorce Act* can be enforced in British Columbia and in any other province. They may also be enforceable outside of Canada, depending on whether the place in which the order is to be enforced has an agreement with the federal government about the mutual enforcement of support orders.

Orders made under the provincial *Family Law Act* can be enforced in British Columbia, as well as in other provinces and territories when the orders are filed in the courts of those provinces and territories. They may also be enforceable outside of Canada, depending on whether the place in which the order is to be enforced is a "reciprocating jurisdiction" under the provincial *Interjurisdictional Support Orders Act* ^[4].

The website of the Department of Justice has a helpful overview of support enforcement mechanisms ^[5] in Canada.

The Family Maintenance Enforcement Program

The Family Maintenance Enforcement Program ^[6] (FMEP) is a government service operated by a private company under provincial legislation, the *Family Maintenance Enforcement Act*. FMEP will monitor payments as they are made (or not made), and calculate the interest accumulating on any arrears. FMEP is a free service.

Clicklaw's HelpMap ^[7] has contact information for FMEP.

Recipients of support

FMEP will enforce the provisions of support orders that are registered with the program. FMEP can take all the steps a private creditor can to collect on any outstanding arrears and will supervise monthly payments. There is no cost to register with FMEP and you do not need to hire a lawyer to have FMEP get to work on your behalf.

FMEP has extremely long arms, and the steps it can take to compel payment are substantial, including:

- the diversion of federal payments to the payor (like tax refunds and CPP benefits),
- the garnishment of wages,
- preventing a payor from renewing his or her driver's licence,
- seizing a payor's passport and federal licences like pilots' licences,
- putting a lien on property owned by the payor, and
- arranging for the payor's arrest.

For the payee, FMEP is a free service. While FMEP may not be as quick as a lawyer to collect on arrears or compel regular payment, I recommend its services.

If you choose to enroll with FMEP, you might want to stop any efforts you have made to collect from the payor, as your actions may conflict or interfere with steps being taken by FMEP and frustrate their process. As well, you'll need the permission of the Director of FMEP if you want to take any independent steps to collect support on your own.

Payors of support

People usually assume that when FMEP is involved it is the payor who is delinquent rather than the recipient. It can sometimes happen, usually as part of a larger dispute, that a recipient will refuse to accept the payor's support payments. If a payor simply throws up his or her hands and says "fine, I'll keep the money," the payor can find him- or herself seriously disadvantaged if the larger problem ever goes to a hearing, plus the payor may have to pay the money the recipient refused to accept!

Payors who find themselves in such a situation can enroll in FMEP, just the way that recipients do. FMEP will accept the payor's payments and attempt to forward them to the recipient. If the recipient still refuses to accept the payments, FMEP will keep the payments on behalf of the recipient as well as a record of the payments made. This will protect the payor's interests at the hearing of the larger problem, if there ever is one, and will save the payor from falling into arrears.

There is a serious potential downside for payors who enroll in FMEP. Once you have enrolled, you can't escape the program without the consent of the recipient. In other words, once you've enrolled you may very well find yourself stuck there until your support obligation ends.

Collecting without the help of FMEP

Recipients can take steps to enforce orders and family agreements without FMEP's involvement. Such actions can include:

- forcing the payor to produce financial statements, income tax returns and other financial information,
- getting an order to compel the disclosure of the payor's employer, assets and sources of income,
- getting an order to garnish the payor's wages or bank accounts, and
- summoning the payor to a special hearing for an order for the payment of the arrears and the terms on which the arrears will be paid.

Collecting in the Supreme Court

Other ways of obtaining financial information and compelling payment are available under the Supreme Court Family Rules ^[8] and under the provincial *Court Order Enforcement Act*. These remedies include the garnishment of wages, forcing the sale of property, and commencing proceedings against the payor for contempt of court, among other things.

These are the important parts of the Supreme Court Family Rules dealing the collection of arrears:

- Rule 15-4: Writ of Execution
- Rule 15-6: subpoenas to debtors
- Rule 15-8: sales by the court
- Rule 15-7: examination in aid of execution
- Rule 21-7: contempt of court

A Writ of Execution can also be issued by a recipient under Part 5 of the *Court Order Enforcement Act* ^[2]. Section 3 of that act also allows for the attachment of wages.

Collecting in the Supreme Court and the Provincial Court

Other ways of compelling payment are available under the *Family Maintenance Enforcement Act* and the *Family Law Act* in both the Supreme Court and the Provincial Court.

Under the *Family Maintenance Enforcement Act*, a recipient can take steps like requiring the payor to file a statement of finances, enforcing against a company owned by the payor, applying to garnish the payor's wages, and requiring the payor to attend a default hearing. Remember, though, that if you are registered with FMEP, only FMEP may enforce the order. You must either withdraw from FMEP or get permission from FMEP to make your own efforts to enforce.

Orders for child support and spousal support can also be enforced under the general and extraordinary enforcement provisions of the *Family Law Act*. Under s. 230, the court may require a payor to:

1. post security,
2. pay the recipient's expenses incurred as a result of the payor's actions, or
3. pay up to \$5,000 to the recipient as a fine.

Under s. 231 of the act, the court may jail a payor in breach of an order if no other order will secure the payor's compliance. Going to jail will not cancel any arrears that are still owing.

Enforcing orders about the care of children

Enforcing orders about the care of children can be just as difficult as enforcing orders about support. Orders about the care of children can be enforced under the *Family Law Act*, the *Criminal Code* ^[9], the Supreme Court Family Rules ^[8], and, in certain circumstances involving people located outside of Canada, the Hague Convention on the Civil Aspects of International Child Abduction ^[10].

Orders about custody and access made here under the *Divorce Act* can be registered and enforced anywhere in Canada.

Orders about guardianship, parenting arrangements, and contact made here under the *Family Law Act* can be registered and enforced anywhere in Canada. Orders made outside of British Columbia can be enforced by the courts here under Part 4 Division 7 of the *Family Law Act*. Once an order made outside the province is recognized by our court it is enforceable as if our court had made the order.

Alternatives to enforcement

Before you do anything else, it's possible that you may not need to jump through all the hoops necessary to enforce your order at all. Enormous problems can be caused just from how an order is written. If this is the case for you, it may be easier and less conflictual to try to correct the order instead!

If your order says only that you will have "reasonable and generous parenting time," or otherwise fails to specify the terms of your parenting time or contact with the child, you may be able to clear up the problem by applying to court to specify the terms of parenting time or contact. It is too easy for someone to avoid allowing parenting time or contact that is "reasonable and generous" simply by saying "well, it isn't convenient for me," or "the children are busy this weekend." Your first recourse should be to ask the court for a precise schedule for your parenting time or contact — including weekends, holidays, evenings during the workweek, or whatever else you'd like.

Even an order that says that you will have "parenting time every other weekend" can be difficult. When does the weekend start, Saturday or Friday? If it's Friday, when on Friday? After school? After work? At 6:00pm? Who's doing the picking up and dropping off? What if you're sick? What if the child is sick? What if you're going to be late? What if the Friday is a holiday?

If a vague schedule isn't working, the best thing to do is to ask the court to clarify and specify the schedule. This often solves the problem without having to get everyone's back up with an enforcement application.

Divorce Act orders

Orders for custody and access made under the federal *Divorce Act* are enforced under provincial laws. However, they can't be enforced under the *Court Order Enforcement Act* because that act deals with orders about money and property, and they can't be enforced under the *Family Law Act* because that act only allows for the enforcement of its own orders and foreign orders about the care of children.

These are your options:

- Section 292 of the *Criminal Code* ^[9] makes interference with a parent's right to custody under a court order a criminal offence. You could complain to the police.
- You could apply in the Supreme Court for an order that the person who is breaching the order be found in contempt of court.

Rule 21-7 of the Supreme Court Family Rules ^[8] outlines the procedure for contempt of court applications. A person found to be in contempt can be punished by a fine, by jail time, by both a fine and some time in jail, or by something else. Contempt applications can be complicated and are discussed in more detail below.

Family Law Act orders and foreign orders

Under the *Family Law Act*, the court can make orders allocating parenting time among guardians or giving someone who isn't a guardian rights of contact with a child. Foreign orders that are similar to orders for parenting time or contact can be filed in court and, upon being recognized under s. 75 of the act, may be enforced in the same way as orders made in British Columbia.

Orders for parenting time and contact are enforced under Part 4 Division 5 of the act. Under these provisions, someone who has been wrongfully denied parenting time or contact may apply to the court and, under s. 61, the court may:

- (a) require the parties to participate in family dispute resolution;
- (b) require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs;
- (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
- (d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;
- (e) require that the transfer of the child from one party to another be supervised by another person named in the order;
- (f) if the court is satisfied that the guardian may not comply with an order made under this section, order that guardian to
 - (i) give security in any form the court directs, or
 - (ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (g) require the guardian to pay
 - (i) an amount not exceeding \$5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or
 - (ii) a fine not exceeding \$5 000.

However, the denial must have happened within the last year, and the denial must be *wrongful*. Under s. 62, denial is not wrongful in the following circumstances:

- (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;

(d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;

(e) the applicant

(i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and

(ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;

(f) other circumstances the court considers to be sufficient justification for the denial.

Even if the court decides that the denial was not wrongful, the court may still make an order for make-up time.

Under s. 63, the court can also enforce orders for parenting time and contact where the person entitled to parenting time or contact fails to follow the order. In cases like this, the court may:

1. order that the parties attend family dispute resolution,
2. order that one or more parties or a child attend counselling,
3. require that the transfer of the child be supervised,
4. order that any expenses incurred as a result of the failure be reimbursed,
5. require the person to report to the court, or
6. require the person to post security.

Under the act's extraordinary enforcement provisions, when things have gotten really bad the court may enforce orders for parenting time and contact by:

1. jailing the person for up to 30 days;
2. requiring the police to take the child to the person who is entitled to parenting time and contact; or,
3. when a person with contact refuses to return the child, requiring the police to return the child to the child's guardian.

The Hague Convention

The *Hague Convention on the Civil Aspects of International Child Abduction* ^[10] can be used to deal with cases of international child abduction. The Convention is an international treaty that requires foreign governments who have signed the Convention to take certain steps to return the child to the person who is entitled to the care of the child when there is "a grave risk of physical or psychological harm" to the child and there is an order in place governing which parent should have the child.

The *Hague Convention* only applies between states that have signed the Convention. As of April 2013, the countries that have agreed to enforce custody orders with Canada are:

Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, People's Republic of, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Korea, Republic of, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern

Ireland, United States of America, Uruguay and Venezuela.

As of 1 February 2010, the signatory countries who have not agreed to enforce custody orders with Canada, but will enforce custody orders with other countries (shame on them), are:

Guatemala, Nicaragua and Thailand.

Countries not listed above have elected not to participate in the convention. For more information and the current standing of signatory nations, check out the website of the Hague Conference on Private International Law ^[11], which reports on the status of the various Hague Conventions.

Contempt of court

If the other party persistently refuses to live up to his or her obligations under a court order, you may have no choice but to make an application to court for a finding that the other party is in contempt of court. Contempt of court is punishable by a fine, jail time, both a fine and jail time, or by something else altogether, like community service. Both the Supreme Court and the Provincial Court have certain powers to punish someone for breaching their orders under the legislation, as was discussed above, but only the Supreme Court has the power to punish for contempt. Unlike the Provincial Court, the Supreme Court has something called *inherent jurisdiction*, meaning that the scope of its authority is limited only by our Constitution and the rules of the common law. As a result, the court can punish a party for contempt of court without being confined to the provisions of any particular statute.

The rule governing contempt applications is Rule 21-7 of the Supreme Court Family Rules ^[8]. You can bring an application for a contempt finding under the normal rules governing interim applications. The only difference is that you must personally serve the other person with your Notice of Application and affidavit for the contempt application; you can't simply mail or fax it to his or her address for service. You will need to show the court:

1. the terms of the order you say was breached,
2. how the order was breached,
3. that the other party intended to breach the order, and
4. the harm resulting from the breach.

Because the consequences of a finding of contempt can include jail, the court will be very particular about how the application is prepared and presented. You may want to consider consulting with a lawyer about process and procedure, and the legal test to prove contempt, before you start working on your materials.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Supreme Court Family Rules ^[8]
- Provincial Court Family Rules ^[12]
- *Family Maintenance Enforcement Act* ^[1]
- *Court Order Enforcement Act* ^[2]
- *Interjurisdictional Support Orders Act* ^[4]
- *Criminal Code* ^[9]

Links

- Department of Justice: Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement ^[5]
- Family Maintenance Enforcement Program website ^[6]
- Clicklaw HelpMap: Family Maintenance Enforcement Program details ^[7]
- Hague Conference on Private International Law ^[11]
- Ministry of Justice Website on International Child Abduction ^[13]
- Department of Justice: About support enforcement ^[14]
- Canadian Bar Association BC Branch: Script on enforcing orders and agreements for support ^[15]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Changing Final Orders in Family Matters

Unless you're talking about property and debt or divorce, there really is no such thing as an absolutely final order in court proceedings about family law matters. Children grow up, adults take new jobs and start new relationships, and the obligations involved in leaving a relationship don't end with the final order. As time passes, final orders often need to be updated as circumstances change.

Changing an order is called *varying* an order. In general, orders made under the federal *Divorce Act* and the provincial *Family Law Act* may be varied if there has been a change in circumstances since the order was made. Of course the change has to be an important change, and varying the order needs to be the right solution.

This section discusses when you might want to apply to court to vary an order, and how to do it.

Orders about the care of children

Parents often want to vary an order about the care of children because something has changed for the parents. The court, on the other hand, is only interested in varying an order because something has changed that affects the children. The court will not vary an order simply because one parent is annoyed with the other parent; something new must have happened that affects the child's best interests since the last order was made, or the court will leave the old arrangements alone. If you want to make an application to vary an order about the care of a child, remember that variation applications are always about the child, not you.

The process for applying to vary an order will depend on whether the original order was made under the federal *Divorce Act* or the provincial *Family Law Act*, and if under the *Family Law Act*, whether the order was made by the Supreme Court or the Provincial Court.

***Divorce Act* orders**

Under s. 5^[1] of the *Divorce Act*, the Supreme Court can vary *Divorce Act* orders for custody or access made anywhere in Canada, as long as the person making the application, the *applicant*, normally lives in British Columbia when the application is made or if both spouses agree to have the application heard in British Columbia. If the child has deeper roots and greater social ties in the other province, the court is likely to transfer the matter to be heard there.

Section 17^[2] of the act gives the court the authority to hear and decide variation applications. Under this section, the court may vary, cancel, or suspend orders dealing with custody and access.

Section 17 also sets out the test for the variation of custody and access orders, and the principle that it is in a child's best interests to have maximum contact with each parent. This section provides, in part, as follows:

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as

much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

It's up to the applicant to show that there has been a change in the "condition, means, needs or other circumstances of the child" since the last order was made.

Changing orders about custody

A 1996 case of the Supreme Court of Canada called *Gordon v. Goertz* ^[3], [1996] 2 SCR 27, describes the things that a court must consider when hearing an application to vary an order for custody:

- The person applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in circumstances affecting the child.
- If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of each parent to satisfy them.
- This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
- The inquiry does not begin with a legal presumption in favour of the parent with whom the child normally lives, although that parent's views are entitled to great respect.
- Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
- The focus is on the best interests of the child, not the interests, rights and entitlements of the parents.

In other words, the applicant must show that there has been a serious change in circumstances that affects the child's best interests before a court will even consider the application. Once this hurdle is crossed, the court will look at all of the circumstances before making a decision, as if the matter was being heard for the first time. Most importantly, this means that there is no automatic presumption in favour of the status quo.

Cases where an order for custody has been varied include circumstances such as where:

- the change is in the best interests of the children in the long run,
- the parent with custody has attempted to alienate the child from the other parent,
- the parent with custody has repeatedly frustrated the other parent's access to the child,
- a child has been apprehended by child protection workers,
- a child has been abused by the parent with custody, and
- a mature child over the age of 11 or 12 or so has expressed a wish to live with the other parent.

The court is unlikely to change custody where the children are happy in an existing stable and secure setting.

Changing orders about access

Gordon v. Goertz also applies to changing access orders: the applicant must show that there has been a serious change in circumstances that affects the child's best interests before a court will even consider the matter, and, once this hurdle is crossed, the court will look at all of the circumstances before making a decision as to access, as if the issue was being heard for the first time, with no presumption in favour of the status quo.

Orders for access are most commonly varied because:

- the child has grown up a bit and is more able to spend more time away from the parent with custody,
- one of the parents has been frustrating access,
- a parent is constantly late or cancels visits frequently,
- a parent has moved and the existing access schedule is no longer convenient, or
- a mature child over the age of 11 or 12 or so has expressed a wish to see the other parent more or less often.

Statutory provisions

These are the primary sections of the *Divorce Act* dealing with varying an order about custody or access:

- s. 2: definitions
- s. 5: jurisdiction in variation proceedings
- s. 16: orders for custody and access
- s. 17: varying orders

***Family Law Act* orders**

Both the Supreme Court and the Provincial Court can vary orders for guardianship, parenting arrangements, and contact. An application to vary an order can only be brought to the court that made the original order, which means that an order of the Supreme Court can only be varied by the Supreme Court and an order of the Provincial Court can generally only be varied by the Provincial Court.

Section 47 of the *Family Law Act* sets out the test to vary orders about parenting arrangements:

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

The test to vary orders about contact is at s. 60, and says exactly the same thing, just with the word "contact" in place of the phrase "parenting arrangements."

The general test under the *Family Law Act* to vary orders is at s. 215(1) and applies when there isn't a specific test required for a particular order the way ss. 47 and 60 are required for orders about parenting arrangements and contact. Since there's no specific test to vary orders for guardianship, it's the general test that will apply:

Subject to this Act, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

Whenever the court is asked to make an order about guardianship, parenting arrangements, and contact, s. 37(1) requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at s. 37(2).

Beyond this, it's difficult to say what the court will consider when changing orders about guardianship, parenting arrangements, or contact with a child. The *Family Law Act* is too new to know how the court will handle questions like these.

These are the primary sections of the *Family Law Act* dealing with varying orders about the care of children:

- s. 1: definitions
- s. 37: best interests of the child
- s. 39: who is presumed to be a guardian
- s. 41: parental responsibilities
- s. 42: parenting time
- s. 45: orders about parenting arrangements
- s. 47: changing orders about parenting arrangements
- s. 216: interim orders

Common issues with orders for access, parenting time, and contact

Sometimes conflict about a parenting schedule happens because the schedule is vague, imprecise, and open to interpretation. At other times, circumstances change, making a parenting schedule obsolete. Perhaps a child has grown up and has her own opinions about the best parenting schedule, or perhaps a parent's work schedule has changed.

Vague schedules

Sometimes the easiest way to fix a problem with a parenting schedule isn't to apply to court to rigidly enforce the order, but to get creative and think about ways that the order could be changed to solve the problem. Say someone's shift ends at 5:00 but the child is supposed to be picked up at 4:00. The answer may not be to enforce the order; it may be to change it.

A common problem occurs when a schedule says only that a person will have "liberal and generous access," or sets an access schedule that is vague. In situations like this, it is easy for the schedule to be frustrated. What is "liberal and generous" access anyway? Who decides what is "liberal" and what is "generous?" The best solution is usually to be a lot more specific about when and how the access visits should occur.

Say, for example, that an order says this:

"Sally will have parenting time with the child from Friday to Sunday."

When exactly does Sally's parenting time start? When does it end? Who is supposed to pick the child up and drop her off? Is the Sunday the Sunday immediately following the Friday or the Sunday a week later? A better order would say:

"Sally will have the child from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. Sally will be responsible for picking the child up on Fridays and Bob will be responsible for picking the child up on Sundays."

Even better would be an order or agreement that says:

"Sally will have the child from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. If the Friday is a statutory holiday or a school professional development date, Sally will have the child from Thursday at 4:00pm. If the Monday following the Sunday is a statutory holiday or a school professional development day, Sally will have the child until Monday at 6:00pm.

"Sally will be responsible for picking the child up at the beginning of her access to the child and Bob will be responsible for picking the child up at the conclusion of Sally's access to the child.

"In the event that Sally is unable to care for the child during a scheduled access visit, Sally will give at least two days' notice to Bob.

"On Fathers' Day, Sally's access to the child will be suspended from 10:00am to 2:00pm, during which time Bob will have the child.

"Sally's access to the child will be suspended during the summer, winter and spring school holidays, during which periods the following holiday access schedule will prevail..."

Where there has been a history of difficulties, the court will generally be quite open to further specifying a parenting schedule.

Reducing a parenting schedule

Situations where a parenting schedule has been varied to reduce the amount of time a person has with a child include circumstances such as when:

- the parent and child have moved far enough away as to make the original parenting schedule impossible to comply with,
- a mature child over the age of 12 or so has expressed a wish not to see a parent,
- a parent has suffered a mental or physical illness, such that the children's health and welfare are at risk in his or her care,
- the parents' relationship has worsened to the point that they can no longer cooperate,
- one parent has attempted to interfere with the child's relationship with the other parent, or
- the schedule is proving harmful to the mental or physical health and welfare of the child.

Where there are allegations involving mental health issues, parenting capacity, or the children's wishes, it is often essential to have a psychologist or psychiatrist provide a report that supports the allegations. Needs of the child assessments are discussed in more detail in the chapter Children in Family Law Matters (in the section on reports and assessments) and in How Do I Get a Needs of the Child Assessment?

Increasing a parenting schedule

Of course, parenting schedules can also be changed to increase the amount of time a parent has with the child. Circumstances where this has happened include where:

- a parent was interfering with the child's relationship with the other parent, so that more time with the child was required to restore that relationship,
- the parent with whom the child usually lives was interfering with and unreasonably limiting the time provided to the other parent by an order,
- a child is older and able to spend more time away from the parent with whom the child usually lives, or,
- a child over the age of 11 or 12 or so has expressed a wish to spend more time with a parent.

These are just a few of the circumstances in which a parent's time with the child can be increased from the amount given in an order. As long as there has been a change in circumstances since the order was made and the increased time is in the children's best interests, parenting schedules should be adjusted.

Orders for child support

Orders about child support mostly need to change because the payor's income has gone up or down, because the children have grown up and are no longer entitled to benefit from the payment of child support, or because one or more of the children have left the recipient's home to live with the payor.

Divorce Act orders

Under s. 5^[4] of the *Divorce Act*, the Supreme Court has the jurisdiction to vary an order for child support as long as either spouse was ordinarily living in the province at the time the action started, no matter which province's courts made the original order. (The Provincial Court cannot make or vary orders under the *Divorce Act*.) Section 17^[5] of the *Divorce Act* gives the court the authority to change, cancel, or suspend orders for support made under that act.

Section 17 of the *Divorce Act* says this:

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

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

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

(6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

This all boils down to these principles:

- a court can make an order changing a previous child support order if a change in circumstances has occurred since the order was made,
- any new order for child support must be made according to the Child Support Guidelines,
- the court may make an order for support different from the Guidelines if a previous order or agreement has made special provisions for the care of the child that would make an order under the Guidelines inappropriate, and
- the court may also make an order for support different from the Guidelines if both spouses agree to the order and reasonable arrangements have been made for the support of the children.

Before the Child Support Guidelines came into effect, an applicant had to show that there had been a serious and unforeseen change in circumstances before the court would hear an application to vary an order for child support. Now, an applicant must only show that there has been a change in income or the child's expenses to show that there has been a change in circumstances.

Section 14^[6] of the Guidelines defines a *change in circumstances* as follows:

For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act ...

Financial Statements

When an application to vary a child support order is brought, one or both parties will have to produce fresh financial information. This information is almost always given through a Financial Statement, Form F8 of Supreme Court Family Rules, which described a person's income, expenses, assets and liabilities and is given on the person's oath or affirmation like an affidavit. These are the rules about who may have to produce a Financial Statement:

- The payor must produce a Financial Statement dealing with his or her income if the payor is paying child support according to the tables.
- Both parties must produce Financial Statement dealing with income if custody is shared or split.
- Both parties must produce complete Financial Statement covering income, expenses, assets and liabilities if there is a claim about the children's special expenses, a claim for undue hardship, the payor's income is above \$150,000 per year, or one or more of the children are over the age of majority.

These new Financial Statements are needed to give the court the information it will need to make a new child support order, if it is in fact willing to vary the original order.

Links to and examples of the Financial Statement and other court forms can be found in Supreme Court Forms & Examples.

Statutory provisions

These are the primary sections of the *Divorce Act* dealing with varying child support orders.

- s. 2: definitions
- s. 4: jurisdiction to make child support orders
- s. 5: jurisdiction to change orders
- s. 15.1: child support
- s. 15.3: child support has priority over spousal support
- s. 17: variation proceedings

***Family Law Act* orders**

Section 152(2) of the *Family Law Act* gives a court the authority to cancel, vary, or suspend an order for child support where:

- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

This all boils down to the idea that the court can change an order for child support if there has been a change of circumstances, as defined by s. 14^[7] of the Child Support Guidelines (reproduced above) since the last order, or if new evidence has been discovered since the order was made.

Financial Statements

When an application to vary a child support order is brought, one or both parties will have to produce fresh financial information. This information is almost always given through a Financial Statement, Form F8 of Supreme Court Family Rules or Form 4 of the Provincial Court Family Rules, which described a person's income, expenses, assets and liabilities and is given on the person's oath or affirmation like an affidavit. These are the rules about who may have to produce a Financial Statement:

- The payor must produce a Financial Statement dealing with his or her income if the payor is paying child support according to the tables.
- Both parties must produce Financial Statement dealing with income if custody is shared or split.
- Both parties must produce complete Financial Statement covering income, expenses, assets and liabilities if there is a claim about the children's special expenses, a claim for undue hardship, the payor's income is above \$150,000 per year, or one or more of the children are over the age of majority.

These new Financial Statements are needed to give the court the information it will need to make a new child support order, if it is in fact willing to vary the original order.

Links to and examples of the Financial Statement and other court forms can be found in [Supreme Court Forms & Examples](#) and [Provincial Court Forms & Examples](#).

Statutory provisions

These are the primary sections of the *Family Law Act* dealing with varying a child support order:

- s. 1: general definitions
- s. 3: who is a spouse
- s. 146: definitions for support purposes
- s. 147: who must pay support
- s. 149: orders about support
- s. 150: calculating the amount of child support
- s. 153: changing orders for child support
- s. 174: arrears of support
- s. 216: interim orders

Orders about spousal support

A final order for spousal support is an order made following the trial of a court proceeding or made by the consent of the parties as a settlement of the proceeding. Changing an order is called *varying* an order.

In general, a final order is just that, final. Without an appeal, the final order represents the end of a court proceeding and can't be changed. This rule applies whether the order requires the payment of spousal support or rejects a party's claim for spousal support and says that support shouldn't be paid.

Changing an order refusing support

It used to be the case that a claim for spousal support that was dismissed in a final judgment was permanently dismissed, such that any future application for support could not proceed, no matter how things might have changed for the person in financial need.

A 2003 judgment of the British Columbia Court of Appeal, *Gill-Sager v. Sager* ^[8], 2003 BCCA 46, called into question just how "final" final orders about spousal support should be. In that case, the court issued a strong caution to trial judges against permanently dismissing a spouse's claim for support. Subsequent cases have interpreted this decision to mean that spousal support claims should never be permanently dismissed, only adjourned, so that it will always be open to a spouse to apply for spousal support later on. In practice this means that final orders should not say that a claim for support is *dismissed* but is only *adjourned generally*; in other words, they should say that the issue is not decided.

A party who seeks spousal support after a judgment dismissing support must be able to establish a significant change in his or her financial circumstances, such that if the change were known of at the time of trial, the judge would have made a different decision. For example, a party who develops a serious, disabling illness following trial — a trial held while the party was in perfect health — and can no longer hold a job, might be entitled to apply for spousal support when the illness is discovered.

Changing an order allowing support

When a party seeks to vary a final order for spousal support made under the *Divorce Act*, he or she must show that there has been a *material change in circumstances* affecting one or both of the parties. A material change is a significant change. In the 1996 case of *Tyler v. Tyler* ^[9], 1996 CanLII 1190 (BCCA), the Court of Appeal said that a material change is one that is "substantial, unforeseen and of a continuing nature." In the 1995 case of *G. (L.) v. B. (G.)* ^[10], [1995] 3 SCR 370 the Supreme Court of Canada said that a material change is one that, if known at the time of the original order, would have resulted in a different order being made.

Section 17 ^[5] of the *Divorce Act* says this:

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Section 167 of the *Family Law Act* is a bit broader and looks at whether there is new evidence as well as a change in the circumstances of the recipient:

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

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;

(b) evidence of a substantial nature that was not available during the previous hearing has become available;

(c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

Changing reviewable orders for support

"Reviewable" orders for spousal support are orders that impose a duty to pay spousal support without a particular end date, but allow the order to be reassessed every now and then. A reviewable order would say something like this:

"The Claimant shall pay spousal support to the Respondent in the amount of \$_____ per month, commencing on the first day of June 2012, and continuing on the first day of each and every month thereafter. This order may be reviewed on the application of either party on or after 1 June 2018."

Or, it might say something like this:

"The Claimant shall pay spousal support to the Respondent in the amount of \$_____ per month, commencing on the first day of June 2012, and continuing on the first day of each and every month thereafter, subject to a review upon the Claimant remarrying or living in a marriage-like relationship with another person for a period of three years."

Section 168 of the *Family Law Act* says this about reviewable orders:

- (1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for
 - (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
 - (b) the type of family dispute resolution by which the review will take place,
 - (c) the grounds on which a review will be permitted, and
 - (d) the matters to be considered for the purposes of a review.

When the review date for an order for spousal support arrives, the payor's obligation to keep making the support payments does not end. At that time, it is usually open to both parties to start negotiations or make an application about spousal support. The payor may wish to have the amount of support reduced or have his or her obligation to pay support ended. The recipient, on the other hand, usually seeks to have the support maintained, and, sometimes, increased. If neither party makes an application to have the issue of spousal support reviewed, the existing order continues to be in effect.

Once one of the parties makes an application for the review of the order for spousal support, the issue is heard by the court as a fresh hearing of the issue, called a hearing *de novo*, as if the question of spousal support were being determined for the first time. Section 168(2) says what can happen if the review is by way of a court hearing:

- (2) On review, a court, on application, may do one or more of the following:
 - (a) confirm an agreement or order respecting spousal support;
 - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
 - (c) make an order under section 165.

There is no need to establish that one or both of the parties have had a material change in circumstances at a review hearing.

Changing consent orders for support

A "consent order" is an order that the parties agree the court should make. As such, consent orders have a different status than orders that were argued about, since there is an assumption that the parties to the order knew what they were doing when they agreed to the terms of the order, and had a reasonable knowledge of what their circumstances were at the time of the order and what they were likely to be in the future.

The test for changing consent orders for spousal support used to be the "material change" test, described above. The question was "has there been a material change in the means and needs of either spouse that is connected to the marriage, and which would have resulted in a different order being made had the change had been known of at the time of the original order?" In the 2003 case of *Miglin v. Miglin* ^[11], [2003] 1 SCR 303 the Supreme Court of Canada decided that the material change test should no longer apply to changing agreements for support and described a three-step test to be

used when deciding whether a change is warranted:

1. Was the agreement negotiated and entered into fairly, that is, was there an equality of bargaining power?
2. If the circumstances of the negotiation of the agreement were fair, then the court must consider whether the agreement met the objectives for spousal support described in the legislation at the time the agreement was made.
3. If the agreement did meet the objectives set out in the legislation, does the agreement still reflect the original intention of the parties and does it continue to meet the objectives for spousal support described out in the legislation?

In other words, a court asked to change a consent order for spousal support should first look at the circumstances in which the order was made. Was a party at an unfair advantage? Was a party pressured into agreeing to the order? Secondly, the court should consider whether the order met the criteria for spousal support set out in the *Divorce Act*. Thirdly, if the order passes the first two parts of the test, the court should look at whether the consent order continues to reflect the parties' intentions at the time the order was made, and whether the terms of the consent order continue to meet the criteria set out in the legislation.

Resources and links

Legislation

- *Provincial Court Act* ^[12]
- Provincial Court Family Rules ^[13]
- *Supreme Court Act* ^[14]
- Supreme Court Family Rules ^[15]
- *Court Rules Act* ^[16]
- *Family Law Act*
- *Divorce Act*

Resources

- Provincial Court Practice Directions ^[17]
- Supreme Court Family Practice Directions ^[18]
- Supreme Court Administrative Notices ^[19]
- Supreme Court Trial Scheduling ^[20]
- Court Chambers Lists website ^[21]

Links

- Provincial Court website ^[22]
- Supreme Court website ^[23]
- Legal Services Society Family Law in BC Website: How to change a family law order (Supreme Court and Provincial Court) ^[24]
- Legal Services Society Family Law in BC Website: Fact sheet on when you can change a final order ^[25]
- Legal Services Society Family Law in BC Website: All about court orders ^[26]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

- [1] <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html#sec5>
- [2] <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html#sec17>
- [3] <http://canlii.ca/t/1fr99>
- [4] <http://canlii.ca/t/7vbw#sec5>
- [5] <http://canlii.ca/t/7vbw#sec17>
- [6] <http://canlii.ca/t/80mh#sec14>
- [7] <http://canlii.ca/en/ca/laws/regu/sor-97-175/latest/sor-97-175.html#sec14>
- [8] <http://canlii.ca/t/5cdj>
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- [10] <http://canlii.ca/t/1frh3>
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- [12] <http://canlii.ca/t/jj7h>
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- [16] <http://canlii.ca/t/84h8>
- [17] <http://www.provincialcourt.bc.ca/types-of-cases/family-matters/chief-judge-practice-directions>
- [18] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx
- [19] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/administrative_notices.aspx
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- [21] <https://eservice.ag.gov.bc.ca/cso/courtLists.do>
- [22] <http://www.provincialcourt.bc.ca/>
- [23] http://www.courts.gov.bc.ca/supreme_court/
- [24] <http://www.familylaw.lss.bc.ca/guides/change/cantAgree/index.php>
- [25] http://www.familylaw.lss.bc.ca/resources/fact_sheets/changingFinalOrder.php
- [26] <http://www.clicklaw.bc.ca/resource/1622>

Family Law Agreements

Family Law Agreements

A family law agreement — like a cohabitation agreement, a marriage agreement or a separation agreement — is a contract, just like the contract you might have with an employer or a landlord: each party promises to do something in exchange for something the other party promises to do, and both parties expect that they'll be held responsible for fulfilling their promises. In family law, contracts like these are used to settle the issues that come up when a relationship ends, although cohabitation agreements and marriage agreements are sometimes also used to settle how a relationship will be managed.

This chapter begins with an overview of family law agreements, and discusses the role they play during relationships and when relationships end. It also reviews the typical elements of a family law agreement and discuss some of the things you might wish to keep in mind when negotiating and drafting an agreement yourself.

The other sections of this chapter look at cohabitation agreements, marriage agreements and separation agreements in more detail, and provide additional information about enforcing an agreement and changing an agreement.

Introduction

People who sign a family law agreement when they marry or plan to marry are entering into a *marriage agreement*, also called a pre-nuptial agreement. People who sign an agreement when they start living together or plan on living together are entering into a *cohabitation agreement*, also called a living-together agreement.

The usual point of agreements like these is to say what will happen if the relationship breaks down, although they can also talk about how things will be handled during the relationship. The weird thing about marriage agreements and cohabitation agreements is that although they mostly talk about what will happen when a relationship ends, that may not happen for five years or 20 years, or it may never happen at all. As a result, it can be difficult to make plans based on what the family's circumstances might be like at some unknown point in the future when the relationship ends.

Married spouses, unmarried spouses and other unmarried couples who enter into an agreement after their relationship has broken down are entering into a *separation agreement*. A separation agreement is a contract that describes how some or all of the legal issues arising from the end of the relationship have been resolved.

All of these different kinds of agreement are legal contracts that describe the parties' rights and obligations towards one another. They can deal with everything from who gets to keep the Kenny G boxed CD set, to where the children will live, to how the parties will deal with their mutual friends, to who gets to keep the Ford Pinto. While these agreements are usually all-inclusive, they don't have to be; some issues can be left aside for the courts to deal with. A couple might sign a *property agreement* dealing with just property issues, or a *parenting agreement* dealing with just the care of the children when their relationship has ended.

Despite the intentions of the couple when they signed an agreement, the terms of their agreement may still wind up being reviewed by the court, and possibly changed, if one of the parties later has a problem with the agreement. While the court will pay a great deal of respect to any written agreement, if an agreement was unfairly negotiated, is unfair or becomes unfair the court will generally be willing to look into things and perhaps set aside the agreement and make an order on different terms.

The *Family Law Act* encourages people to make agreements resolving their disputes rather than going to court. Section 6 of the act says this:

- (1) Subject to this Act, 2 or more persons may make an agreement
 - (a) to resolve a family law dispute, or
 - (b) respecting
 - (i) a matter that may be the subject of a family law dispute in the future,
 - (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
 - (iii) the implementation of an agreement or order.
- (2) A single agreement may be made respecting one or more matters.
- (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

Under s. 214 of the act, the court may:

1. set aside part of an agreement, without changing the rest of the agreement,
2. incorporate all or part of an agreement into an order, or,
3. make an order replacing all or part of an agreement.

The test the court must apply in deciding whether to set aside an agreement changes depending on the subject matter of the particular part of the agreement at issue. Some tests, like the test to make a child support order in place of an agreement on child support, are really easy; others, like the test to set aside an agreement on property division, are really hard. If you're asking the court to set aside an agreement, you must read the parts of the *Family Law Act* that deal with setting aside agreements.

The role of family law agreements

The fundamental purpose of all family law agreements is to settle an issue that has come up, or one that could come up, and might be the subject of a legal dispute.

It is almost always better to settle a dispute yourself rather than have the courts resolve your problem for you. It is usually cheaper to settle a dispute rather than take it to court, and negotiated settlements usually give you the best possible chance of maintaining a halfway decent relationship with each other in the future. Family law agreements also give you an incredibly flexible way of resolving your dispute. Your agreement can be tailored to suit your particular circumstances and needs, and can be far more creative in resolving a problem than a court order ever could be.

Marriage and cohabitation agreements

Marriage agreements and cohabitation agreements usually talk about what will happen if the parties' relationship breaks down, although they can sometimes talk about how things will be handled during the relationship. These sorts of agreements are normally made well before the parties marry or begin to live together.

It is important to know that you do not have to enter into a marriage or cohabitation agreement just because your partner wants you to, or just because you're about to marry or start living with someone. While your partner may want you to sign an agreement, you are under no legal obligation to do so. With or without a family law agreement, remedies are almost always available under the common law, the *Divorce Act*, or the *Family Law Act* if problems crop up later on.

Marriage agreements and cohabitation agreements aren't always appropriate. Most people who enter into these agreements have been married before (once bitten, twice shy!), are coming into the relationship with children, are coming into the relationship with significant assets or significant debts, or expect to receive significant assets during the relationship. A young couple who have no significant assets and no children don't necessarily have any particular need to sign a marriage agreement or a cohabitation agreement.

During the relationship

The sorts of terms people want to apply during their relationships are most often financial. That being said, family law agreements are incredibly flexible and can require the parties to do anything imaginable, from caring for the children during the work week, to having a certain number of holidays each year, to always wearing purple shirts on Thursdays, to sharing the household chores. Typically, however, people want to address issues like these:

- How will a joint bank account be managed? Will the parties contribute a fixed monthly amount to the joint account?
- How will common household expenses be shared? Will specific bills be paid by a specific party or will they be shared proportionately to the parties' incomes?
- How will unexpected expenses be paid for? Will both parties pay for household repairs?
- How will savings, RESPs, RRSPs and retirement funds be managed? Will each party be required to contribute a fixed monthly amount?
- How will each party's income during the relationship be handled? What will happen if someone gets an unexpected windfall, like a lottery win or an inheritance?

Some agreements do not deal with these issues, and some paint only a vague picture of the parties' respective financial responsibilities. Other agreements are mind-bogglingly detailed and cover even the tiniest details. In my view, unless someone is spectacularly anal retentive, the less said in a marriage agreement or cohabitation agreement about how a relationship will be managed, the better. You wouldn't want every aspect of your relationship governed by a legal contract — that's exactly the sort of thing that encourages relationship breakdown.

After the relationship

The most common reason why people enter into a marriage agreement or a cohabitation agreement is to specify how property will be dealt with if the relationship comes to an end, although agreements like these can also deal with the payment or waiver of spousal support. Typically, however, these sorts of agreements just try to preserve a party's interest in an asset after the relationship has ended.

Agreements about the care of children or the payment of child support are only binding if they are made after separation or when the parties are about to separate.

Separation agreements

Separation agreements are entered into after a relationship has broken down. There is no need for the parties to have moved out or gotten a divorce when the agreement is made; in fact, when a couple is married it's usually best to deal with the separation agreement before you apply for a divorce, just in case you can't reach an agreement.

Separation agreements are always the product of negotiations between the parties and, hopefully, their lawyers. The goal of a separation agreement is to deal with all or some of the issues related to the separation in a way that both parties are as happy with as possible. Separation agreements usually deal with the following issues:

- How will the children be cared for? How will important parenting decisions about the children be made?
- If the children will be living mostly with one parent, how much time with the children will the other parent have?
- How much child support be paid, and which of the children's expenses will be shared between the parents?
- Should a party receive spousal support? If so, how much support should be paid and for how long?
- How will the family property be divided? Should the parties' excluded property be divided?
- How will the family debt be divided?

Separation agreements can cover everything that is a problem for a couple, even things that the court would not ordinarily deal with or be able to deal with.

Separation agreements are binding from the moment they are signed by both parties, unless the agreement says something different. They operate from the time they are made and, where children, child support, or spousal support are issues, they often continue to operate indefinitely into the future. Theoretically, a separation agreement will be binding on the parties until they die. In practice, however, most people stop relying on the agreement once the children have grown up, left home and become independent, even though their agreement continues to be legally binding on them.

The elements of a family law agreement

The point of a family law agreement is to make a legal contract that both parties intend to be bound by and that the court can and will enforce if a party doesn't live up to his or her obligations. In order to be legally binding and enforceable, agreements must be negotiated, drafted and signed in a certain way and include certain terms.

Negotiating the terms of an agreement

Family law agreements are about really important things like where the children will live, who will pay support to whom and how the parties will divide their property. As a result, the terms of the agreement are almost always the result of lots of talking and negotiating. It is critical that:

- each person has all of the information that is necessary, to figure out what's a good deal and what's a bad deal,
- each person understands his or her legal rights and obligations, to know what's a good deal and what's bad deal,
- each person is able to express his or her views and contribute to negotiating the agreement, and
- there is no pressure to reach an agreement on either party, beyond the importance of reaching a reasonable agreement and saving money on legal fees and court costs.

Properly negotiating and entering into a family law agreement isn't simply a matter of putting the important parts on paper and signing the document. There must be fairness in the way an agreement is negotiated, fairness in the way it is drafted, and fairness in the way it is signed. The people who are negotiating the agreement must be able to understand the agreement, be capable of agreeing to it, and agree to it voluntarily. This is what s. 93(3) of the *Family Law Act* says about agreements for the division of property and debt:

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement ... only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

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

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

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

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

This is fairly straightforward:

- you have to make full disclosure of your income, your expenses, your assets and your debts, and any other information that is important to the agreement,
- you can't exploit the other party's weaknesses to get a good deal for yourself,
- you have to make sure that the other party understands exactly what the agreement means and how it will affect his or her life, both now and in the future, and,
- you can't force or pressure someone to sign the agreement, you can't cheat someone into signing the agreement, and the agreement must be reasonable.

Although s. 93 is about property, s. 164(3) says the same thing about agreements for spousal support, and I think that this is a pretty reasonable standard to set for all other family law agreements. If you don't want the court to throw out your agreement, you've got to take the time to do it right, and you've got to be fair and not take advantage of the other party.

The legal formalities common to all family law agreements are these:

- The parties to the agreement must provide full financial disclosure to each other and must be completely honest in describing their circumstances.
- The agreement must be in writing. (While oral agreements have been upheld by the courts, it can be very difficult to establish the terms of the agreement, and oral agreements cannot be enforced until a court has determined what the terms of the agreement are.)
- The parties can't be under any sort of legal disability such as insanity.
- The parties must both sign the agreement of their own free will, without unfair pressure by the other party.
- The agreement must be properly executed, which means being signed by the parties in the presence of at least one witness.

As a general rule, each person who enters into a family law agreement should get *independent legal advice*, advice from his or her own lawyer, before the agreement is signed about:

- what the agreement means,
- what rights and obligations the agreement gives to each party,
- how the agreement does or doesn't limit the other legal remedies that might be available,
- how the agreement may affect each person over the short- and long-term, and,
- the options and remedies that would have been available if everyone had decided to go to court instead of settling things with an agreement.

Independent legal advice is important for two reasons: it ensures that the parties to the agreement know exactly what their rights and obligations are; and, it makes the agreement stronger by preventing a party from claiming later on that he or she didn't fully understand what the agreement meant or how it would impact him or her. If you really want to make sure that your agreement will stand the test of time, you've got to make sure that you and the other party have both seen a lawyer about the agreement!

Drafting an agreement

Lawyers often write family law agreements in a standard format using standard terms, tailored, of course, to the specific needs and circumstances of the parties. Just because family law agreements are often written using standard terms and standard language doesn't mean that an agreement using different wording will be set aside because it expresses things in a different way. As long as it is clear what the intentions of the parties are and as long as the agreement is fair and continues to be fair, the courts will usually uphold the agreement.

A British Columbia company called Self-Counsel Press publishes a variety of do-it-yourself agreement kits along with instructions for completing and executing them, or you might try LawDepot.com ^[1], an American company which says that it has family law agreement kits suitable for British Columbia.

There are still other resources available for free that might help, and your library might have a copy of the Self-Counsel Press materials available for loan. Guides to drafting family law agreements are also available at a branch of Courthouse Libraries BC ^[2]; one of the very best is the *Family Law Agreements Manual* ^[3] published by the Continuing Legal Education Society of British Columbia.

What follows are examples of the typical elements of a family agreement, using the example of John Doe and Jane Doe, a married couple who are entering into a separation agreement. These examples are not complete and are provided only to illustrate a point; they should not be used to draft your own agreement!

The introduction

The introduction to an agreement, also known as the *exordium* (isn't that a great word?), is the portion of an agreement that identifies the parties to the agreement, provides a title for the agreement, and sets out the date on which the agreement is made. This section typically looks like this:

THIS SEPARATION AGREEMENT is made on this the 1st day of March, 2013.

BETWEEN:

Jane Doe
of 123 King Street, Anytown, British Columbia
("Jane")

AND:

John Doe
of 456 Queen Street, Anytown, British Columbia
("John")

The recitals

The recitals describe the parties' circumstances when the agreement is made in a summary sort of way. They include the basic facts of their relationship, give the names and birth dates of any children, describe the property and debts that the agreement deals with, and describe the parties' incomes, among other things.

The recitals are the foundation on which the agreement is built. They should be sufficient to tell a complete stranger why the parties entered not just into any agreement but this particular agreement. It is important that the recitals be as complete as possible because if anyone tries to challenge the agreement in the future, the recitals will set out the facts that were important to the parties at the time the agreement was made.

In the case of a separation agreement, the recitals often look something like this:

WHEREAS:

A. Jane and John were married on August 1st, 1996 at Anytown, British Columbia.

B. There are two children of the marriage:

i) Buckminster Elliot Doe, born on March 5th, 1998, and

ii) Randall Eustace Doe, born on April 11th, 2000

(together, "the Children").

C. Jane is presently employed part-time as a mason by ABC Construction Ltd. and has an annual income of approximately \$34,000.

D. John is presently employed full-time as a chef by DEF Resorts Inc. and has an annual income of approximately \$45,000.

E. Jane and John have lived separately and apart since December 25th, 2012 (the "Date of Separation"), when Jane left the family home.

F. Since the Date of Separation, the Children have remained living with John in the family home, and Jane has had parenting time with the Children every other weekend from Friday after school until Sunday at 7:00pm.

The rest of the recitals will continue in the same way. Other recitals might describe the make, model and value of each party's car, the address and value of the family home, the credits cards owned by the parties and the amounts owing on them, and so on. Essentially, every fact that is relevant to the agreement should be put into the recitals to the agreement.

By the way, the parts where you see a capitalized word in brackets, like (the "Date of Separation"), are called *defined terms*. These are very helpful because you can use a defined term to refer to the same thing throughout an agreement. Instead of saying the house owned by Jane and John at 123 Main Street in Anytown, British Columbia every time you need to talk about that property, you could say the house owned by Jane and John at 123 Main Street in Anytown, British Columbia (the "Family Home") once, and whenever you need to mention the property after that you can just say the Family Home.

The operative clauses

The operative clauses of an agreement are the nuts and bolts of the settlement. They are the essential terms of the agreement and describe what each party's rights and obligations are. In the case of a separation agreement, the operative clauses might look like this:

IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE THAT:

1. Jane and John will live separate from each other.
2. Neither party will molest, annoy or harass the other or his or her friends, relatives and associates.
3. Except as is specifically provided in this Agreement, Jane and John will each keep all property presently in their possession and control as their own, free and clear of any and all claim by the other.

THE CHILDREN

4. Jane and John are the guardians of the Children, and John will have the Children's primary residence.
5. Jane and John will exercise all parental responsibilities with respect to the Children in consultation with each other. Jane and John will make every effort to agree on decisions that need to be made concerning the Children, and will make their decisions in the best interests of the Children. However, in the event that Jane and John cannot agree on a particular decision, John will have the right to make that decision.
6. Jane will have parenting time with the Children every Wednesday night, from the end of school or 4:00pm until 8:00pm, and on every other weekend from the end of school or 4:00pm on Friday until the following Sunday at 8:00pm.
7. Jane will have additional parenting time with the Children the children for one-half of the Children's winter school holiday, the whole of the Children's spring school holiday, and for two two-week periods during the Children's summer school holiday.

CHILD SUPPORT

8. Jane will pay child support to John in the amount of \$525 on the first day of each and every month, continuing for so long as the Children remain "children" as defined by the *Family Law Act*.

The rest of the operative clauses will continue in the same way. Other paragraphs might deal with specific property such as a car or the family home, the payment of debts, and the sharing of the children's expenses. The operative claims might also say who will pay what bills, whether and for how long spousal support will be paid, who will pay for the divorce if the couple are married, which laws will govern the interpretation of the agreement, and so on.

The signatures

The last part of a family law agreement is where each of the parties will sign their names in the presence of a witness. The parties can sign the agreement at the same time or separately, at different times and in different locations. Either way, each party's signature must be witnessed, and the witness, after seeing the party sign the agreement, must sign his or her name to the agreement. The witness usually provides some other information, typically his or her full name, address, and occupation.

IN WITNESS WHEREOF, Jane has hereto set her hand and seal at the City of Anytown in the Province of British Columbia, this the 20th day of March, 2013.

| | |
|-----------------------|----------|
| SIGNED, SEALED AND) | |
| DELIVERED by Jane) | |
| in the presence of:) | |
|) | |
| _____) | _____ |
| Signature) | JANE DOE |
| _____) | |
| Name) | |
| _____) | |
| Occupation) | |
| _____) | |
| Address) | |
| _____) | |

This would be repeated for John's signature and that of John's witness.

The witnesses to the parties' signatures do not become parties to the agreement and the agreement cannot be enforced against them. The signature of the witness simply says that he or she saw the particular party sign the agreement, in case someone ever denies signing the agreement.

For a quick summary of how to execute a family law agreement, see the *How Do I?* part of this resource for *How Do I Execute a Family Law Agreement?* Look under *Family Law Agreements*.

Negotiating considerations

For many couples, negotiations begin and end over a cup of coffee at the local Tim Hortons. This is fine, providing that everyone is relatively friendly and the parties are approaching their negotiations from a relatively level footing. The court will respect the agreements that negotiations like these produce, on the basis that people are free to make their own bargains and to contract to whatever they like.

The views of the court

Problems can arise when negotiations aren't completely fair. In a 2003 case from the Supreme Court of Canada, *Miglin v. Miglin* ^[4], [2003] 1 SCR 303, the court held that family law agreements should not be considered under exactly the same standards that are applied to ordinary commercial contracts because family law agreements are usually negotiated at "a time of intense personal and emotional turmoil, in which one of both of the parties may be particularly vulnerable." Some of these vulnerabilities were described in a 2000 case from Ontario, *Leopold v. Leopold* ^[5], 2000 CanLII 22708 (ON SC):

"One party may have power and dominance financially, or may possess power through influence over children ... often both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other. The complex marital relationship is full of potential power imbalance."

In a 2009 case, *Rick v. Brandsema* ^[6], [2009] 1 SCR 295 the Supreme Court of Canada added another factor to this list, incomplete or misleading financial disclosure.

Potential unfairness, then, can come from:

- exploiting a party's emotional or psychological vulnerability,
- influence over a party through dominance and oppression,
- control over the family finances,
- influence over the children's allegiances, or
- access to or control over the release of financial information.

Where unfairness is found, the court will be more likely to set aside an agreement or to make an order on terms different than those set out in an agreement. As a result, people negotiating family law agreements must take special care to ensure that everyone is on a level playing field and are negotiating from positions of relative equality. Here are some things that can help:

- **Independent legal advice:** Make sure everyone has legal advice about the meaning and consequences of the agreement from their own lawyers. Have the same lawyers witness the parties' signatures on the agreement, and sign certificates of independent legal advice.
- **Respect vulnerabilities:** Stop negotiations when someone is too upset to continue or appears to be compromised in any way. If there is any doubt that a party is not in his or her right mind, down tools and come back to the table later. Consider the need for counselling or therapy before continuing.
- **Make full disclosure:** Always make full disclosure of all financial facts, whether disclosure has been requested or not. Have documentation available of current income, past income, bank and investment account balances, outstanding debts, property values, values of shares and options, art and jewelry appraisals, and so on.
- **Never lie:** Intentionally misleading someone about the value of something, the amount of a debt, past income and future income expectations, or any other relevant fact will always undermine the strength of an agreement. Be scrupulously honest and transparent at all times.
- **Know the law:** The *Divorce Act* and the *Family Law Act* say when and why spousal support and child support should be paid. The *Divorce Act* talks about how much time children should have with their parents. For married spouses and unmarried spouses, the *Family Law Act* talks about how property and debt should be divided. Know how the law treats these different subjects and ensure the agreement roughly reflects the law.

The tests under the *Family Law Act*

Unfairness is a key element of the tests under the *Family Law Act* to set aside the parts of agreements about the division of property and debt and about spousal support, as we saw under s. 93(3), reproduced above.

Under s. 44(4) of the act, the court can set aside the parts of agreements about parenting arrangements if the parenting arrangements are not in the best interests of the child:

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

The same test is used to set aside the parts of agreements about contact. Under s. 148(3), the court can set aside the parts of agreements about child support if it would make a different order:

On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

Section 150 is the part of the *Family Law Act* dealing with how child support is calculated.

Drafting considerations

First of all, it is always best to have a lawyer prepare any sort of contract, including family law agreements. While the Self-Counsel Press forms will likely be considered to be legally binding, a family law lawyer will be best able to advise you of the duties and obligations involved in the contract, the rights you will be giving up by entering into the contract, and other unexpected but critical issues the agreement might involve, such as:

- income tax consequences,
- the transfer of property,
- dividing property located outside of British Columbia, or,
- liabilities to third parties and creditors.

If you can't or don't want to hire a lawyer, here are a few things you will want to keep in mind.

Don't use "legalese"

Some people are tempted to use words that sound particularly legal, like using the word "issue" to refer to children. Avoid this at all costs, and try to use plain language to express the content of your agreement. Words like "issue" can have a particular legal meaning — in this case first-generation, directly-descended heirs — that are often at odds with what people think the term means. As a result, if you use legalese there is a risk that your contract won't wind up meaning quite what you think it means.

Be as clear as possible

Ask yourself these questions:

- What would a complete stranger think of your agreement?
- Would the stranger be able to understand what you mean?
- Are any parts of the agreement vague or capable of more than one meaning?
- Do you understand what the agreement means?

If a term of your agreement has more than one possible interpretation, it may lead to future conflict between yourself and the other party. If there are two cars, make sure each car is identified separately and distinctly, using defined terms like "Jerry's Ford Pinto" and "Mary's Pontiac Sunfire," and always refer to those cars in that way, and never just as "the car." If a term might mean more than one thing, change it to be more precise and more specific!

Also, remember that while you and your partner may know exactly what "the old spoons" might mean, a court may not, especially if there are a lot of different sets of spoons involved. It's best to be specific, like "the Teaspoons of the World silver spoon collection Jerry inherited from his grandmother Mabel."

Avoid agreeing to agree

An agreement that requires a further, future agreement — "the household furniture will be divided as Mary and Jerry will agree" — is open to further, future conflict. Whenever possible, try to limit an agreement to all that can be agreed upon at the moment and try to agree on as much as possible.

Remember the loose ends

It is always best to tie up any loose ends. This may require some thought as it isn't always obvious what else needs to be included. If a house has to be sold, for example, who will list it and hire the realtor? Who will live in it until the sale? How will the list price be chosen? Under what conditions will the list price be reduced? Are there any repairs or improvements that need to be made, and if so who will do them and how will they be paid for? How will the sale proceeds be dealt with? What debts will be paid from the sale proceeds? These things should all be specified, where at all possible.

Be realistic

You've got to live with the agreement; make sure it is something you can live with, not just now but in three or five years. Make sure that the obligations you must fulfill under the agreement are obligations that you can reasonably fulfill. Promising to pay off a credit card within a year, for example, isn't always the easiest thing to do and it isn't always practical.

Sometimes people who have separated are desperate to have done with it, to have a deal signed and finished. If you feel rushed into an agreement, step back and take two (or twenty-two) deep breaths. The world will not end if you take a moment or a week to think about something. It is critical that whatever you wind up agreeing to is something that you will still be okay with next month, next year, and in 10 more years. Be patient and take your time.

Use sample clauses with caution

Before copying a term from someone else's agreement into your own agreement, make sure you fully understand what that term means. A clause that suits one couple in one situation may be entirely inappropriate for another couple. It is all too easy to adopt a term that sounds good or appropriate, without fully considering what that term means. Be cautious, be prudent, be careful.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society's Family Law Website: Fact sheet on making an agreement after separation ^[7]
- Legal Services Society's Family Law Website: Who can help you reach an agreement? ^[8]
- Legal Services Society's "Living Together or Living Apart", chapter 2, Making Agreements ^[9]
- Canadian Bar Association BC Branch: Script on marriage agreements and cohabitation agreements ^[10]
- West Coast LEAF: Booklet on Separation agreements and right to fairness ^[11]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 18, 2013.

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- [9] <http://www.clicklaw.bc.ca/resource/1058>
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Cohabitation Agreements

Cohabitation agreements are contracts signed by couples who plan to live together or who are already living together. Cohabitation agreements typically deal with things like how property and debt will be divided or whether spousal support will be paid if the relationship ends. Cohabitation agreements can also deal with things during the relationship, like how the housework is distributed and how the household expenses are paid. There is no legal requirement for people to sign a cohabitation agreement when they decide to live together.

This section talks about when and why cohabitation agreements are usually signed and the legal requirements of valid cohabitation agreements.

Entering into a cohabitation agreement

Cohabitation agreements, also known as "living together agreements," are usually signed before or shortly after a couple starts living together. A couple may enter into a cohabitation agreement with the intention of addressing things that might happen during the time they live together, while they *cohabit*, but cohabitation agreements are most often intended to address the issues that might arise if their relationship breaks down.

There is no legal requirement that you must sign a cohabitation agreement if you're living with someone or plan on living with someone. You can't be forced to sign a cohabitation agreement.

Unmarried couples and cohabitation agreements

The big difference between marriage agreements and cohabitation agreements is that people who sign a cohabitation agreement aren't married and may not intend to get married, or at least not just yet. They may become unmarried spouses or they may not. As a result, it's important to understand exactly how the legal status of unmarried spouses differs from the legal status of other unmarried couples and the legal status of married spouses before even thinking about the idea of a cohabitation agreement.

Married spouses have been legally married, either by a civil ceremony performed by a marriage commissioner or in a religious ceremony performed by a religious official. Married spouses who go to court are entitled to ask for orders under the *Family Law Act* about the division of property and debt and spousal support, and, if they have children, orders about parenting arrangements and contact.

An unmarried couple will become "spouses" for the purposes of the *Family Law Act* if:

1. they've lived together in a marriage-like relationship for two years, or
2. they've lived together in a marriage-like relationship for a shorter period of time and have a child together.

Unmarried spouses who have lived together for at least two years and go to court are entitled to ask for orders under the *Family Law Act* about the division of property and debt and spousal support, and, if they have children, orders about parenting arrangements and contact. Their rights are exactly the same as married spouses; these couples should also read the discussion on Marriage Agreements in the next section of this chapter.

However, unmarried spouses who have a child and have lived together for less than two years are only entitled to ask for orders about and spousal support, and, if they have children, orders about parenting arrangements and contact. They can't ask for orders about the division of property and debt under the *Family Law Act*.

An unmarried couple who aren't spouses under the *Family Law Act* can only ask for orders about parenting arrangements and contact. They can't ask for orders about the division of property and debt or spousal support under the *Family Law Act*.

For the purposes of this discussion, the critical distinction between unmarried spouses who have lived together and other unmarried couples lies in the different legal issues that arise when these different sorts of relationship come to an end. Here's a summary:

| | Unmarried Spouses (together for two years or more) | Unmarried Spouses (together for less than two years) | Other Unmarried Couples |
|---|---|---|-------------------------|
| Divorce | | | |
| Guardianship | Yes | Yes | Yes |
| Parental Responsibilities and Parenting Time | Yes | Yes | Yes |
| Contact | Yes | Yes | Yes |
| Child Support | Yes | Yes | Yes |
| Spousal Support | Yes | Yes | |
| Family Property and Family Debt | Yes | | |
| Protection Orders | Yes | Yes | Yes |
| Financial Restraining Orders | Yes | | |

Issues relating to the care and financial support of children born to unmarried people are fairly straightforward, since legal issues about children mostly depend on whether someone is a *parent*, not on the nature of the relationship between the parties. Only married spouses and unmarried spouses who have lived together for at least two years can make claims for spousal support, and only married spouses and unmarried spouses who have lived together for at least two years can make claims for the division of property and debt.

Deciding whether a cohabitation agreement is appropriate

The most common reason why a couple enters into cohabitation agreements is to protect their separate property and income, so that each person's property going into a relationship is preserved as much as possible if the relationship comes to an end. Sometimes one person wants to preserve property from claims by the other person; sometimes a person will want to protect property from the other person's debts. Generally speaking, most couples who are thinking about executing a cohabitation agreement want a "I'll keep what's mine, you'll keep what's yours" sort of deal, and that's fine.

A couple might also enter into a cohabitation agreement to address spousal support if the relationship comes to an end. Sometimes a person will want to guarantee a certain minimum payment, but most often people want to be protected from having to pay spousal support. That's fine too, it happens all the time.

Cohabitation agreements are usually entered into when:

- the relationship is expected to be a long one,
- one or both parties have a substantial amount of property going into the relationship,
- one or both parties have significant debts going into the relationship,
- one of the parties has significantly more income than the other,
- one or both parties expect to acquire property during the relationship from, for example, a business, an inheritance, a court award, a gift, or employment income,
- one or both parties are bringing a child into the relationship,
- the parties expect to have child within the first two years of living together, or
- the parties expect that spousal support may be an issue if the relationship ends.

Cohabitation agreements are generally not appropriate when:

- the couple are young,
- neither party has significant property or debt going into the relationship,
- neither party is bringing any children into the relationship and no children are expected right away, or
- both parties are working out of the home and expect to continue working out of the home.

On top of these considerations, the *Family Law Act* also says that an agreement made before the parties have separated cannot deal with:

1. parental responsibilities and parenting time, or
2. child support.

Cohabitation agreements can also be useful to set rules for how the parties will manage things during the relationship, although this type of cohabitation agreement is fairly rare. When a cohabitation agreement is needed to deal with those issues, the parties' financial positions may not be relevant.

The usual sort of things a household management type of cohabitation agreement might be intended to address include:

- Who will pay for the household expenses? Will each party pay for a specific set of bills, or will the parties share in all the bills in a fixed amount?
- Will the parties keep separate bank accounts, or will they have a joint account for household costs? If there is a joint account, how will each party contribute to the account?

- Who will do the household chores? Will each party be responsible for a list of particular tasks?
- How will children brought into the relationship be cared for? Will the other party assume any parenting tasks?

If, at the end of the day, a cohabitation agreement is appropriate and desirable, the parties will negotiate the terms of the agreement, and someone, whether a lawyer or one of the parties, will draft the written agreement. As with all family law agreements, it's important that both parties get independent legal advice about what exactly the agreement means, how it affects their present rights and responsibilities towards one another, and how it will affect those rights and responsibilities if their relationship comes to an end. Getting independent legal advice strengthens the agreement by preventing one spouse from saying "I didn't know what it meant!" if the agreement is challenged later on.

Finally, a good cohabitation agreement should specify that the agreement will terminate if the parties marry, or that the agreement will become a marriage agreement if the parties marry. Either way, the prospect of marriage and its impact on the cohabitation agreement should be dealt with in some manner.

Avoid do-it-yourself cohabitation agreement kits

Staples, Chapters, London Drugs and other stores generally carry a wide range of DIY legal products, from doing your own will to getting your own divorce.

In my view most of these do-it-yourself kits are fine for most people most of the time. However, cohabitation agreements can be complicated and must be drafted with a good knowledge of family law, cohabitation agreements in particular, and the general law applicable in British Columbia. Using a do-it-yourself cohabitation agreement kit is really not a good strategy.

If you figure that you absolutely must have a cohabitation agreement, it's well worth spending \$1,500 to \$4,000 to have a lawyer draw it up correctly for you, rather than spending \$15,000 to \$40,000 on lawyer's fees down the road if the agreement is flawed.

Legal and formal requirements of a cohabitation agreement

The point of entering into a cohabitation agreement is so that, at some later time, the contract will be enforceable in court if the parties fail to live up to it. As such, a cohabitation agreement, just like any other family law agreement, must conform to certain basic rules, including the following:

- A cohabitation agreement must be in writing.
- The agreement must be signed by each party, and should be signed in the presence of a witness.
- Neither party should be under a legal disability when signing the agreement, however children who are parents or spouses may enter into a binding agreement.
- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these simple formalities of a family law agreement, you might want to think about certain other principles of contract law such as these:

- The parties must each enter into the agreement of their own free will, without any coercion or duress by the other party, or by anyone else for that matter.
- Both parties must make full and complete disclosure of their circumstances going into the agreement.
- The parties cannot make an illegal bargain, that is, they can't make an agreement that obliges them to do something against the law.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may be interpreted in favour of the party who didn't have the lawyer.

- The court will attempt to give effect to a contract wherever possible, that is, it will attempt to give meaning to the terms of a contract rather than declare it void.
- If a term of a cohabitation agreement is found to be invalid, only the invalid part of the agreement will stop being in effect. The remainder of the agreement will continue to be valid and binding on the parties.

Aside from these considerations, it's also important to remember that cohabitation agreements that deal with property and debts or issues like spousal support are usually only meant to be used when the relationship comes to an end, at some unknown time in the future. As a result, it can be difficult to guess what each party's situation will be like when the agreement begins to operate and guess whether it will still be appropriate and fair. Because of these problems, hiring the services of a lawyer to prepare a cohabitation agreement is highly recommended. Crafting a solid cohabitation agreement is a tricky business at the best of times.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society Family Law Website: Making an agreement when you live together ^[1]
- Legal Services Society's "Living Together or Living Apart", chapter 2, Making Agreements ^[2]
- Canadian Bar Association BC Branch: Script on marriage agreements and cohabitation agreements ^[3]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

[1] http://www.familylaw.lss.bc.ca/resources/fact_sheets/makingAnAgmtWhenYouLiveTogether.php

[2] <http://www.clicklaw.bc.ca/resource/1058>

[3] <http://www.clicklaw.bc.ca/resource/1259>

Marriage Agreements

Marriage agreements are contracts signed by couples either before they marry or shortly afterwards. Most marriage agreements are drafted and signed well ahead of the date of marriage, and that kind of timing is usually a very good idea. Marriage agreements are usually intended to deal with the legal issues if the marriage breaks down, but they can also deal with how day-to-day things will be handled during the marriage.

This section discusses when and why marriage agreements are usually entered into, the legal requirements of a valid marriage agreement, and the possible subjects of a marriage agreement.

Entering into a marriage agreement

While a couple might enter into a marriage agreement with the intention of addressing things that could happen during the course of their marriage, more typically these agreements are intended to address the issues that will arise if the marriage breaks down. Marriage agreements are binding on the parties as a legal contract. They may be enforced by the courts if someone tries to escape or change an obligation they have agreed to.

Most couples who marry do not have a marriage agreement. *There is no legal requirement that you must enter into such an agreement if you're getting married. You cannot be forced into a marriage agreement.*

When a marriage agreement is a good idea

Marriage agreements are usually appropriate when:

- one or both of the parties have a substantial amount of property going into the marriage,
- one of the parties expects to acquire substantial property during the marriage, through, for example, a business, an inheritance, a settlement or court award, or a gift,
- the parties want to avoid some of the stress and anger that can come after separation by deciding in advance how certain difficult issues, like the division of family property and family debt, will be dealt with,
- one or both of the parties experienced an ugly court battle leaving a previous relationship,
- one or both of the parties will be bringing children from a previous relationship into the marriage, or
- one of the parties is entering the marriage with substantial debt.

In most cases, people generally want to protect the property that they're bringing into the marriage and avoid the scheme for dividing property and debt set out in the provincial *Family Law Act*; many people are looking for an "I'll keep what's mine, you'll keep what's yours" sort of deal, and that — or any other reasonable kind of arrangement — is precisely what you can get with a separation agreement.

When a marriage agreement might be a bad idea

A marriage agreement may not be appropriate when:

- neither party has significant property,
- neither party has significant debts,
- both parties are relatively young and intend the marriage to be permanent, and
- neither party is bringing any children into the marriage from another relationship.

In circumstances like that, there really isn't much point to having a marriage agreement. There aren't any kids to worry about and neither party has any assets to protect going into the marriage. What purpose would a marriage agreement serve?

As well, the *Family Law Act* also says that an agreement made before the parties have separated cannot deal with:

1. parental responsibilities and parenting time, or
2. child support.

Marriage agreements are odd things anyway as they tend to lend a unpleasant and sometimes petty financial dimension to what ought to be a joyous occasion. If there's no good reason to have a marriage agreement, don't have a marriage agreement.

Negotiating a marriage agreement

If a marriage agreement is appropriate and desirable, the people involved will negotiate the terms of the agreement and one or both of the parties will draft a written agreement. As with all family law agreements, it is important that both parties make complete financial disclosure and get independent legal advice about what exactly the agreement means, how it affects their present rights and responsibilities towards one another, and how it will impact on those rights and responsibilities if the marriage comes to an end. Getting independent legal advice makes the agreement harder to change later on by preventing one spouse from saying "I didn't know what it meant" or "she had the lawyer, not me."

Remember what s. 93(3) of the *Family Law Act* says about the test to set aside agreements for the division of property and debt (the same principles apply to agreements about spousal support under s. 164(3)):

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement ... only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

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

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

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

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

Marriage agreements should be signed well in advance of the marriage ceremony. If an agreement is being negotiated on the brink of the wedding, the court may be concerned about the fairness of the circumstances in which the agreement was negotiated and made. The emotional stress involved in arranging and potentially cancelling the wedding might be found to mean that someone was coerced into signing the agreement.

On the other hand, there's nothing wrong with signing a marriage agreement after the ceremony, except that the spouse who wants the agreement loses a fair bit of bargaining power once the wedding is done.

Avoid do-it-yourself marriage agreement kits

Staples, Chapters, London Drugs and other stores generally carry a wide range of DIY legal products, from doing your own will to getting your own divorce.

In my view most of these do-it-yourself kits are fine for most people most of the time. They are not fine for marriage agreements. Marriage agreements can be terribly complicated, more so than separation agreements, and must be drafted with a good knowledge of family law in general and marriage agreements in particular. Using a do-it-yourself marriage agreement kit is really not a good strategy.

If you figure that you absolutely must have a marriage agreement, it's well worth spending \$1,500 to \$4,000 to have a lawyer draw it up correctly for you, rather than spending \$15,000 to \$40,000 on lawyer's fees down the road if the agreement is flawed.

Legal and formal requirements of a marriage agreement

The point of entering into a marriage agreement is so that, at some later time, the contract will be enforceable in court if the parties fail to live up to it. As such, a marriage agreement, just like any other family law agreement, must conform to certain basic rules, including the following:

- A marriage agreement must be in writing.
- The agreement must be signed by each party, and should be signed in the presence of a witness.
- Neither party should be under a legal disability when they sign the agreement, however children who are parents or spouses may enter into a binding agreement.
- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these simple formalities of a proper family law agreement, you might want to think about certain other principles of contract law such as these:

- The parties must each enter into the agreement of their own free will, without any coercion or duress by the other party, or by anyone else for that matter.
- Both parties must make full and complete disclosure of their circumstances going into the agreement.
- The parties cannot make an illegal bargain, that is, they can't make an agreement that obliges them to do something against the law.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may be interpreted in favour of the party who didn't have the lawyer.
- The court will attempt to give effect to a contract wherever possible, that is, they will attempt to give meaning to the terms of a contract rather than declare it void.
- If a term of a marriage agreement is found to be invalid, only the invalid part of the agreement will stop being in effect. The remainder of the agreement will continue to be valid and binding on the parties.

Aside from these considerations, it is also important to remember that marriage agreements are usually only meant to be used at some unknown time in the future. While separation agreements are intended to work immediately from the moment they are signed, marriage agreements usually aren't intended to work until some later time, usually upon the spouses' separation. As a result, it can be difficult to guess what each party's situation will be like when the agreement begins to operate and guess whether it will still be appropriate and fair. Because of these problems, hiring the services of a lawyer to prepare a marriage agreement is highly recommended.

The possible subjects of a marriage agreement

A marriage agreement can address any number of subjects, and deal with anything that's a concern to one or both spouses. Typical subjects include the following.

- How will the spouses own property during the marriage, separately or jointly?
- How will the spouses divide their property and debts after the marriage? Will there be any division of property at all?
- Will the spouses share in the value or cost of property bought during the marriage, like a car or a house?
- Will the parties have a share in any excluded property brought into the marriage by one of the spouses?
- How will unexpected windfalls like inheritances and lottery wins be dealt with? Will they be shared or kept separate?
- How will household chores be shared during the marriage?
- How will household expenses be paid for during the marriage? Will both spouses contribute to the bills? Will the bills be divided between them?
- How will the spouses manage retirement savings during the marriage?
- How will the children brought into the marriage from another relationship be dealt with during the marriage? Will any responsibilities survive separation?
- How will children born during the marriage be cared for after separation?

Except for the restrictions on agreements about parental responsibilities, parenting time, and child support, the possible subjects of a marriage agreement are limited only by your imagination, common sense, and the law of contracts. I've seen some fairly unique marriage agreements over the years, including agreements, likely unenforceable, that talk about the frequency of sex and who will take out the garbage.

However, as a general rule of thumb, it's best to deal with the concrete things that exist at the time of the marriage (such as children from a previous relationship, existing debts, and existing property) and things that the couple can reasonably expect to happen during the marriage in the short term (such as receiving an inheritance or a court award). Dealing with things that *might* happen (like new children, a move to a new town, or lottery winnings) is really speculative, and it's almost impossible to know how they should be dealt with if, at some unknown point in the future, the marriage comes to an end.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society's Family Law Website: Fact sheet on making an agreement after separation ^[1]
- Legal Services Society's Family Law Website: Who can help you reach an agreement? ^[2]
- Legal Services Society's "Living Together or Living Apart", chapter 2, Making Agreements ^[3]
- Canadian Bar Association BC Branch: Script on marriage agreements and cohabitation agreements ^[4]
- West Coast LEAF: Booklet on Separation agreements and right to fairness ^[5]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

- [1] http://www.familylaw.lss.bc.ca/resources/fact_sheets/makingAnAgmtAfterYouSeparate.php
- [2] http://www.familylaw.lss.bc.ca/resources/fact_sheets/whoCanHelpYouReachAnAgmt.php
- [3] <http://www.clicklaw.bc.ca/resource/1058>
- [4] <http://www.clicklaw.bc.ca/resource/1259>
- [5] <http://www.clicklaw.bc.ca/resource/2551>

Separation Agreements

A separation agreement is a contract that records a settlement of the issues that arise when a married or unmarried relationship ends. Unlike marriage and cohabitation agreements which are made when a relationship starts, separation agreements are made when the relationship is over.

Separation agreements can be an effective and inexpensive way of settling things. However, the terms of the agreement must be fair, and the parties must be able to get along well enough to negotiate the deal and then put it into action when it's done.

This section provides an introduction to separation agreements, discusses how separation agreements are formed, and describes the legal requirements of separation agreements. It also looks at the typical subjects of separation agreements in some detail. In addition, it discusses the effect of reconciliation on separation agreements.

Introduction

Every separating couple has three options to resolve the legal issues between them:

1. settle the matters between them out of court through negotiation or mediation, or through some other process like arbitration or collaborative settlement processes,
2. have a judge decide what should happen, after spending a lot of money on lawyers and the litigation process, or
3. give up and just walk away from the mess.

It is almost always better to negotiate and settle a dispute than to begin a court proceeding and resolve a dispute by trial. While a settlement usually gives neither party all of what they wished for, it will give them as much of what they asked for as possible. Litigation is stressful and expensive, offers no guarantees of success, and can be extraordinarily acrimonious. A negotiated settlement is less stressful, much cheaper, and gives the parties the best chance of not hating each other at the end of the process.

A couple can reach a settlement at any time, even after a court proceeding has started. Typically a settlement reached before a proceeding has begun is put into the form of a separation agreement. Settlements reached after the start of a proceeding can also be put into a separation agreement, but more typically the terms of such settlements are put into the form of a *consent order*, an order that both parties agree the judge should make.

Separation agreements can deal with almost any issue a couple have to address, from who will keep the cats, to how the mortgage will be paid, to how the children's post-secondary education costs will be handled. They also offer a lot more flexibility than court orders, as some terms that can be put into an agreement can't be put into a court order. Most importantly, separation agreements can be tailored to meet the specific needs and circumstances of each couple.

Of course, separation agreements aren't for everyone. There must be a certain basic amount of mutual trust and good faith, and each party must have a certain flexibility and a willingness to accommodate the other side. A separation agreement will not be appropriate where a couple are so filled with anger, jealousy or stubbornness that even a basic level of mutual respect is absent and dialogue is not possible.

Alternatives to separation agreements

Settlement can be reached in a number of different ways before a court proceeding has started, through negotiation, mediation, a collaborative settlement process, or arbitration. Settlements reached in these ways are almost always recorded in the form of a separation agreement.

Settlements reached after a proceeding has started are generally only recorded as separation agreements if they are unusually complicated or if there are concerns about whether a term of the settlement can be put into a court order. Otherwise, a settlement of litigation will be recorded as minutes of settlement or a consent order.

Minutes of settlement

Minutes of settlement are a written record of the settlement of a court proceeding. They are reached after a court proceeding has begun and are usually used to describe the terms of a consent order, an order that both parties agree the court should make. Both of the lawyers and each of the parties will sign the minutes of settlement; usually only the lawyers will sign the final consent order.

Minutes of settlement sometimes have a rough-and-ready feel to them, as they are usually used to record an often hasty settlement of the legal issues, a settlement that is sometimes reached on the morning the trial is set to start. As a result, minutes of settlement are typically less comprehensive than separation agreements. However, even though they lack the same fine-tuning and detail, minutes of settlement are just as binding upon the parties as a separation agreement would be. Both are contracts and can be enforced as such.

Minutes of settlement should:

1. be signed by both lawyers and by both parties, although the signature of the parties isn't strictly necessary,
2. deal with each significant issue in a final manner, and
3. be attached to the draft consent order submitted to the court for its approval.

Consent orders

A consent order is an order that both parties agree that a judge should make. Consent orders are only appropriate if litigation has started. It is not necessary to have minutes of settlement done before a consent order is agreed to.

When a judge pronounces an order by consent, the order has just the same effect as a final order reached after a trial and is binding upon the parties as a final order.

Minutes of settlement and consent orders

The advantage of minutes of settlement is that the minutes can stand alone as evidence of the written agreement of the parties, while the form of a draft consent order, which may reflect the parties' agreement, still requires the court's approval. Moreover, if the terms of a draft consent order are argued about, there may not be any evidence of the agreement — as would be provided by minutes of settlement — which a court can use to decide the matter.

Consent orders have unique advantages of their own, in that it is usually extremely difficult to vary an order pronounced by consent without a serious and unanticipated change in circumstances, and because such orders are almost impossible to appeal.

Other final agreements

Any dispute a couple has can be resolved by a formal contract of some nature. Separation agreements are usually signed by married spouses or unmarried spouses and deal with a large range of issues, from the care of children to the division of property and debt.

Some couples may only have one issue to resolve and the usual sort of separation agreement isn't required. People who are just parents and never married or cohabited may want a parenting agreement that talks about parental responsibilities and the allocation of parenting time. Couples, including unmarried spouses who lived together for less than two years, who only need to deal with child support and/or spousal support may want a support agreement that deals with either or both issues. Couples who only need to resolve who keeps what property and which debts may want a simple property agreement.

Family law agreements can also involve more people than the people involved in a relationship. Separated parents might sign an agreement for contact with grandparents who want to see their grandchildren. A separating couple might sign a loan agreement or promissory note with a friend or family member to whom they owe money.

Entering into a separation agreement

A separation agreement can be negotiated and signed at any time after a married or unmarried relationship has broken down. A separation agreement can be signed after a court proceeding has been started or before one has even been considered.

The basic process

The process for entering into a separation agreement is fairly simple. The parties discuss the issues resulting from the breakdown of their relationship between themselves (and, hopefully, in consultation with their lawyers as well). They attempt to reach a resolution of each of the legal issues that is as satisfactory to both of them as possible. It's a good idea to take notes and record how each issue is resolved, as these notes may wind up forming the basis for any agreement that might be reached.

The settlement process is a process of negotiation: each party usually has a pretty good idea of how they would like to see things resolved, and then, following the exchange of these ideas, a compromise is reached that represents a blending of the two positions. Once settlement is reached, one of the parties will draw up a formal agreement and give it to the other party. This draft is carefully reviewed to ensure that it accurately reflects the agreement that was reached, to check whether anything was left out, and to make sure that there are no other issues that need to be discussed and included.

Drafting a separation agreement is something that requires a great deal of skill and a solid understanding of family law and contract law. While kits are available that can guide you in drafting an agreement, I highly recommend that you hire a lawyer to deal with the matter when the content of your agreement is anything other than completely straightforward.

Once both parties are content with the text of the agreement, they must each take the agreement to their respective lawyers — or to any lawyer, for that matter — for advice on how the agreement affects their legal rights and the options they may have open to them if they don't sign the agreement. This is called getting *independent legal advice*. This stage is critical for three reasons:

1. If you are entering into an agreement that will resolve a legal problem, you must know how that agreement affects the rights you would have had if you had pressed on with a court proceeding.
2. You must understand the obligations and rights you have under the agreement.
3. It stops either party from claiming, later on, that he or she didn't know what the agreement meant or that he or she was at a disadvantage because the other party's lawyer drafted the agreement.

After each party has had independent legal advice about the agreement, they will sign the agreement in the presence of a witness if they're still willing to do the deal. Normally, each party will execute the agreement before the lawyer who provided the independent legal advice, but anyone can witness a party's signature, as long as the witness isn't under the age of 19 and doesn't stand to benefit from the agreement. The witness will watch as the party signs the agreement, and the witness will then sign the agreement him- or herself.

Someone who witnesses an agreement does not become a party to that agreement and isn't responsible for seeing that the agreement is followed. The signature of a witness on an agreement merely says "I know Mr. Smith and I saw him sign the agreement."

If the parties had legal advice, the lawyer who gave the advice will usually also sign a certificate confirming that: the party received advice as to how the agreement affects his or her legal interests; the party understood the terms of the agreement; and, the party wasn't forced into making the agreement. This is usually called a *Certificate of Independent Legal Advice*.

Normally, four separate original copies of a separation agreement are executed. This is so that the parties and their lawyers can each have an original copy of the agreement. Sometimes, an extra original copy is executed in case the agreement must be filed in court.

If you are negotiating an agreement and have a lawyer

Even if you have a lawyer it can be extremely tempting to work something out with your ex on the side. If you feel even remotely tempted to do so, call your lawyer! Make sure your lawyer knows that you're trying to explore settlement, and make sure you understand what to say and what not to say.

Nothing is quite as frustrating as finding out that a client has negotiated an inadequate or prejudicial agreement without the lawyer's input. While you, the client, are free to do as you want and can arrive at any settlement you wish, be warned that you may find yourself settling for poor terms compared to what your lawyer might have been able to negotiate for you or compared to the results you might have obtained at trial. Remember that you may be stuck with any agreement that you freely enter into, regardless of whether it's a good agreement or a bad one.

Call your lawyer before you sign or initial anything. This is what you're paying her for.

Formal requirements of separation agreements

A separation agreement is a contract, in just the same way you have a contract with your employer, your landlord, or the company from which you lease your car. On the other hand, it's a special kind of agreement, different from commercial contracts, because it deals with family law issues that are also discussed in the *Family Law Act* and the *Divorce Act*. As a result, the law dealing with separation agreements is a blend of legislation, the common law relating to family agreements, and certain parts of the law dealing with traditional commercial contracts.

The whole point of a separation agreement is so that, at some later time, the contract will be enforceable in court if the parties fail to live up to it. As such, the agreement must be enforceable and it must be able withstand a challenge in court, that is, it must be drafted in such a way and contain terms that are reasonably fair such that a court will uphold the agreement if it is attacked.

A separation agreement must therefore conform to certain basic rules, including these:

- A separation agreement must be in writing.
- The agreement must be signed by each party, and should be signed in the presence of a witness.
- Neither party should be under a legal disability at the time the agreement is signed, however children who are parents or spouses may enter into a binding agreement.

- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these simple formalities of a proper family law agreement, you might want to think about certain other principles of contract law such as these:

- The parties must each enter into the agreement of their own free will, without any coercion or duress by the other party, or by anyone else for that matter.
- Both parties must make full and complete disclosure of their circumstances going into the agreement.
- The parties cannot make an illegal bargain, that is, they can't make an agreement that obliges them to do something against the law.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may be interpreted in favour of the party who didn't have the lawyer.
- The court will attempt to give effect to a contract wherever possible, that is, they will attempt to give meaning to the terms of a contract rather than declare it void.

Family law agreements are also subject to other principles that don't necessarily apply to commercial contracts:

- The parties must make full, complete and honest disclosure of their financial circumstances going into the agreement.
- If one term of a separation agreement is void, only that term will fail and the rest of the agreement will continue as a valid agreement that is binding on the parties.
- A separation agreement will not be considered to be invalid just because one party doesn't comply with a term of the agreement, that is, you can't say the whole agreement has been broken because the other party didn't do something he or she was supposed to do.
- While the parties can later agree to do something different than what their agreement says about a particular issue, the remainder of the agreement will remain in force.

Note that the courts will rarely if ever uphold an agreement that attempts to contract out of a statutory obligation. Child support, for example, is a positive, almost absolute, obligation a parent has toward his or her children. The court will not consider itself bound by an agreement that says a person will never have to pay child support.

The possible subjects of a separation agreement

The potential subjects of a separation agreement are limited only by common sense and what the law will allow. That said, it is always best to be as realistic as possible when drafting a separation agreement. Is a schedule of payments unrealistically difficult for one party? Will the children be able to adapt to a shared parenting arrangement? Are the parties' obligations to one another too complex? Are they too optimistic? Are they affordable? While it is best that all of the issues between the parties be dealt with in a separation agreement, the simpler an agreement is, the better it will usually work in real life.

Children

Issues about parenting after separation are covered by the federal *Divorce Act* for married spouses and by the provincial *Family Law Act* for married spouses, unmarried spouses and other unmarried couples, and other people who have an interest in the care of a child.

The *Divorce Act* uses some pretty old fashioned language to talk about children, *custody* and *access*. The *Family Law Act* talks about people who are the *guardians* of a child and have *parental responsibilities* and *parenting time*, and people who are not guardians and have *contact*.

Custody and access

There are two basic types of custody available under the *Divorce Act*: sole custody and joint custody. Sole custody is less common than it used to be, and is usually only appropriate where the parties are constantly at each other's throats or where one party is or expects to be absent from the child's life. Joint custody is far more common than sole custody. In this situation, both parents are custodians of the children and both have responsibility for making decisions about the children.

Joint custody has little to do with how much time the child spends with each parent. The child's time can be shared equally or almost equally, or the child can see a parent only on weekends, and the parents can still have joint custody.

Guardianship

Under s. 39(1) of the *Family Law Act*, a child's parents are usually the child's guardians as long as they have lived together during the child's life. These parents are guardians and don't need an order or an agreement to make them a guardian. A parent who has never lived with his or her child isn't a guardian unless the parent "regularly cares" for the child.

Under s. 50, only a parent can become the guardian of a child through an agreement with all of the child's guardians. (Of course, the only parents who would need to become a guardian in this way, are parents who aren't guardians to begin with — parents who have never lived with the child and have not "regularly cared" for the child.) Someone who is not a parent can't be made a guardian by an agreement.

Parental responsibilities

Only a guardian can have parental responsibilities for a child under the *Family Law Act*. These responsibilities are listed at s. 41:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Guardians can share one or more of these parental responsibilities, or one or more parental responsibilities can be allocated just to one guardian, so that only that guardian has responsibility for that issue.

Parenting time and contact

Parenting time and contact are both about the child's parenting schedule, although parenting time is about a bit more than just the child's schedule. Only guardians have parenting time; people who aren't guardians have contact with a child.

The terms of a child's parenting schedule can be very specific or, where the parties get along exceptionally well with one another, the terms can be as vague as "Jane will have liberal and generous access to the child."

If there has been a history of difficulty exercising parenting time or contact, or there is even a smidgen of conflict between the parties, it can be important to spell out the child's schedule in more detail to avoid future arguments. The terms of the child's schedule usually spell out when the party will see the child on a week-to-week basis, such as "John will have the child from Friday at the end of school to the following Sunday at 7:00pm, every other week, plus each Wednesday from the end of school until 7:00pm."

Children's schedules can also take into account:

- the child's birthday,
- Mothers' Day and Fathers' Day,
- the parties' birthdays,
- school and religious holidays,
- extended access when there is a civic holiday or a professional development day at school,
- communication by telephone and computer, including email, instant messaging and video conferencing,
- responsibility for picking up and dropping off the child,
- school events,
- the child's extracurricular activities, and
- birthdays of the child's friends.

Child support

Child support is a monthly sum, paid by the parent who has the child for the least amount of time, the *payor*, to the parent who has the child for the most amount of time, to help cover the day-to-day living expenses of the child. The amount of child support that is paid is almost always dealt with by referring to the Child Support Guidelines, which set out the amount of a parent's child support obligation according to the number of children support is being paid for and the payor's income.

A good separation agreement will:

1. state the income of each parent at the time the agreement is made,
2. state the monthly child support to be paid,
3. set up a system that requires the parties to exchange copies of their tax returns and Canada Revenue Agency notices of assessment each year or every other year,
4. provide for a review of child support if the payor's income rises or falls, and
5. provide for the recalculation of the parties' shares of the cost of the child's special expenses if either party's income rises or falls.

The Guidelines are an extremely convenient way to calculate a party's child support obligations up to the point where the spouse paying support, the *payor*, has access to the child for 39% or less of the time. Once the payor has 40% or more of the child's time, the Guidelines tables become less important, and child support is assessed based on, among other things, each party's income and the amount of expenses related to the child that each party is paying. In the context of separation agreements, this allows for a little more flexibility in determining child support, but makes the annual exchange of financial information even more important.

Spousal support

Spousal support is paid by one spouse to the other to help cover that person's day-to-day living expenses. A separation agreement that provides for the payment of spousal support should be negotiated bearing in mind all of the things the court would have considered in making an order for spousal support.

Typically, a separation agreement that requires spousal support to be paid will include some means of limiting the length of time for which support will be payable. Such terms might include:

- a fixed length of time over which support will be paid, after which the payor will have no more responsibility to pay,
- an indefinite amount of time that support will be paid, with one or more dates set for spousal support to be reviewed,
- a series of graduated payments, so that the recipient receives a declining amount of support as he or she re-enters the work force,
- the termination of support if the recipient enters a new spousal relationship, or
- the payment of support in a single, lump sum.

In some situations, of course, permanent support may be required, especially if the relationship was lengthy or if the recipient is unlikely ever to become self-sufficient because of illness, for example.

Some agreements also provide that no spousal support will be payable. If you are the spouse who would ordinarily be entitled to receive support, you need to be pretty confident that the agreement is fair as it may be very difficult to get support later on if your personal circumstances change.

The division of property and debt

The ways that a separation agreement can deal with the division of family property and family debt are virtually unlimited. Under the *Family Law Act*, each spouse is presumed to keep the property he or she brought into the relationship and share in the property bought during the relationship. The spouses are presumed to be each half responsible for any debt incurred during the relationship. However, you can make whatever other arrangements you want, as long as you both agree to those arrangements and they're reasonably fair.

When the division of property and debt are issues, it's often helpful to exchange Financial Statements. A Financial Statement, Form F8 of the Supreme Court Family Rules ^[1], is a helpful court form in which each party describes his or her income, assets, expenses and debts on oath or affirmation, like an affidavit. This form can be very useful for each spouse to get a clear idea of the family's financial situation before negotiations start. You can find links to and examples of a Financial Statement and other forms in [Supreme Court Forms & Examples](#).

A separation agreement should talk about how debts will be managed. Separating couples typically pay out family debts by the sale of a shared asset where there's not enough cash to pay it out, which is usually how the mortgage on the family home gets paid out, or they can allocate a different share of the family property to compensate for a family debt that can't be paid out. When a debt won't be paid out, it's essential to do two things: allocate responsibility for the debt; and, provide that the party remaining responsible for the debt will protect the party from having to repay the debt.

Other issues

Arrangements for the care of children, the payment of support, and the division of family property and family debts are the most common issues that come up in family law. There are a whole host of other issues that couples may have to deal with, including some that can only be dealt with in separation agreements.

The parties' future relationship with each other

Most separation agreements include a whole section devoted to describing how the parties will deal with each other once the agreement is executed. Typically, this portion of an agreement requires the parties, among other things, to:

- not incur debts in the name of the other party,
- not interfere with the personal life of the other party, including interfering with the other party's relationships with his or her parents, family, friends, and future partners, and,
- not molest, harass or annoy the other party.

Some separation agreements will also describe what will happen if the parties reconcile with each other. Most often an agreement will simply say that it becomes a marriage agreement or a cohabitation agreement if the parties reconcile, and that it will not cease to be in effect simply because of the reconciliation.

Life insurance

Where children are involved, it can be a good idea to provide that each party will maintain a life insurance policy until the children have all reached the age of majority. Each policy will name the other parent as the sole beneficiary of the policy in trust for the benefit of the children, in order to ensure that the kids will be looked after in the event that either party dies. Most agreements that deal with insurance allow the parties to change the beneficiaries of their policies once the youngest child turns 19.

In general, it's only appropriate to include a term about insurance policies if the parents can afford to pay for those policies.

Undisclosed assets

If you have even the slightest doubt that the other party hasn't been entirely forthcoming about the extent of his or her assets, a term governing undisclosed assets can be important. These sorts of terms usually provide that:

- any property that wasn't disclosed when the agreement was executed will automatically be deemed to be owned equally by both parties,
- the party that didn't disclose the asset will have to give the other party one-half of the asset's value, and,
- the party that didn't disclose the asset will have to pay the expenses the other party incurred in finding the asset, plus a financial penalty.

The effect of reconciliation

Separation agreements don't always contain special terms providing for the reconciliation of the parties and the resumption of their relationship. But if a couple does reconcile, what happens to their separation agreement? Does the agreement stay in force? What happens if the parties separate again?

The general rule here comes from the common law. Without a specific clause preserving some or all of the terms of a separation agreement, the agreement will be void if the parties reconcile and resume their relationship and live as a couple. This rule was upheld in a 2003 decision of the Ontario Court of Appeal, *Sydor v. Sydor*^[2], 2003 CanLII 17626 (ON CA). In that case, the court held that unless a separation agreement contains a term to the effect that the agreement will survive reconciliation, the agreement will be void when the couple reconciles, notwithstanding a term of the agreement that it is a "full, final and conclusive settlement" of all issues arising from their relationship.

The upshot of all this is that if there's a chance that you and your spouse might get back together, and you want your separation agreement to survive your reconciliation, you must put a term to that effect in your separation agreement. Without it, your agreement may be worthless if you reconcile and the relationship breaks down again at some point afterwards.

Separation agreements filed in court

Agreements that are filed in court can be enforced as if they were orders of the court in which they are filed. Among other things, this means that the Family Maintenance Enforcement Program can enforce an agreement for support exactly as it would enforce an order for support.

To find out how to file an agreement, or to see if your agreement has been filed in court, read *How Do I File an Agreement in Court?* It's located in the *How Do I?* part of this resource under *Separation Agreements*.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society's Family Law Website: Fact sheet on making an agreement after separation ^[3]
- Legal Services Society's Family Law Website: Who can help you reach an agreement? ^[4]
- Legal Services Society's "Living Together or Living Apart", chapter 2, Making Agreements ^[5]
- Canadian Bar Association BC Branch: Script on marriage agreements and cohabitation agreements ^[6]
- West Coast LEAF: Booklet on separation agreements and right to fairness ^[7]
- Law Society of BC: Separation agreement drafting checklist ^[8]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

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[4] http://www.familylaw.lss.bc.ca/resources/fact_sheets/whoCanHelpYouReachAnAgmt.php
[5] <http://www.clicklaw.bc.ca/resource/1058>
[6] <http://www.clicklaw.bc.ca/resource/1259>
[7] <http://www.clicklaw.bc.ca/resource/2551>
[8] <http://www.lawsociety.bc.ca/docs/practice/checklists/D-3.pdf>

Enforcing Family Law Agreements

People who sign a family law agreement are signing a *contract*. A contract is an agreement between two or more people that creates an obligation to do or to not do something. Other kinds of contracts include the rental agreement a tenant has with a landlord, the lease agreement you might have with a car company, or the employment contract an employee has with an employer. Contracts can be enforced by the courts when someone doesn't do what the contract requires of them; in fact, that's the whole point of having a contract. You want a document that describes your obligations to each other and you want to have a way of making the other party do what they're supposed to do.

This section discusses how family law agreements can be enforced by the courts and by the Family Maintenance Enforcement Program, an agency of the provincial government that can help with the enforcement of agreements for the payment of child support and spousal support.

Introduction

When someone who has signed a family law agreement doesn't do the things the agreement requires, that person is *in breach* of the agreement. In family law, unlike in the law about commercial contracts, a party to an agreement can breach just part of the agreement without being considered to be in breach of the whole agreement. As a result, when someone breaches just a part of a family law agreement, the other party isn't allowed to treat the entire agreement as having been rejected by the breaching party, no matter how important the breach was, and the agreement continues to be binding on both parties.

The *Family Law Act* says this about family law agreements at s. 6:

- (1) Subject to this Act, 2 or more persons may make an agreement
 - (a) to resolve a family law dispute, or
 - (b) respecting
 - (i) a matter that may be the subject of a family law dispute in the future,
 - (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
 - (iii) the implementation of an agreement or order.
- (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.
- (4) Subsection (3) applies whether or not
 - (a) there is consideration,
 - (b) the agreement has been made with the involvement of a family dispute resolution professional, or
 - (c) the agreement is filed with a court.

When a term of an agreement is breached, the other party is entitled to take steps to make the breaching party comply with his or her obligations under the agreement. This is called *enforcing* the agreement. How a separation agreement is enforced depends largely on which particular term of the agreement has been breached. Some terms, like those dealing with child support, are fairly easy to enforce. Other terms, like those dealing with the allocation of parental

responsibilities, can be much harder to deal with.

Enforcement under the *Family Law Act*

The *Family Law Act* allows certain family law agreements about certain subjects to be filed in court and enforced under the act:

- agreements on *parental responsibilities and parenting time* can be filed under s. 44(3),
- agreements for *contact* can be filed under s. 58(3),
- agreements for *child support* can be filed under s. 148(2), and
- agreements for *spousal support* can be filed under s. 163(3).

Once filed in court, these agreements can be enforced under the *Family Law Act* in the same way as orders are enforced under the act.

The act has different ways of enforcing orders that change depending on the subject of the order (or agreement). Where the act provides a way particular way of enforcing an order, the order can be enforced under that *specific* enforcement power and by the act's *extraordinary* enforcement power. Where the act does not provide a particular way of enforcing an order, the order can be enforced under the act's *general* enforcement power and by its *extraordinary* enforcement power.

General enforcement power

Under s. 230 of the *Family Law Act*, the court can enforce an order (or agreement) by requiring a person:

- to post security, usually by paying a sum of money into court,
- to pay the expenses of the other party incurred from the person's breach,
- to pay up to \$5,000 to the other party or a child or spouse who was affected by the person's breach, or
- to pay up to \$5,000 as a fine.

These provisions apply to agreements about parental responsibilities, child support, and spousal support.

Extraordinary enforcement power

Under s. 231 of the act, when no other order will be sufficient to make someone comply with an order (or agreement), the court can enforce the order (or agreement) by imprisoning the breaching party for up to 30 days.

This provision applies to agreements about parental responsibilities, parenting time, contact, child support, and spousal support.

Enforcement under other legislation

The federal *Divorce Act* does not address the enforcement of family law agreements, however other laws do, such as the provincial *Family Maintenance Enforcement Act* ^[1] and the provincial *Personal Property Security Act* ^[2].

Orders about child support and spousal support

Under ss. 148 and 163 of the *Family Law Act*, an agreement about child support or spousal support that has been filed in court can also be enforced under the *Family Maintenance Enforcement Act* ^[1] and the *Court Order Enforcement Act* ^[3].

Agreements about child support or spousal support made outside of British Columbia can be filed in court under the *Interjurisdictional Support Orders Act* ^[4], and then be enforced under the *Family Maintenance Enforcement Act*.

Orders about property

Under s. 99 of the *Family Law Act*, a party to a family law agreement about property can file a Notice of Agreement in the Land Title Office that will be registered as a charge on the title of a property under the *Land Title Act* ^[5]. This will stop the property from being transferred or mortgaged until the Notice of Agreement is cancelled.

Under s. 100 of the act, a party to a family law agreement about a manufactured home can file a Financing Statement in the Personal Property Registry ^[6] that will be registered against the manufactured home under the *Personal Property Security Act* ^[2]. This will stop the manufactured home from being transferred until the Financing Statement is cancelled.

Agreements about the care of children

Under the federal *Divorce Act*, married spouses have *custody* of their children, and the schedule of their time with the children is called *access*. Married spouses could make an agreement talking about the care of their children in terms of custody and access, but should probably use the language used by the provincial *Family Law Act* because only that act provides specifically for the enforcement of agreements.

Under the *Family Law Act*, guardians, who may or may not be parents, have *parental responsibilities* for raising the children, and the schedule of their time with the children is *parenting time*. People who are not guardians may have *contact* with a child.

Parental responsibilities

An agreement about parental responsibilities can be filed in court under s. 44(3) of the *Family Law Act* and be enforced through the act's general and extraordinary enforcement powers.

Parenting time and contact

An agreement about parenting time can be filed in court under s. 44(3); an agreement about parenting time can be filed in court under s. 58(3). These agreements can be enforced through the specific enforcement powers found in ss. 61 and 63 as well as the act's extraordinary enforcement powers.

Denial of parenting time or contact

Under s. 61 where someone has been *wrongfully denied* parenting time or contact in the previous 12 months, the court can:

- (a) require the parties to participate in family dispute resolution;
- (b) require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs;
- (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;

- (d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;
- (e) require that the transfer of the child from one party to another be supervised by another person named in the order;
- (f) if the court is satisfied that the guardian may not comply with an order made under this section, order that guardian to
 - (i) give security in any form the court directs, or
 - (ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (g) require the guardian to pay
 - (i) an amount not exceeding \$5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or
 - (ii) a fine not exceeding \$5 000.

The court can enforce agreements for parenting time or contact using its extraordinary power to jail someone, as well as certain other extraordinary powers intended for problems like these. Under s. 231(4), where a guardian withholds parenting time or contact, the court can require a police officer to take the child to the person entitled to parenting time or contact. Under s. 231(5), where a person with contact refuses to return the child to his or her guardian, the court can require a police officer to take the child to his or her guardian.

Under s. 62(2), the denial of parenting time or contact is not wrongful if:

- (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
- (d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;
- (e) the applicant
 - (i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and
 - (ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;
- (f) other circumstances the court considers to be sufficient justification for the denial.

Failure to exercise parenting time or contact

Under s. 63 where someone "fails repeatedly" to exercise a right of parenting time or contact under an agreement, the court can:

- require the parties to attend a course of dispute resolution,
- require one or more parties or the child to attend counselling,
- require the transfer of the child between the parties to be supervised,
- require the reimbursement of expenses incurred as a result of the failure,
- require the posting of security, or
- require the breaching person to report to the court.

The court can enforce these agreements using its extraordinary power to jail a person.

Agreements for child support and spousal support

When a payor falls behind in his or her support payments as required by an agreement, or stops making them altogether, he or she is said to be in *arrears* of support. Support is often the easiest part of an agreement to enforce.

Once an agreement is filed in court, under s. 148 of the *Family Law Act* for child support and s. 163 for spousal support, the agreement can be enforced through the act's general and extraordinary enforcement powers. Filed agreements can also be enforced by the provincial Family Maintenance Enforcement Program ^[7]. This is a free service that can be very effective in forcing a payor to meet his or her obligations and monitor ongoing payments.

Agreements about property and debt

Where an agreement provides for the division property and debt and someone doesn't live up to his or her obligations, the agreement can be enforced by starting a court proceeding in the Supreme Court for *breach of contract*, asking the court to make an order for the *specific performance* of the agreement by the person in breach, plus an order for costs. An order for the specific performance of an agreement requires the breaching person to do whatever it is that the agreement required of him or her, like transferring real property, surrendering personal property, or paying a debt. An order for costs requires the breaching person to pay some money toward the cost of the court proceeding.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Interjurisdictional Support Orders Act* ^[4]
- *Family Maintenance Enforcement Act* ^[1]
- *Court Order Enforcement Act* ^[3]
- *Land Title Act* ^[5]
- *Personal Property Security Act* ^[2]

Links

- Canadian Bar Association BC Branch: Script on enforcing orders and agreements for support ^[8]
- Department of Justice: About support enforcement ^[9]
- Department of Justice: Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement ^[10]
- Family Maintenance Enforcement Program website ^[7]
- Clicklaw HelpMap: Family Maintenance Enforcement Program details ^[11]
- Legal Services Society's Family Law Website: Information about FMEP ^[12]
- Personal Property Registry website ^[6]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [2] <http://canlii.ca/t/8495>
- [3] <http://canlii.ca/t/84h5>
- [4] <http://canlii.ca/t/8413>
- [5] <http://canlii.ca/t/8456>
- [6] <http://www.bcregistryservices.gov.bc.ca/bcreg/pprpg/ppinfo.page>
- [7] <http://www.fmep.gov.bc.ca/>
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- [11] <http://clicklaw.bc.ca/helpmap/service/1082>
- [12] http://www.familylaw.lss.bc.ca/help/who_Family_Maintenance_Enforcement_Program.php

Changing Family Law Agreements

After a family law agreement has been signed, one of three things can happen:

1. The parties can follow the agreement and everything continues as it should.
2. The circumstances of the parties or a child change and their agreement must also change.
3. One of the parties refuses to follow the agreement and it must be enforced by the courts.

This section focuses on separation agreements and talks about how agreements can be changed without going to court, and when the agreements can be set aside by the court.

You can find out how family law agreements are enforced in the Enforcing Family Law Agreements section of this chapter.

Changing agreements by agreement

There are always two ways of doing something: the hard way or the easy way. In family law, the easy way usually involves discussion and negotiation. The hard way usually involves a court proceeding, and is generally a fair bit more expensive and time-consuming than the easy way.

Any family law agreement can be changed at any time, as long as the parties to the agreement agree to the change. If the parties can't agree on the change or on the terms of the change, the party who wants the change may have to go to court if the problem is important enough. Since the court doesn't have the power to vary an agreement, the best the court can do is to cancel the part of the agreement that has to change and then make an order in place of the part that was cancelled.

Amending an agreement

A family law agreement can be changed by a later agreement. If the parties to an agreement both agree that the original agreement should be changed and on how it should be changed, the parties can sign a second agreement called an *amendment agreement*, an *amending agreement* or an *addendum agreement* to the original agreement.

An agreement changing an agreement must refer to the original agreement and is usually titled something like "Amendment to the Separation Agreement Executed on 1 April 2010." Amending agreements are usually very short, as the idea is to change just one particular part of an agreement rather than to rewrite the entire original agreement. The amending agreement should specify which particular paragraph of the original agreement is being changed, and then set out the new text of that paragraph:

2. The parties agree that Paragraph 23 of the Agreement executed on 1 April 2010 will be cancelled and be replaced with the following:

Sally will also have parenting time with the children beginning on Tuesdays at 4:00pm or the end of school to the following Wednesday at 9:00am or the start of school, whichever is earlier.

3. Sally's income is \$45,000 per year as at the date of the execution of this Amending Agreement. The parties agree that Sally's child support obligation, set out at Paragraph 28 of the Agreement executed on 1 April 2010, will be \$684 per month, commencing on the first day of the month following the execution of this Amending Agreement.

Just like the original agreement, the amending agreement must be signed by both parties in the presence of a witness, who watches each party sign the agreement and then signs the agreement him- or herself.

Amending an agreement through negotiation

A well-written agreement will usually provide a way for the parties to resolve disputes arising from the agreement. Sometimes this mechanism requires that the parties go to court; sometimes this mechanism prescribes some other means of dispute resolution like mediation or arbitration.

Mediation is, in general, the best option if simple negotiation doesn't get you anywhere. In mediation, the parties attempt to negotiate a resolution to their dispute with the help of a neutral third party, the mediator, who is skilled in family law issues and works with the parties to get them to a new agreement.

Mediation is not always appropriate, particularly where the problem is limited to one particular term of the agreement and it seems that neither party is willing to bend on the matter. In such cases, arbitration on that one issue should be considered. The job of an arbitrator is to listen to the evidence and the arguments and then make a decision, called an *award*, that resolves the dispute and is binding on the parties. It is always faster to arbitrate than to litigate, and when both parties have lawyers it's usually cheaper to arbitrate as well.

Whatever method is chosen, it's almost always better for people to reach a resolution of the problem themselves without having to go to court. This way the power remains in the hands of the people whose lives are affected by the agreement and who must live with it on a daily basis, rather than in the hands of someone else, a judge, who doesn't know the people involved and may make a decision that no one is entirely happy with.

See the chapter Resolving Family Law Problems out of Court for more information on Family Law Mediation and Family Law Arbitration.

Intervention by the courts

If a party to an agreement becomes unhappy with an agreement, there are two ways to proceed. First, the party could ask the court to throw out the entire agreement because it is unfair, because the agreement is invalid, or because of some other fatal problem with the contract. Second, the party could apply under the *Family Law Act* to have the court set aside just part of the agreement.

In general, the court will be reluctant to meddle with a reasonable separation agreement. In fact, the Court of Appeal for British Columbia has said that separation agreements should be treated by the courts with "great deference." This is because a separation agreement is a private contract between two parties that is the product of an often lengthy process of negotiation, and the courts are usually unwilling to disturb an agreement without a very good reason for doing so. The courts will be similarly reluctant to change a final order that was the product of a separation agreement.

Setting aside agreements under the law of contracts

Just like a commercial contract, the validity of a family law agreement can be challenged for a number of reasons based on the common law of contracts:

1. the agreement was *not freely entered into*, in other words, a party was under duress when the agreement was negotiated or executed,
2. the agreement is *unconscionable*, in other words, the agreement is obviously and seriously unfair to a party,
3. a party signed the agreement without independent legal advice, did not fully understand what the agreement meant, and signed it by *mistake*,
4. the agreement was signed without *full disclosure* having been made, or
5. a party signed the agreement because *misleading information* had been provided.

Duress, coercion, unconscionability and mistake

The courts won't enforce an agreement — that is, they won't compel the parties to abide by an agreement — where one of the parties was forced or pressured to enter into the agreement. An agreement must be entered into freely and voluntarily.

Likewise, the courts won't enforce an agreement where one of the parties used a position of power to achieve an unfair agreement. This can include threats and manipulation, as well as signing an agreement in circumstances of extreme emotional stress, such as just before a wedding, following a hospitalization, or during an emotional breakdown.

Agreements that are hugely unfair can also be found to be unconscionable, as can agreements formed under a fundamental misunderstanding about the nature of the family finances or the extent of a party's assets.

Lack of independent legal advice

A spouse may be able to challenge the validity of an agreement where he or she did not receive independent legal advice before entering into the agreement. Independent legal advice helps to ensure that both parties are on a more or less equal footing, and to ensure that one party doesn't unintentionally enter into an unfair agreement.

There is, however, no requirement that independent legal advice be sought before an agreement is signed. In most situations, the absence of independent legal advice alone will not be enough to overturn an agreement by itself.

Fraud and the failure to make full disclosure

When people enter into an agreement, they do so on the assumption that certain material facts are true, that each is earning as much money as they say they are, that each has no more assets than they say they have, and so forth. These assumptions are the foundation on which the agreement is built. If one of the parties has failed to make full disclosure of these sorts of material facts, or if one party has lied about or misrepresented these facts, the courts may be willing to overturn an agreement.

Setting aside agreements under the *Family Law Act*

Under the provincial *Family Law Act*, the court cannot vary or amend a valid agreement. When the court is convinced that an agreement must change, the court will set aside the parts of the agreement that are causing the problem and make an order in place of the parts set aside. Section 214 of the act says this:

- (1) If an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement.
- (2) A court may incorporate into an order all or part of a written agreement respecting a family law dispute made by the parties to the proceeding and, unless the court orders otherwise,
 - (a) the order replaces that part of the agreement that is incorporated, and
 - (b) the remainder of the agreement remains effective.
- (3) Unless the court orders otherwise, if an agreement and an order made after the agreement provide differently for the same subject matter,
 - (a) the order replaces the part of the agreement that provides differently for the same subject matter, and
 - (b) the remainder of the agreement remains effective.

The legal test that the court must apply to set aside part of an agreement changes, depending on the subject of the part of the agreement in question.

Guardianship

The *Family Law Act* does not provide a specific test to vary an agreement appointing a parent as the guardian of a child. However, under s. 214(3), the court can make an order on different terms than an agreement.

Under s. 37(1), when the court is making an order about guardianship, it must do so considering only the best interests of the child. The factors the court must think about to decide what is in the best interests of a child are listed at s. 37(2) of the act, and, when family violence is a factor, also at s. 38.

Parental responsibilities, parenting time and contact

Under s. 44(4) of the *Family Law Act* says this about agreements for parental responsibilities and parenting time:

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

Section 58(4) says almost exactly the same about agreements for contact.

The factors the court must think about to decide what is in the best interests of a child are listed at s. 37(2) of the act, and, when family violence is an issue, also the factors listed at s. 38.

Child support

As in all matters concerning children, the court's only concern is the best interests of the child. The court will rarely interfere with an agreement that provides for child support in accordance with the federal Child Support Guidelines. The courts will also be reluctant to reduce a child support provision that is higher than what the Guidelines require, because it is logically in the best interests of the child to have the benefit of as much support as possible. The courts will be much more inclined to interfere with a provision of an agreement that calls for a lesser amount of support than what the Guidelines require.

Section 148(3) of the *Family Law Act* says this:

On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

Section 150 is the section that says how child support is to be calculated, namely that it is to be calculated according to the Guidelines. As a result, the court will set aside the part of an agreement dealing with child support if:

1. the payor's income has increased,
2. the payor's income has decreased,
3. one or more children are no longer living mostly with the parent receiving support,
4. one or more children are now splitting their time almost equally between the homes of the payor and the recipient,
5. one or more children are no longer entitled to receive support, or
6. the agreement otherwise provides for an inadequate amount of child support.

Spousal support

Section 164 of the *Family Law Act* talks about when the parts of an agreement about spousal support should be set aside. Under s. 163(2), an agreement about spousal support includes an agreement that spousal support *won't* be paid as well as an agreement that spousal support *will* be paid.

Section 164 provides two legal tests to help the court decide whether an agreement should be set aside. The first test requires the court to look at what happened when the agreement was being negotiated and signed:

(3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

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

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

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

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

That last part, at s. 164(3)(d), is about the common law of contracts, discussed above.

Even if there are no problems with the circumstances when the agreement was being negotiated and signed, the court can still set aside the agreement if it considers the agreement to be "significantly unfair" considering five factors:

(5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;

(b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;

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

(d) the degree to which the spouses relied on the terms of the agreement;

(e) the degree to which the agreement meets the objectives set out in section 161.

Section 161 is the section that says why spousal support should be awarded.

Property and debt

Section 93 of the *Family Law Act* talks about when the parts of an agreement about dividing property and dividing debt should be set aside. Like s. 164 on spousal support, discussed above, s. 93 provides two legal tests to help the court decide whether an agreement should be set aside. The first test requires the court to look at what happened when the agreement was being negotiated and signed and is exactly the same as the test at s. 164(3). The second test allows the court set aside the agreement, even if there are no problems with the circumstances when the agreement was being negotiated and signed, if the agreement is "significantly unfair." However, to determine significant unfairness under s. 93(5), looks at three factors, not five:

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines

Links

- West Coast LEAF: Booklet on separation agreements and right to fairness ^[1]

✓ The above was last reviewed for legal accuracy by JP Boyd, April 16, 2013.

References

[1] <http://www.clicklaw.bc.ca/resource/2551>

Children

Children in Family Law Matters

When a couple involved in a family law dispute has children, they must make decisions about four important issues: where the children will live, how parenting decisions will be made, how often each person will see the children, and how the children will be provided for. This chapter reviews the first three of these issues in detail. The fourth issue is covered in the Child Support chapter.

This introductory section provides an overview of the law on the care of children after separation, and looks at traditional and developing concepts in this area of the law. It also discusses the rights and interests that grandparents and other non-parents might have. Other sections of this chapter look more closely at parenting after separation, guardianship and contact, custody and access, making changes to orders and agreements involving children, and the problem of alienated and estranged children.

Other legal issues relating to children, such as family violence, naming, and adoption, are discussed in the chapter Other Family Law Issues.

Introduction

There are two laws that deal with issues about the care of children when parents separate, the federal *Divorce Act* and the provincial *Family Law Act*. Both laws allow parents and other people to apply for orders about where the children will live and how much time each person will have with the children if they can't make an agreement about these issues themselves. Whenever the court is asked to make a decision about issues like these, the court's primary concern is the children and the sort of arrangements that will be in their best interests. Most of the sections in this chapter talk about how the court makes these decisions and the laws that apply to different parents in different situations.

The Parenting after Separation section talks about some very important issues that don't involve the courts and the legislation but are equally important: how to protect children from the conflict between their parents, how to develop parenting plans, and how to locate resources that are available to separating and separated parents. When parents separate, there is a lot more at stake than just where the children are going to be living tomorrow. Parents have an obligation to think in the long-term, and take a perspective that sees years down the road. How is their conflict going to affect their children? How can both parents maintain a meaningful role in their children's lives? How will the children adapt to the separation? When the children are older and look back on their childhood, what will they think of the separation? And, perhaps most importantly, how can the children best be helped to grow and mature into adults with families of their own?

There's a lot more to dealing with the care of children after separation than what you'll find in the *Divorce Act* and the *Family Law Act*. The romantic relationship between the parents may be over, but they'll always be parents no matter the nature of their relationship with each other. Parents owe a duty to their children to overcome their differences and always put their children first, no matter how hard it is to cope with the emotional and legal issues that arise from their separation.

The *Divorce Act* and the *Family Law Act*

For married spouses, the law about children after separation is governed by the federal *Divorce Act* as well as the provincial *Family Law Act*. For unmarried spouses and other unmarried couples, the only law that applies is the *Family Law Act*. Although married spouses can ask for orders under both the *Divorce Act* and the *Family Law Act*, it's best to pick one or the other. This is because the two laws approach the care of children with different attitudes and use different language.

Custody and access

The *Divorce Act* talks about the care of children in terms of *custody* and *access*. Custody is about the right to have the child with you and the right to make decisions about how the child is cared for and raised. Access is about the child's schedule of time with his or her parents. A parent who has access but doesn't have custody is still entitled to have information about the health, education and well-being of the child.

Guardianship and parental responsibilities

The *Family Law Act* talks about people who are *guardians*. A guardian is a person who is responsible for making decisions about how the child is cared for and raised. A guardian has *parental responsibilities*, which means that a guardian must make these decisions in the best interests of the child.

Guardians are usually, but not always, the parents of a child, including people who are parents because of an assisted reproduction agreement. A parent who isn't a guardian can become a guardian by an agreement signed by all of the child's guardians. However, if the parent and the guardians can't agree, the parent will have to apply to court to be appointed as a guardian.

Someone who isn't a parent can usually only be appointed as the guardian of a child by a court order.

Parenting time and contact

Under the *Family Law Act*, a guardian's time with a child is called *parenting time*. During a guardian's parenting time, the guardian is responsible for the care of the child and is entitled to make basic day-to-day decisions for the child.

The schedule of a child's time with someone who isn't a guardian is called *contact*.

The best interests of the children

Whenever the court considers issues involving children, its first and foremost concern is the best interests of the children, not whatever the particular wishes of a parent might be, no matter how well-intentioned those wishes might be. It's not about you; it's about your kids. As a result, in any application concerning children you must show that the outcome you're looking for is the outcome that is in your children's best interests.

Section 16 of the *Divorce Act* is about custody and access and says this:

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

Section 37 of the *Family Law Act* is titled "Best interests of child" and goes into more detail than the *Divorce Act* about what children's "best interests" means:

(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.

(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 or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

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

In making decisions about custody and access under the *Divorce Act*, or parental responsibilities, parenting time and contact under the *Family Law Act*, the court will take into account a whole range of factors, including some of the following:

- Who looked after the child most of the time during the marriage?
- Does the child have a stronger bond with one parent than the other?
- How much will each parent work to encourage the child to spend time with the other parent?
- What plans do the parents have to look after and care for the child?
- How well can the parents cooperate and communicate with each other?
- How will the order proposed by the applicant affect the child?
- Will the proposed order be in the child's long-term best interests?

- Will the proposed order disrupt the child's present life? Is there an established status quo that the child has already settled into?
- Will the proposal disrupt the child's schooling, or take the child away from his or her friends and family?

You should bear in mind these quotes from Mr. Justice Spencer in *Tyabji v. Sandana* ^[1], 1994 CanLII 410 (BC SC) a 1994 decision of the Supreme Court:

"Custody is not awarded in any sense to punish the parent who is deprived of it. There is no contest between parents to see who most deserves the children nor who was the more responsible for the break-up of the family unit."

"Custody is a placement of the children with the person who, in the court's judgment, presents that prospect of care and upbringing which is in the best interests of the children."

Custody and guardianship after separation

The old *Family Relations Act* made certain assumptions about who would have custody and guardianship of the children after a couple had separated. In general, the person who had the children most of the time was said to have "*de facto* custody" and "*de facto* guardianship" of the children, meaning having custody and guardianship as a matter of fact rather than because of a court order.

Under s. 39 of the new *Family Law Act*, while parents are living together and after they separate, both of them are presumed to be the guardians of their children. These parents are guardians in fact and in law and do not need a court order to give them guardianship of their children. Other people who are presumed to be guardians are:

1. people who are parents under an assisted reproduction agreement, and
2. a parent who has never lived with the other parent but "regularly cares" for his or her child.

The *Divorce Act* does not make any presumptions about who has custody of the children after separation.

Legal concepts about the care of children

Custody and access under the *Divorce Act*

Custody is about the right to have the child with you and the right to make decisions about how the child is raised. Custody can be awarded to one person, called *sole custody*, or it can be shared between two parents, usually called *joint custody*.

A parent who has sole custody has the household in which the child lives for the majority of the time.

When parents have joint custody, both parents have the right to the day-to-day care of the child, although the child may spend more time at the home of one parent than the other, sometimes a lot more time. Parents can have joint custody even when one of them only sees the child on the weekends and even when the parents live in different provinces. There is no connection between having joint custody and the amount of time each parent has with the child.

Access is the schedule of the child's time between his or her parents.

It is very important to understand that a parent's access rights to a child are entirely separate from that parent's obligation to pay child support. Child support is not a fee paid or charged to see one's child. It is never appropriate to withhold access because a parent missed a child support payment, nor is it ever appropriate to stop paying child support because access has been withheld. The courts do not look kindly on parents who have engaged in this sort of conduct.

Custody under the Child Support Guidelines

The Child Support Guidelines is a regulation to the *Divorce Act* that has been adopted by almost every province, including British Columbia. The Guidelines talks about how child support should be calculated, but along the way it also talks about how the children's time is shared between their parents, since that can have an impact on the calculation of child support.

Parents have *split custody* of their children, under s. 8 of the Guidelines, when one or more of the children live with each parent most of the time. This sort of arrangement is pretty rare because it means that siblings will be separated from each other for significant periods of time. Split custody will only be ordered when there is good evidence that it is in the best interests of the children to live apart from each other, which might be the case when the children don't get along with each other and are constantly fighting, or where it can be proved that one or more but not all of the children will be better off with the other parent.

Parents have *shared custody*, under s. 9 of the Guidelines, when the children spend an equal or almost equal amount of time in each of the parents' homes. This sort of arrangement is becoming increasingly common.

Guardianship under the *Family Law Act*

The *Family Law Act* doesn't talk about custody. Instead it talks about the rights and duties of people who are *guardians*. Most of the time, a guardian is a child's parent. However, other people can become guardians by being appointed by the court or by being named as guardian in a guardian's will.

Parental responsibilities

Guardians have *parental responsibilities* for the children in their care, which is the duty to make decisions about the children in the best interests of the children. The terms of how parental responsibilities will be handled can be vague or they can be very specific. Specific terms usually define the distribution of parental responsibilities using a set of clauses drafted by Mr. Justice Joyce (the "Joyce model") or by Master Horn (the "Horn model") or some hybrid of the two. Both models describe the rights and obligations both parents have when they are both guardians.

The Joyce and Horn models of sharing parental responsibilities are discussed in more detail in the section Guardianship, Parenting Arrangements and Contact.

Parenting time

The schedule of a child's time between guardians is called *parenting time*, and the allocation of parenting time between the child's guardians is about the child's living arrangements. During a guardian's parenting time, the guardian is responsible for the care of the child and may make decisions about day-to-day issues concerning the child.

It is very important to understand that a guardian's parenting time with a child is entirely separate from his or her obligation to pay child support. Child support is not a fee paid or charged to see a child. It is never appropriate to withhold parenting time because a guardian missed a child support payment, nor is it ever appropriate to stop paying child support because parenting time has been withheld. The courts do not look kindly on guardians who have engaged in this sort of conduct.

Contact under the *Family Law Act*

Under the *Family Law Act*, someone who is not a parent, has *contact* with a child. Someone with contact does not have any parental responsibilities for the child, including any responsibility for day-to-day decision-making concerning the child.

It is very important to understand that a person's contact with a child is entirely separate from his or her obligation to pay child support. Child support is not a fee paid or charged to see a child. It is never appropriate to withhold contact because a child support payment was missed, nor is it ever appropriate to stop paying child support because contact has been withheld. The courts do not look kindly on people who have engaged in this sort of conduct.

Other legal concepts

Birdnesting

Birdnesting refers to a parenting schedule where the children live full-time in the family home and their parents move in and out. In a usual situation where the children's time is shared fairly equally between their parents, the children go to live with one parent for a period of time, then go to live with the other parent for a similar period of time. When parents birdnest, the children remain in the same place and it's the parents who do the moving, normally while maintaining separate homes outside the family home.

The theory underlying this concept is that it is disruptive for children to switch homes every week and that it can be too costly to make sure there's a full set of clothing, toys, books and whatnot in both houses. Birdnesting lets the kids stay in a single home, usually the family home that they've grown up in. Of course, the cost saved by avoiding duplication of the children's clothes and books is offset by the need to maintain three homes: the family home, and a home for each of the parents.

Birdnesting is a term that has been created by lawyers and judges, like the term "primary residence." Birdnesting is not a term you will find in the *Family Law Act* or the *Divorce Act*.

Parallel parenting

Parallel parenting is a way of distributing parental responsibilities between guardians that is best suited for high-conflict situations where each of the guardians is a good parent and the children would do well with either of them. A helpful 2004 decision of the Provincial Court, *J.R. v. S.H.C.* ^[2], 2004 BCPC 0421 discusses the concept of parallel parenting at length:

- A guardian assumes complete responsibility for the children when they are with him or her.
- A guardian has no say over the actions of the other guardian when the children are in that guardian's care.
- There is no expectation of flexibility between the guardians.
- A guardian does not plan activities for the children when they are with the other guardian.
- Contact between the guardians is minimized and children are not asked to pass messages to the other guardian. When the guardians must communicate, they do so by writing in a book that the children take with them from one home to the other.

To further minimize disputes, guardians who are parallel parenting are assigned specific parental responsibilities over which they will have sole authority. For example, one guardian might be responsible for educational and religious issues while the other is responsible for sports and music lessons.

Parallel parenting is not a term you will find in the *Family Law Act* or in the *Divorce Act*.

Reports and assessments

Parents, guardians, and the court sometimes need help in deciding what is in the best interests of the children and need to get someone else's input, which might be from a psychologist, clinical counsellor, family justice counsellor or social worker, or from the children themselves. The two most common ways of doing this are through *needs of the child assessments*, which used to be called "section fifteen reports" or "custody and access reports," or through *views of the child reports*.

Needs of the child assessments

Section 211 of the *Family Law Act* allows the court to order that an assessment be conducted of the children's wishes, the children's needs, and the ability of a person to meet those needs. Needs of the child assessments are helpful to the court and can be very useful when the parties are trying something other than court, like mediation, collaborative settlement processes, or arbitration.

The Supreme Court discussed the purposes of the old custody and access reports in a 2001 case called *Gupta v. Gupta* ^[3], 2001 BCSC 649. The court's comments apply just as well to the new needs of the child assessments:

"The purpose of a Court ordered s. 15 Assessment and Report ... is to assist the Court in determining the issues before it, including the paramount of issues of what is in the best interests of the children. The section itself contemplates that the person doing the investigation must be approved by the Court, and must be independent or neutral. ... The investigation is carried out for the purposes of the Court, and in the best interests of the children, and not those of the partial parents who are embroiled in what is seen as the dispute of their lives, who generally represent the extremes of every issue, and whose evidence is often found to be coloured to say the least."

When a needs of the child assessment is required, the court will usually name a family justice counsellor or a particular psychologist or psychiatrist to conduct the assessment. In the Provincial Court, the court will almost always refer the parties to a family justice counsellor.

Ordinarily, the assessor will meet each of the parents separately and meet them each again in the presence of the children. If the children are old enough, the assessor may speak to the children separately. The assessor may also speak to other people who know the parents and their children, such as friends, family and neighbours, the children's teachers, and any counsellors or therapists.

Once the assessment is finished, a process that can take anywhere from two months to five months, the assessor sends the assessment to the parties and to the court, if the assessment was court ordered. These assessments can be used in two ways: to encourage settlement; and, at trial, to persuade the court that the parenting proposal of one parent or guardian is to be preferred over that of the other. The person who prepared the assessment can be called to testify at the trial and will be subject to cross-examination as to how he or she conducted the assessment and reached his or her conclusions and recommendations.

It is important to remember that the function of the assessor in court is to present his or her recommendations and the evidence that he or she relied on, such as test scores and interview observations, in coming to those recommendations. At the end of the day, it is always up to the judge to decide the parenting arrangements for the children. A needs of the child assessment is merely the assessor's recommendation to the court based on his or her particular expertise as an experienced psychologist, psychiatrist, or family justice counsellor; the assessment is not a final determination of the issue.

For information on to how get a needs of the child assessment, see *How Do I Get a Needs of the Child Assessment?* It's located in the *How Do I?* part of this resource, in the section *Other Litigation Issues*.

Views of the child reports

A views of the child report, sometimes called a "hear the child report," is exactly what it sounds like. It's a report that describes the child's preferences about his or her parenting arrangements and living circumstances. These reports might address a child's preferences about his or her parenting schedule, the home he or she would like to live in, and whether the child would like to move out of town with a parent. It might address the child's experiences of the conflict between his or her parents or guardians, or perhaps the child's experience with a parent's new partner.

There are two types of views of the child report, one type prepared by experts, like psychologists and psychiatrists, and another type prepared by lay persons, people who are not experts, like lawyers and family justice counsellors. These reports are ordered under ss. 37 and 202 of the *Family Law Act*. Section 37(2)(b) is the part of the best interests of the child test that says that children's views should be heard; s. 202 allows the court to decide how a child's evidence will be received.

Although views of the child reports can usually be finished much more quickly and more cheaply than needs of the child assessments, they are no substitute for a proper needs of the child assessment. Parents who want a views of the child report must understand that these reports do not provide the full reporting, testing and analysis offered by a needs of the child assessment, particularly when the person preparing the views of the child report is not a psychologist or psychiatrist.

It is important to know that the court will not make a decision based only on what the views of the child report says. The child is not making the decision and will not be responsible for making the decision. It's important for the child to know this as well.

For information on how to get a views of the child report, see *How Do I Get a Views of the Child Report?* It's located in the *How Do I?* part of this resource, in the section *Other Litigation Issues*.

Expert views of the child reports

Expert views of the child reports usually wind up looking like condensed needs of the child assessments that focus on the child's reports to the assessor. They may include an opinion about things like whether the child's reported preferences represent the child's true preferences, whether the child was coached to report the preferences reported, and perhaps whether the child is being alienated from one parent by the other parent.

The assessor will usually meet with the child at least once, in fact probably more than once, and may administer a number of psychological tests intended to give the assessor more insight into the child's preferences and state of mind. The assessor may or may not collect additional information from the parents or the other people involved in the child's life.

Because these reports do not involve the same extensive interviews and testing involved in needs of the child assessments, they tend to be cheaper to prepare and they should be prepared faster than needs of the child assessments.

These sorts of reports are generally only appropriate when:

1. a full needs of the child assessment isn't necessary,
2. the child is more than four or five years old, and
3. the judge wants to hear from the child but does not want to interview the child him- or herself.

Non-evaluative views of the child reports

Views of the child reports prepared by lay persons like lawyers and family justice counsellors don't provide the same level of analysis or authority offered by expert views of the child reports. These people are not qualified to offer an opinion about the child's state of mind or the truthfulness of the child's statements. All they can really do is say what the child told them, which is why these reports are *non-evaluative*. They don't evaluate; they just report.

The reporter will generally meet with the child once and speak with each parent once. The reporter will generally know very little about the background of the case before meeting the child except for what the child's parents or lawyers may have mentioned.

Because these reports involve no testing and no expert analysis they can usually be prepared very quickly and very cheaply. (I can, for example, usually get reports like these done within a week or two of being hired, although you shouldn't assume this is typical of all lay reporters.) These sorts of reports are generally only appropriate when:

1. the parents understand that the views of the child are only one part of the whole picture,
2. the parents understand that the report is not an expert report,
3. a full needs of the child assessment isn't necessary,
4. the child is more than six or seven years old, and
5. the judge wants to hear from the child but does not want to interview the child him- or herself.

These reports will not be appropriate where the child is not capable of expressing his or her preferences or where there are allegations of parental alienation.

Children's caregivers and extended family

People other than a child's biological parents can also have a legal interest in a child. Typically, these people are a child's blood relatives — grandparents, aunts, uncles, and so forth — although there's no reason at all why someone else, like an unrelated long-term caregiver or neighbour, couldn't also have an interest in a child. Most often, however, it's grandparents who feel the need to seek a legal role in their grandchildren's lives. For that reason, this discussion is primarily directed to grandparents, although it applies equally to other people who are not the parent of a child.

Grandparents and other people who are not parents normally become involved in court proceedings dealing with children, as parties in their own right, in only a few situations:

1. where one or both of the guardians of the children are dead,
2. where one or both of the guardians have abandoned the children or the care of the children,
3. where there are serious concerns about the fitness of the guardians to care for the children, or
4. where they are being denied time or involvement with the children.

Their concerns are usually about:

1. getting contact with the children,
2. supervising the parenting of the children when they are with a guardian, or
3. being appointed as a guardian of the children.

No matter how valid or legitimate a grandparent's or other non-parent's concerns might be, the court will place a great deal of weight on the wishes of the parents. In a 2003 case of the Supreme Court, *M.(D.W.) v. M.(J.S.)* ^[4], 2003 BCSC 1229 the court said that while it must give "paramount consideration" to the best interests of the child, "significant deference must be accorded the custodial parent and their ability to determine the child's best interests."

Legislation

Two laws might apply to non-parents seeking guardianship of or contact with children. Where the children's parents or guardians are already in court about the children, that will be either the federal *Divorce Act*, if the guardians are or were married, or the provincial *Family Law Act*. If the parents or guardians are not involved in a court proceeding between each other, it will be the *Family Law Act*.

Each law has different rules about how and when non-parents can apply in court, and it's important to understand which law might be applicable.

The *Divorce Act*

According to s. 16(1) of the *Divorce Act*, the court can make an order for *access* or *custody* on the application of a spouse or "any other person." Section 16(3), however, says that an "other person" must get the court's permission before bringing on such an application.

Since we're talking about the *Divorce Act*, a court proceeding must have already started between married spouses or formerly married spouses before the grandparents can step in; there must be an existing proceeding in which to bring the application. A grandparent cannot start a court proceeding under the *Divorce Act*, since the act only applies to disputes between married spouses.

The *Family Law Act*

The *Family Law Act* talks about *guardians* who have *parental responsibilities* and have *parenting time* with children, and about people who are not guardians who have *contact* with a child.

Any person can apply to be appointed as the guardian of a child under s. 51 of the act. However, these applications can be difficult and time-consuming and the court must be satisfied that the appointment is in the best interests of the child. A person who is applying to become the guardian of a child, an *applicant*, must fill out a special affidavit required by the Provincial Court (Family) Rules ^[5] and the Supreme Court Family Rules ^[6] that talks about:

1. the applicant's relationship to the child,
2. the other children currently in the care of the applicant,
3. any history of family violence that might affect the child, and
4. any previous civil or criminal court proceedings related to the best interests of the child.

Applicants must also get a new criminal records check, and a records check from the Ministry of Children and Family Development (MCFD).

Any person can apply for contact with a child under s. 59 of the act. The court must be satisfied that the contact asked for is in the best interests of the child. People who are applying for contact don't need to get a criminal records check or an MCFD records check done.

Custody and guardianship

There is a strong presumption in favour of the natural or adoptive parents of the children. The court will generally be inclined to allow the children to remain with their parent or parents unless a strong case can be shown that the parents are neglectful and that the children are suffering in their care. To quote from a 1992 case of the British Columbia Supreme Court, *Reid v. Watts* ^[7], 1992 CanLII 916 (BC SC), Vancouver Registry No. A913221:

"Parental claims will not be lightly set aside except in clear cases where the welfare of a child cannot otherwise be achieved."

The Supreme Court of Canada emphasized the children's best interests a bit more strongly in *Racine v. Woods* ^[8], [1983] 2 SCR 173 a case from 1983:

"The law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests."

Nevertheless, grandparents and other non-parents who are seeking custody or guardianship of a child will face a difficult challenge, especially where both guardians are still in the picture, even if they have been actively involved in caring for the children themselves. Since actual, concrete harm must usually be shown before grandparents are awarded custody, it can be critical to gather as much documentary evidence as possible. Some helpful sources include: police records; the records of social workers involved with the children; files from the Ministry for Children and Families; and, a psychologist's report.

Factors that the courts have taken into consideration in awarding custody to a non-parent have included:

- ill-treatment, mistreatment and neglect of the children,
- chronic drug or alcohol use, a partying type of lifestyle,
- instability of the guardians' lifestyle and living situation,
- abandonment of the children by the guardians, or an existing status quo in which the non-parent is primarily responsible for the care of the children, and
- poor parenting skills on the part of the guardian.

Grandparents and other non-parents shouldn't be too discouraged by the generally pessimistic tone of this discussion. There are quite a few cases in which grandparents have been awarded custody of their grandchildren. It is possible to succeed on a custody or guardianship application, although the chances of success depend wholly on the circumstances of each case.

Access and contact

There is a big difference between seeking custody or guardianship and seeking access or contact. In custody cases, the courts are concerned with the fundamental living arrangements and the health and welfare of the children. In court proceedings for access or contact, the parent usually has custody and no one is challenging the right of the parent to control his or her child's upbringing. As a result, the court will place an even greater emphasis on the parent's discretion and judgment.

Grandparents and other non-parents do not have a presumptive right of access to or contact with children under either the *Divorce Act* or the *Family Law Act*, but they can ask the court to make an order giving them access to or contact with their grandchildren. The 1993 British Columbia case of *Chapman v. Chapman* ^[9], 1993 CanLII 2598 (BC SC) sets out the general rules governing applications for access or contact by non-parents:

- The burden is on the non-parent to show that the proposed access or contact is in the child's best interests.
- The child's guardians have a significant role and the court should be slow to interfere with the guardians' discretion, and should only do so when satisfied that the access or contact is in the child's best interests.

- It is not in the child's best interests to be placed in circumstances of conflict between guardians and non-parents, and access or contact should not be given where it would only escalate the conflict between the parties.
- Non-parents may also have to demonstrate that they offer some positive benefit to the child before access or contact will be allowed, and they must demonstrate that the child's time with them will be in the child's best interests.

Normally, grandparents and other non-parents are allowed only the amount of access or contact that the guardians will agree to.

Where both guardians are still in the picture, the court will usually require that grandparents' access or contact occurs during the time that their child has the grandchild. In other words, maternal grandparents will usually have access or contact, if the court makes the order at all, during the mother's time with the child. Where only one guardian is in the picture, the court will usually determine what access or contact the grandparents ought to have independently of the interests of the guardian.

As with applications for custody or guardianship, grandparents and other non-parents should not be discouraged by the generally pessimistic tone of this discussion. There are numerous cases in which grandparents have been awarded time with their grandchildren; it is possible to succeed on an application for access or contact.

Financial support

When a non-parent obtains custody of a child or an order that the child live mostly with him or her, that person can apply for child support to be paid by the guardians of the child. The same rules will apply to a non-parent's application for child support as apply to a guardian's application, except that grandparents and other non-parents can only apply for child support under the *Family Law Act*; they cannot apply under the *Divorce Act*.

Grandparents are also entitled to ask for financial support from the provincial government to help meet the cost of caring for any grandchildren in their care. The province of British Columbia pays grandparents who are looking after their grandchildren at the same rate as foster parents. It's not a princely sum, but it's better than a kick in the teeth.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Federal Child Support Guidelines* ^[10]
- Provincial Court (Family) Rules ^[5]
- Supreme Court Family Rules ^[6]

Links

- Ministry of Justice: Application information for criminal record checks ^[11]
- Canadian Police Information Centre (CPIC) ^[12]
- Legal Services Society's Family Law Website: Children's right to time with grandparents ^[13]
- Grandparents Raising Grandchildren Support Line ^[14]
- Clicklaw Common Question on Benefits for Grandparents Raising Grandchildren ^[15]
- Canadian Bar Association BC Branch: Custody and access, guardianship, parenting arrangements and contact ^[16]
- Legal Services Society Fact Sheet: How to become a child's guardian ^[17]
- Legal Services Society's Family Law Website: Access ^[18]

- Legal Services Society's Family Law Website: Custody ^[19]
- Legal Services Society's Family Law Website: Guardianship, parenting time and parental responsibilities ^[20]
- Legal Services Society's Guide to the New Family Act ^[21]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/1dll3>
- [2] <http://canlii.ca/t/1jptk>
- [3] <http://canlii.ca/t/4xfd>
- [4] <http://canlii.ca/t/572w>
- [5] <http://canlii.ca/t/85pb>
- [6] <http://canlii.ca/t/8mcr>
- [7] <http://canlii.ca/t/1dfd1>
- [8] <http://canlii.ca/t/11pdq>
- [9] <http://canlii.ca/t/1djbt>
- [10] <http://canlii.ca/t/80mh>
- [11] <http://www.pssg.gov.bc.ca/criminal-records-review/apply/#options>
- [12] <http://www.cpic-cipc.ca/English/index.cfm>
- [13] <http://clicklaw.bc.ca/helpmap/service/1113>
- [14] <http://clicklaw.bc.ca/helpmap/service/1133>
- [15] <http://clicklaw.bc.ca/question/commonquestion/1118>
- [16] <http://clicklaw.bc.ca/resource/1246>
- [17] <http://clicklaw.bc.ca/resource/2639>
- [18] <http://clicklaw.bc.ca/resource/1608>
- [19] <http://clicklaw.bc.ca/resource/1891>
- [20] <http://clicklaw.bc.ca/resource/1631>
- [21] <http://clicklaw.bc.ca/resource/2586>

Parenting after Separation

This section is all about putting your children first. It provides a brief introduction to parenting after separation and looks at different types of parenting issues, including parenting schedules and parenting plans. It also provides a selection of related parenting resources and reading materials.

While the other sections in this chapter discuss the legal issues involved in determining how children will be cared for after a couple separate, they do not talk about the non-legal issues: what it means to parent after separation, how separation affects children, and how parents talk to their children about their separation.

Introduction

If you've got children and you've separated from your partner, you'll find you've got three enormous problems to deal with. First, you've got to get a grip on all the emotional baggage that comes along with the end of a relationship. Second, you've got a pile of legal issues you have to sort through. Finally, but most importantly, you have to develop a strategy for parenting your children after the relationship ends.

No matter how pressing the first two issues are, you must remember that the post-separation parenting of your children must take priority over everything else. If you think the end of your relationship is difficult for you, imagine how confusing and unsettling it must be for your children. Their needs and best interests must come ahead of your own, and those of your partner. This is certainly the view that the court will take.

You will have found that during your relationship, issues involving the care of your children just sort of worked themselves out, perhaps smoothly, perhaps not. In general, you will have developed a routine, a routine that you and your partner were comfy with and one that your children had become accustomed to.

After separation, that routine isn't possible anymore, especially if you and your partner are living in separate homes. Suddenly, the children can no longer rely on both parents being around the house, on the schedules each parent used to keep, or on all the little things like the bedtime story from a particular parent, the special breakfast, playing catch after school with the other parent, and so forth. On top of all that change and uncertainty, the children will be fully aware that something isn't right between their parents, even if they don't quite grasp exactly what's going on.

This is all a little preachy, but the fact is that no matter how adults are able to intellectually rationalize the consequences of the end of their relationship, children can't. The job of the parents, regardless of their own emotional and legal entanglements, is to protect their children from their dispute as much as possible, and to develop a parenting regime that will maximize their respective involvement in the children's lives.

Language

The words we use often shape how we see the world around us. There's a big difference, for example, between saying "Pat lied to me about ..." and "Pat was mistaken when he told me that ..." In the same way, there's a difference between saying "Tuesday is my access day" and "Tuesday is when I visit with Moesha."

Over the past ten years or so, the courts and policy makers have become increasingly sensitive to how the words used to describe a parent's involvement with his or her child can impact on both the child's and the parent's perception of that relationship. As a result, joint custody is becoming increasingly the standard, even in situations where, twenty years ago, Parent A would be described as the "access parent" and Parent B would be described as the "custodial parent." The phrase "access parent" can often lead to a sense, shared by everyone, including the children, that this parent is somehow a lesser parent, has less of a role to play, or is less important to his or her child's life. It also encourages the idea that there

are "winning parents" and "losing parents" in custody disputes, when really the main winner or loser is the child.

Words like "custody" and "access," used in the federal *Divorce Act*, are loaded terms with a lot of extra meanings that aren't particularly helpful to the children, or to each parent's view of his or her role with the children. However, the new provincial *Family Law Act* talks about the care of children in terms of guardians who exercise *parental responsibilities* and have *parenting time* with their children, and people who are not guardians who have *contact* with a child. This is a huge improvement, and the language of the *Family Law Act* should be used whenever possible.

A few notes from JP Boyd

I am not a psychologist, a psychiatrist or a counsellor. As a result this section should be read with a grain of salt, as it is based on my observations of my clients' experiences and a healthy dose of common sense. For the same reason you are cautioned that this section should not be used as an authority for the propositions it sets out.

Secondly, there are a ton of Parenting After Separation programs ^[1] conducted by trained psychologists and counsellors available throughout British Columbia. If you are separating or have separated, I highly recommend that you attend one of these programs, no matter how good (or bad!) you think your relationship is with your ex-partner.

Parenting after separation

The general consensus among psychologists specializing in childhood development is that the best post-separation parenting arrangement is one in which both parents contribute equally, or near-equally, to the raising of their children and have an equal, or near-equal, amount of time with them.

That being said, not all parents can separate in a civil manner, and not all parents share an equal interest in participating in the lives and parenting of their children. Some people are quite content to walk away and start a new life; others are painfully torn by the conflict between their former partner and their role as a parent. However, in the absence of some serious problem (such as abusiveness, alcoholism, or pedophilia) that renders a parent unfit to play a meaningful role in his or her child's life, the practical reality of parenting after separation is this: it is almost always in a child's best interests to grow up with two parents, with as strong a bond with both parents as possible, and to spend as much time with both parents as possible.

Parenting tips

The Ottawa Centre for Mediation ^[2], formerly the Ottawa Centre for Family and Community Mediation, offers the following parenting dos and don'ts.

Things to think about:

- Children can best deal with their feelings surrounding the separation experience in a climate of cooperation.
- Working together as parents means cooperating with the other parent about raising the children. If you can't do this in person, try communicating by phone or by using notes that are exchanged with the child.
- It is a myth that parents who did not get along as a couple cannot work together as parents. They can. It takes time and effort but parents can redefine the relationship from being a couple, to a more business-like relationship of being partners in the parenting of their children.
- Go directly to the other parent for information, an answer, or a solution to a problem. Don't allow the child to be in the middle, to act as a messenger, or act as a spy. If you cannot deal directly with the other parent, use another adult.
- Give the benefit of the doubt to the other parent's motives.
- Don't let yourself get caught in any angry feelings the child may have towards the other parent. Encourage the children to speak about their difficulties with the other parent to the other parent; don't get caught in the middle.

Children may be harmed if they:

- are restricted or prevented from spending sufficient time with both parents,
- are told that one parent is good and the other is bad,
- are encouraged to take sides, or
- don't feel free to love both parents and also stepparents.

Parents may harm their children if they:

- don't prepare children for changes that will occur,
- burden children with adult problems, such as their legal issues or financial woes,
- compete with or criticize the other parent in front of the children,
- badmouth or blame the other parent in the children's presence or earshot, or
- expect children to comfort them.

Parenting schedules

While, as a basic rule of thumb, equal or near-equal shared time is generally considered the best parenting arrangement possible, it isn't appropriate for all children or for all parents. Two things must be considered when you are developing a parenting schedule: the child's age, and each parent's parenting skills. First, very young children, especially breastfeeding children, require more constant attention and are not able to be away from one parent for long periods of time. This will change, of course, as they grow older. Second, not all parents have the time to devote to an equal parenting arrangement, and not all parents have the skills and resources to offer the children.

Unequal time

The Langley Family Justice Center published an excellent pamphlet called "Suggested Visitation/Time-Sharing Skills" which they gave to their clients, drawn from Gary Neuman's book, *Helping your Kids Cope with Divorce the Sandcastles Way* ^[3]. The following is adapted from this pamphlet, and is intended for parents who do not intend to establish an equal time-sharing arrangement.

| Age | Basic Recommended Time | Limited Parenting Skills | Good Parenting Skills |
|-----------------------------|---|--|---|
| Birth to 8 months | 2 or 3 weekly visits for 2 to 3 hours each | supervised visits in the primary parent's home | 2 weekly visits for 6 to 8 hours each, plus one shorter visit |
| 9 to 12 months | 2 or 3 weekly visits for 4 to 8 hours each, plus one longer weekend visit | 2 to 4 weekly visits for 3 hours each | 2 or 3 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit |
| 13 months to 3 years | 1 or 2 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit | 1 or 2 weekly visits for 4 to 6 hours each, and possibly one weekly short overnight visit | 2 weekly 24-hour overnight visits that are not consecutive, plus one weekly visit for 6 to 8 hours, and a less than equal sharing of holidays |
| 4 to 5 years | 1 or 2 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit | 1 or 2 weekly visits for 4 to 6 hours each, and possibly one weekly short overnight visit | 2 weekly 24-hour overnight visits that are not consecutive, plus one weekly visit for 6 to 8 hours, and a greater sharing of holidays |
| 6 to 8 years | every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays | one weekly 24-hour overnight visit, plus one weeknight after school until one hour before bedtime, plus 3 two-day visits during the summer | every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays |

| | | | |
|-----------------------|---|--|--|
| 9 to 12 years | every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays | every other weekend, Saturday morning until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 three-day visits during the summer | every other weekend, from Thursday after school until Monday morning before school, plus one weeknight after school until one hour before bedtime, plus half of all holidays |
| 13 to 18 years | every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays | every other weekend, Saturday morning until Sunday evening, plus one weeknight after school until one hour before bedtime, plus summer visits set in consultation with the child | every other weekend, from Thursday after school until Monday morning before school, plus half of all holidays |

Equal time

In an equal parenting schedule, the time that a very, very young child, less than 18 months of age, requires to integrate fully with the other parent can be compressed.

Most children are able to start spending an equal amount of time with each parent by the time they enter kindergarten, although the weeks should be divided so that the change in home is more frequent.

By grade two, many children are able to do a whole week with one parent, followed by a whole week with the other parent. Most parents exchange the child on Fridays after school to minimize disruption to the child's schoolwork.

By the time the child is in his or her early teens, the week-on/week-off arrangement can be extended to two weeks with each parent. This will change as the teenager gets older, and his or her preferences should be taken into account around age 14. Some parents even wind up working on a month-on/month-off arrangement with older teens; again, though, this will depend on the parents and the child.

Parenting plans

A *parenting plan* is a written agreement that describes how issues involving the care of children will be handled, typically with a long-term view that addresses how visitation and other arrangements should evolve as the children grow up and mature. Parenting plans are most common when the children are very young when their parents separate, say age five or less.

The main reasons why parents might want to make a parenting plan are to address future issues ahead of time and to minimize the likelihood of future conflict. A parenting plan takes the basic developmental points in the children's life into consideration:

- The parenting schedule appropriate for a breastfeeding one-year-old won't be appropriate when the child is weaned.
- The parenting schedule that works for a three-year-old won't work when the child turns five, enters the school system, and is suddenly tied to a schedule neither parent controls.
- The schedule of a seven-year-old must accommodate sports and other extracurricular activities as well as homework and other take-home assignments.
- Nine-year-olds will be starting to go to day camps or overnight camps during the summer.
- The schedule of a twelve-year-old must take into account his or her social schedule and activities with friends.

In other words, a parenting schedule can't be static; it has to be able to evolve with time. This is precisely what a parenting plan is intended to address.

Parenting plans also typically address guardianship issues and cover how the parents will make decisions about the children's care, medical needs, and schooling. Since parenting plans aren't mentioned in the *Divorce Act* or the *Family Law Act*, there are no rules about what should and shouldn't be in a parenting plan. It's up to the parents to be as inclusive

and creative as they want.

Parenting plans can be included in separation agreements or, but not usually, in court orders. (The best you're likely to get in a court order is a statement about guardianship rights and parenting time for the present, with a provision requiring a review of those arrangements in a fixed amount of time.)

Parenting plans can also stand on their own as a separate document.

Sample parenting plans

A lot of users of this resource have asked about sample parenting plans. I can't post an example of a parenting plan or separation agreement of my own, as I always draft those from scratch to reflect the unique needs and circumstances of each client. I can, however, post the following parenting plans that are drawn from the Idaho Benchbook, a creation of family law lawyers from the Idaho state bar and judiciary. Other parenting plans and parenting agreements can doubtless be found online.

- Sample #1 ^[4]: developed for a young child with a primary parent, frequent contact with the other parent but no overnight visitation and addresses safety and transportation issues
- Sample #2 ^[5]: developed with a primary parent, every other weekend visitation and addresses substance abuse issues
- Sample #3 ^[6]: developed as a 50/50 shared parenting plan and addresses extra-circular activities and summer vacations

Note three things about the Idaho plans:

1. Much of the legal language in the Benchbook plan is suited to American law and won't be suitable for British Columbia parenting plans; you'll have to adapt the terminology accordingly.
2. The plans refer to American subjects (like holidays and social security numbers) that you'll have to change or delete.
3. The plans can adapted to include visitation schedules that will evolve as the children grow up.

You might also want to have a look at the Parenting Time Guidelines ^[7] found in the Indiana Rules of Court, which are extremely detailed and very child-focused.

Common visitation issues

There are lots of stumbling blocks that can crop up in preparing a parenting schedule, and it can be very difficult to anticipate all the "special days" that you might want to address in addition to the week-to-week schedule. Most often, these special days are things like Mothers' Day or Fathers' Day, the children's birthdays and religious holidays.

Other problems can come up when the parenting schedule is ignored by a parent or refused by a child. Some solutions to issues like this are discussed below. More information can be found in other sections in this chapter, including the Estranged & Alienated Children section.

Weekends

Weekends can be especially important to schedule carefully, and it is important that they be shared between parents, particularly if the children are going to school. Often the parent who has the children during the workweek becomes the disciplinarian, since that parent has the burden of telling the kids to go to sleep on time, do their homework, and so forth. The other parent, on the other hand, becomes the "fun" parent, taking the kids to the park, to the movies, and buying them treats on the weekend.

It is important that weekends be shared to avoid the children developing a bad parent/fun parent view. It is rarely a good idea to come up with a schedule that gives one parent all of the children's weekends.

Statutory holidays

Make sure that statutory holidays and school professional development days are taken into account when you work out a parenting schedule. Many schedules that require a parent to return the child on Sunday evening, for example, allow that the child be returned on Monday evening if the Monday is a statutory holiday.

Special days

When you're working out your parenting schedule, don't forget about special days like birthdays, Fathers' Day, Mothers' Day, religious holidays and so forth. Some (but not all) parents do things like alternating the children's birthdays, or making special arrangements for extra time on Fathers' Day and Mothers' Day.

For religious holidays, like Christmas, many parents work out a plan so that in even-numbered years, one parent will have the children from Christmas Eve to the afternoon of Christmas Day, and the other parent will have them from the afternoon on Christmas to the evening of Boxing Day, a schedule that reverses on odd-numbered years. Be creative about scheduling these sorts of special days. In the case of Passover, for example, some parents alternate the first and second nights each year.

School holidays

The main school holidays are the winter break (usually about two to two-and-a-half weeks), the spring break (a week or two weeks) and the summer holiday (slightly more than two months). These holidays can be split up, shared between parents every other year, or treated as if the child was in school.

Particularly during the summer, both of the parents should have a fair chunk of time with the children during school holidays. Summers don't have to be split equally — some people's work schedules just won't give them that much time off — but each parent should at least have a solid week with the children. During times like this, the usual parenting schedule is suspended so that each parent's holiday visits are uninterrupted.

Children's refusal to visit

No child, particularly children under the age of 12, should be able to dictate the time they spend with the other parent. Sometimes children will not want to leave a parent because of a sort of separation anxiety, at other times reluctance is meant to show loyalty to the parent the child is leaving.

It is important to continue to ensure the child sees the other parent, and to encourage the child to look forward to the visit. Even when the child seems adamant about not going, you must compel the child to go. Where a parenting schedule takes the form of a court order, the court will place the blame for a missed visit on you, not the child.

From the point of view of the parent expecting the visit, do not take the child's reactions personally, and avoid blaming the other parent. Most often the refusal or reluctance has more to do with the change in residence or a temper tantrum, rather than with a genuine reluctance to see the parent.

If the child's refusal is sudden and the child is highly resistant to the visit, you may want to take the child to a counsellor to confirm that the reasons for the child's refusal are not serious.

Parents' refusal to visit

Children need stability and constancy in their lives. It is disruptive to both them and the other parent when a parent misses a scheduled visit, cancels at the last minute, or just fails to show up at all. This is an absolute no-no. Both parents need to be able to rely on a fixed parenting schedule; this benefits the child by giving them a reliable routine, and it benefits both parents by allowing them to plan their life apart from the child. Some flexibility from both parents is a wonderful thing, but a situation where one parent is constantly backing out, cancelling, or changing dates is not good for

anyone.

From the point of view of the parent expecting the children to be picked up, there is precious little that can be done to force a disinterested parent to visit with the children. The court cannot compel someone to see their children when they don't want to. What you must consider is whether the disruption and disappointment the children experience warrants stopping the other parent's scheduled visits with the children altogether.

Parenting resources

There are quite a lot of public and community resources available to help parents deal with parenting issues, including issues arising while the parents are together. No matter what your circumstances are, if you are having problems, get help. Whether that help involves reading a book or a pamphlet, or going to a seminar, or meeting with a support group, your children are worth it.

Programs and agencies

The Parenting After Separation program ^[8] is run by the provincial Ministry of Justice. It is the mandatory program required of parents by certain Provincial (Family) Courts, but is open to everyone. A list of the agencies that provide this service is available from the Family Justice division through Clicklaw ^[9]. You can download the Parenting After Separation program's handbook ^[10] online, in English, Chinese, Punjabi and French.

The Parenting After Separation program is offered in Cantonese and Mandarin in Surrey, Richmond and Vancouver, call 604-684-1628. The program is also offered in Punjabi and Hindi in those areas, call 604-597-0205.

Simon Fraser University offers Information Children ^[11], a fairly broad and extremely useful non-profit program that deals with parenting issues and includes mediation services. This program offers parenting workshops in New Westminster and Burnaby, and has a handy parenting helpline. Contact Information Children through their website ^[11] or at:

604-291-3548 phone

604-291-5846 fax

The provincial Family Justice Centres may be able to direct you to other helpful parenting resources, and are located across the province. Contact them through Clicklaw's HelpMap ^[12] or at:

Vancouver: 604-660-6828

Victoria: 250-952-4111

Recommended reading for parents

There are lots of good books about parenting after separation available at your local bookstore, included the following (my favourites are in bold):

- The Good Divorce: Keeping your family together when your marriage comes apart, by D. Ahrons
- Helping your Child through your Divorce, by F. Bienenfeld
- **The Truth about Children and Divorce**, by R.E. Emery
- Healing Hearts: Helping Children and Adults Recover from Divorce, by E. Hickey and E. Dalton
- **Helping your Kids Cope with Divorce the Sandcastles Way**, by M.G. Neuman
- Mom's House, Dad's House: Making Two Homes for Your Child, by I. Ricci
- Joint Custody with a Jerk: Raising your Child with an Uncooperative Ex, by J.A. Ross

- *Helping Children Cope with Divorce*, by A. Teyber

The federal Department of Justice has a number of high-quality resources that may be helpful. The Supporting Families ^[13] website has a lot of information about separation and divorce. Inside this site you'll find a library of department publications and a wide variety of research papers about parenting after separation, the costs of high-conflict separation, and other topics relating to a child's well-being and outcomes following separation. These papers are of a uniformly high quality and are well worth the read.

Recommended reading for children

The books that follow are drawn from the suggestions of the Vancouver law firm Henderson Heinrichs and are reproduced with permission.

- *At Daddy's on Saturdays*, by L. Walvoord and J. Friedman; for ages 5+
- *Dinosaurs Divorce: A Guide for Changing Families*, by L. Krasny Brown and M. Brown; for ages 4+
- *Divorce is a Grown Up Problem*, by J. Sinberg; for ages 4+
- *Let's Talk About It: Divorce*, by F. Rogers; for ages 5+
- *On Divorce* by S. Bennett Stein and E. Stone; for ages 3+
- *What's Going to Happen to Me?*, by E. Leshan; for ages 9+
- *Why Are We Getting a Divorce?*, by P. Mayle and A. Robins; for ages 6+

The provincial Ministry of Justice has published two websites at www.familieschange.ca ^[14] designed to help children understand and cope with the issues that arise when their parents separate or divorce. One is for children and the other is for teens; both are very well put together.

The federal Department of Justice has published a book for 9- to 12-year-olds called *What Happens Next?* ^[15], available online and in print. The print version is a lot friendlier and what I'd suggest giving to a child.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Clicklaw Common Question: More information about the Parenting After Separation program ^[1]
- Justice Education Society: Parenting After Separation handbook for parents ^[16]
- Justice Education Society: Parenting After Separation brochure ^[17]
- Justice Education Society: Aboriginal Parenting After Separation ^[18]
- BC Ministry of Justice: Feedback from Parenting After Separation Program Participants ^[19]
- Legal Services Society: Parenting After Separation courses ^[8]
- BC Ministry of Justice and JES: A guide for grown-ups (Complement kids' guide to separation and divorce) ^[20]
- Parenting After Separation program ^[21]
- Indiana Parenting Time Guidelines ^[7]
- Sample Parenting Plans Idaho ^[22]
- Online Parenting After Separation Course ^[23]

- Simon Fraser University's Information Children Website ^[11]
- Department of Justice's Supporting Families Website ^[13]
- Justice Education Society and BC Ministry of Justice's Families Change Website ^[24]

✓ **The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.**

References

- [1] <http://www.clicklaw.bc.ca/question/commonquestion/1010>
- [2] <http://www.ementalhealth.ca/index.php?m=record&ID=9687>
- [3] <http://www.worldcat.org/title/helping-your-kids-cope-with-divorce-the-sandcastles-way/oclc/42193621>
- [4] <http://fourthjudicialcourt.idaho.gov/pdf/sample1.doc>
- [5] <http://fourthjudicialcourt.idaho.gov/pdf/sample2.doc>
- [6] <http://fourthjudicialcourt.idaho.gov/pdf/sample3.doc>
- [7] <http://www.in.gov/judiciary/rules/parenting/>
- [8] <http://www.clicklaw.bc.ca/resource/1638>
- [9] <http://www.clicklaw.bc.ca/resource/2638>
- [10] <http://clicklaw.bc.ca/resource/1527>
- [11] <http://www.informationchildren.com/>
- [12] <http://clicklaw.bc.ca/helpmap/service/1019>
- [13] <http://www.justice.gc.ca/eng/pi/fcy-fea/>
- [14] <http://www.familieschange.ca>
- [15] <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/pub/cal/2013/index.html>
- [16] <http://www.clicklaw.bc.ca/resource/1527>
- [17] <http://www.clicklaw.bc.ca/resource/2637>
- [18] <http://www.clicklaw.bc.ca/resource/1531>
- [19] <http://www.clicklaw.bc.ca/resource/1204>
- [20] <http://www.clicklaw.bc.ca/resource/1179>
- [21] http://www.familylaw.lss.bc.ca/resources/fact_sheets/parent_after_separation.php
- [22] http://fourthjudicialcourt.idaho.gov/ada/parenting_plans.html
- [23] <http://parenting.familieschange.ca>
- [24] <http://clicklaw.bc.ca/resource/1588>

Guardianship, Parenting Arrangements and Contact

Guardianship is a very old concept that goes back to the law of ancient Rome. Although guardianship can be hard to define, it's probably easiest to think of guardianship as the full bundle of rights and duties involved in caring for and raising a child. Guardianship is still about parental authority. Parents can be, and usually are, the guardians of a child. Other people can be guardians too, including grandparents and stepparents, and the people who become guardians through a guardian's will.

This section talks about who is presumed to be the guardian of a child, how people can apply to be appointed as the guardian of a child, and how people can become a guardian upon the death of a guardian. It also talks about the rights and obligations involved in being a guardian, parental responsibilities and parenting time, and about contact, the time that someone who isn't a guardian may have with a child.

Introduction

The provincial *Family Law Act* talks about the care of children in terms of *guardians* and the rights and duties they have for the children in their care. Most of the time a child's parents will be the child's guardians, but other people can be guardians too, including people who have a court order appointing them as guardians and people who are made guardians by a guardian's will.

Guardians raise the children in their care by exercising *parental responsibilities* in the best interests of the children. Parental responsibilities include deciding where a child goes to school, how a sick child is treated, whether a child is raised in a religion, and what sports the child plays after school. All of a child's guardians can exercise all parental responsibilities, or parental responsibilities can be divided between guardians, so that only one or more guardians have the right to make decisions about a particular issue.

The time a guardian has with a child is called *parenting time*. During parenting time, a guardian is responsible for the care of the child and has decision-making authority about day-to-day issues.

People who are not guardians, including parents who are not guardians, do not have parental responsibilities. Their time with a child is *contact*. A person who is not a guardian does not have decision-making authority when the child is in his or her care.

Being a guardian and becoming a guardian

Section 39 of the *Family Law Act* sets out the basic rules about who is presumed to be a guardian:

- (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
- (2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.
- (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
 - (a) section 30 applies and the person is a parent under that section;

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

(c) the parent regularly cares for the child.

Putting this another way, under s. 39(1), parents who lived together for some period of time after their child was born (birth is when you become a parent) are presumed to be the guardians of their child during their relationship and after they separate. Parents who didn't live together, on the other hand, aren't guardians unless: they are parents because of an assisted reproduction agreement; the parent and all of the child's guardians made an agreement that the parent would be a guardian; or, if the parent "regularly cares" for the child.

People who aren't guardians, including parents who aren't guardians, don't have the right to say how a child is raised or be involved in decision-making about the child. If a guardian plans on moving with the child, people who aren't guardians don't have the right to object.

Being a guardian means that you, along with any other guardians, have the obligation to make decisions on behalf of a child and the right to determine how the child is raised. Guardians are presumed to be entitled to manage children's property worth less than \$10,000. A guardian can object if another guardian wants to move, with the child or without, and a guardian can make another person a guardian of the child in his or her will.

Most of the time, a parent will want to be a guardian of his or her child.

Being a guardian

People who are guardians because of the presumptions at s. 39 of the *Family Law Act* are guardians and don't need to ask for an order saying they are guardians. This is really important because if you don't need to start a court proceeding to become a guardian, you shouldn't.

That said, it's unlikely that too many people are going to be aware of the presumptions of guardianship s. 39 talks about, and you may have problems dealing with people like doctors, teachers, police and border guards. First of all, it's unlikely that these people will have read the *Family Law Act*. Secondly, how would they know that you lived with the other parent after the child's birth? What you might want to get is an agreement that says "Brenda is the guardian of the child Max," or the declaration of a judge, called a *declaratory order*, confirming your status in relation to your child.

Parents who think they are guardians because they "regularly care" for their child will also want some kind of confirmation that they are their child's guardian. Obviously "regular care" is a matter of opinion, and it's easy to imagine a guardian not wanting to have to share that responsibility with someone else. Clearly some kind of decision or declaration will need to be made saying whether or not the parent is a guardian.

Becoming a guardian

If you are not a guardian of a child and you want to become a guardian, your choices depend on your relationship to the child and the views of the child's other guardians:

- If you are a *parent*, you can become a guardian by an agreement with the child's guardians.
- If you are not a parent or if the other guardians aren't inclined to agree, you can only become a guardian by making an application to court to be made a guardian.
- You can also become a guardian, whether you're a parent or not, through a guardian's will or signed Form 2 Appointment when the guardian dies or becomes incapacitated.

If you are the new spouse or partner of a guardian of a child, you do *not* become a guardian of the child just because of your relationship with the guardian. If you would like to be the guardian of your stepchild, you should consider applying for an order appointing you as one of the child's guardians.

Agreements

If you are a parent, you can become a guardian under s. 39(3)(b) of the *Family Law Act* by making an agreement with all of the child's other guardians. If one of the child's guardians disagrees, you will have to apply to court to be made a guardian.

Guardians cannot make an agreement appointing anyone other than a parent as a guardian.

Applying to court

Parents and other people can apply to be made a guardian under s. 51 of the *Family Law Act*. This section requires a person applying for guardianship, an *applicant*, to provide certain information about why the order would be in the best interests of the child.

In the Provincial Court, Rule 18.1 of the Provincial Court Family Rules ^[1] requires the applicant to provide a special affidavit in Form 34, sworn no more than 7 days before it is filed in court, that talks about:

1. the applicant's relationship with the child,
2. the child's current living arrangements,
3. the applicant's plan for the parenting of the child,
4. any incidents of family violence that might affect the child, and
5. the applicant's involvement with other court proceedings involving children under the *Family Law Act*, the old *Family Relations Act*, the *Child, Family and Community Service Act* ^[2] and the *Divorce Act*.

Rule 18.1 also requires that the applicant supply a criminal records check and a records check from the Ministry for Children and Family Development dated within 60 days of the filing of the affidavit.

Rule 15-2.1 of the Supreme Court Family Rules ^[3] says much the same thing but requires that the special affidavit, in Form F101, be sworn at least 28 days before a hearing where people will present arguments, or at least 7 days before filing if there will not be a hearing. The records checks must be done no more than 60 days before the date of the hearing.

You can find links to and examples of forms, including Form 34 and Form F101, in Provincial Court Forms & Examples and Supreme Court Forms & Examples.

Appointment by will or Form 2 Appointment

Parents and other people can also be made a guardian if they have been appointed by a guardian as a *standby guardian* under s. 55 of the *Family Law Act* or as a *testamentary guardian* under s. 53 of the act. Guardians who have been appointed in this way don't need to make an application under s. 51 and don't need to worry about filing the special affidavit or getting records checks done.

Standby guardians are appointed when the appointing guardian completes an Appointment in Form 2 of the Family Law Act Regulation ^[4]. Testamentary guardians can be appointed through Form 2 or in the appointing guardian's will. This is discussed in more detail below, in the discussion about the incapacity and death of a guardian.

Parental responsibilities and parenting time

People who are the guardians of a child have *parental responsibilities* for that child and their time with the child is called *parenting time*. Together, parental responsibilities and parenting time are known as *parenting arrangements*. Section 40 of the *Family Law Act* talks about who has parental responsibilities and parenting time and how they are shared:

- (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.
- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

This section says a few important things. First, guardians are presumed to exercise all parental responsibilities until an order or agreement says otherwise, and guardians are required to consult with each other in the exercise of these responsibilities. Second, if you do have an order or agreement, the order or agreement can require guardians to share certain parental responsibilities or divide them so that a particular responsibility will only be exercised by one or more guardians acting on their own. Third, the court must not make any assumptions about how parental responsibilities and parenting time are to be divided.

Parental responsibilities are listed at s. 41:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child

is an aboriginal child, the child's aboriginal identity;

(f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

(j) requesting and receiving from third parties health, education or other information respecting the child;

(k) subject to any applicable provincial legislation,

(i) starting, defending, compromising or settling any proceeding relating to the child, and

(ii) identifying, advancing and protecting the child's legal and financial interests;

(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

This list is not a closed list. If there's something important to the child that's not listed in (a) to (k), you can probably have the issue addressed under (l). Note also that guardians are required, under s. 43(1), to always exercise their parental responsibilities in the best interests of the child.

The *Family Law Act* deals with parenting time very briefly. Section 42 says this:

(1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.

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

You have basically two choices if it becomes important to formalize the parenting arrangements for a child. You can come up with an agreement with the other guardians, by negotiation, mediation, or a collaborative settlement process, or, if you can't agree, you can go to court. It sometimes takes a while for guardians to get to the point where they feel they must get something formal in place. Sometimes, people are just content with the status quo. In cases like this, where a stable set of arrangements has managed to gel over time, s. 48 says that a guardian shouldn't make unilateral changes to those arrangements without talking to the other guardians first:

(1) If

(a) no agreement or order respecting parenting arrangements applies in respect of a child, and

(b) the child's guardians have had in place informal parenting arrangements for a period of time sufficient for those parenting arrangements to have been established as a normal part of that child's

routine,

a child's guardian must not change the informal parenting arrangements without consulting the other guardians who are parties to those arrangements, unless consultation would be unreasonable or inappropriate in the circumstances.

(2) Nothing in subsection (1) prevents a child's guardian from seeking

(a) an agreement respecting parenting arrangements, or

(b) an order under section 45.

When formal arrangements are required, s. 44 allows two or more of a child's guardians to make an agreement about the allocation of parental responsibilities and parenting time, as well as how disputes about those parenting arrangement will be resolved. (Agreements like these can't be made until the guardians have separated or are about to separate.) If agreement is impossible, a guardian can apply for a court order about parenting arrangements under s. 45 of the act.

When a child has more than one guardian, the guardians need to work together and cooperate in raising the children. This can sometimes be difficult, particularly when there is a lot of conflict in the guardians' relationship with one another. Before the *Family Law Act* came into effect, the rights and obligations involved in raising children were usually addressed through a joint guardianship order under the *Family Relations Act*, in particular through two models of joint guardianship, the Horn model and the Joyce model. The *Family Law Act* doesn't talk about guardianship the way the old law did and can't be used to spell out guardians' rights and obligations in the same way. However, since guardians need to work together and cooperate in making parenting decisions, the models can still work. They just need to be changed a bit.

The Joyce model for sharing parental responsibilities

The Joyce model, created by Mr. Justice Joyce, is fairly detailed and requires the guardians to consult with one another on all important decisions affecting the child, to make their best efforts to work together to reach a solution that is in the best interests of the child, and so forth. When guardians can't agree on a decision, the Joyce model might say that one guardian will have the last word, or it might say that the parents will try to mediate the issue, consult a child psychologist about the issue, or ask a judge for directions on the issue.

Here's the standard version of the Joyce model adapted for people who are guardians under the *Family Law Act*:

The guardians will exercise all parental responsibilities with respect to the child on the following terms:

1. in the event of the death of a guardian, the surviving guardian(s) will be the only guardian(s) of the child,
2. each guardian will have the obligation to advise the other guardian(s) of any matters of a significant nature affecting the child,
3. each guardian will have the obligation to discuss with the other guardians any significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction, and general welfare,
4. the guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions,
5. in the event that the guardians cannot reach agreement on a significant decision despite their best efforts, the guardian with the majority of parenting time with the child will be entitled to make those decisions and the other guardian(s) will have the right to apply for directions on any decision the guardian(s) consider(s) contrary to the best interests of the child, under s. 49 of the *Family Law Act*, and

6. each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.

You can download a version of the adapted Joyce model in PDF format in the resources section at the bottom of this page.

The Horn model for sharing parental responsibilities

The Horn model, created by Master Horn, is more about the guardians' rights to get information about the child, usually about the child's schooling, health, and extracurricular activities. The Horn model implies that the guardian with whom the child mostly lives will be entitled to make decisions about the child as he or she sees fit, with the other guardian having a right to information about the child. Under s. 49 of the *Family Law Act*, however, the other guardian will always have the right to ask the court for directions on the subject of the other guardian's decision.

Here's the standard version of the Horn model adapted for people who are guardians under the *Family Law Act*:

The guardian with the majority of parenting time with the child will exercise all parental responsibilities in respect of the child and the other guardian(s) will have the right:

1. to be informed of the child's medical and dental practitioners,
2. to contact the child's medical and dental practitioners and obtain the child's medical and dental records,
3. to be consulted about the selection of the child's alternative caregivers, such as daycare and preschool,
4. to consult with the children's alternative caregivers and teachers,
5. to be informed of events at the child's schools or daycare so that the parent without primary care may attend,
6. to be informed of parent/teacher nights so that the other guardian(s) may attend,
7. to be consulted about any significant health issues relating to the child, and
8. to be consulted about any significant change in the child's social environment.

You can download a version of the adapted Horn model in PDF format in the resources section at the bottom of this page.

Contact

The time a person who is not a guardian has with a child is *contact*, including the time of parents who are not guardians. The *Family Law Act* doesn't say much about contact, except to say that anyone can apply for it, including parents and grandparents. This is the definition of contact from s. 1 of the act:

contact with a child or **contact with the child** means contact between a child and a person, other than the child's guardian, the terms of which are set out in an agreement or order

A schedule of contact can be set by agreement between the person and the child's guardians under s. 58 of the *Family Law Act*, or a schedule of contact can be fixed by a court order made under s. 59. Agreements for contact are only good if they are signed by all of the child's guardians who have the parental responsibility of determining who can have contact with the child.

Incapacity and death of a guardian

When a guardian anticipates being unable to care for a child, either temporarily or permanently, the guardian may appoint a person to act in his or her place. Even if when there's nothing to suggest that a guardian may become incapable, it's always a good idea for a guardian to give some thought to the question of who would look after the child in the event of the guardian's unexpected death.

Temporary authorizations

Under s. 43(2) of the *Family Law Act*, a guardian who is temporarily unable to exercise certain parental responsibilities may authorize someone to exercise those responsibilities on his or her behalf. Such authorizations must be made in writing, and should say exactly what it is that the authorized person can do.

The parental responsibilities that someone can exercise under a written authorization are:

- making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child,
- making decisions respecting with whom the child will live and associate,
- making decisions respecting the child's education and participation in extracurricular activities,
- giving, refusing, or withdrawing consent to medical, dental and other health-related treatments for the child,
- applying for a passport, licence or permit for the child,
- giving, refusing or withdrawing consent for the child, if consent is required,
- receiving and responding to any notice that a parent or guardian is entitled or required by law to receive, and
- requesting and receiving from third-parties health, education, or other information about the child.

Authorizations like these are mostly used: when the child has to go somewhere else to attend school and the guardian needs to ensure the child is looked after; when the guardian is seriously ill but going to recover; and when the guardian is going to be out of commission for a while to recover from a surgery or treatment.

Appointing standby guardians

Under s. 55 of the *Family Law Act*, where a guardian is facing a terminal illness or permanent loss of mental capacity, the guardian can appoint someone to become guardian when he or she becomes incapable of continuing to act as guardian.

Appointments are made by Form 2, a form set out in the Family Law Act Regulation ^[4]. The guardian must sign the form in the presence of two witnesses, neither of whom is the guardian being appointed. The form must state the conditions that have to be met for the appointment to take effect, such as a doctor's certificate of incapacity. A guardian cannot appoint a guardian to act with any more parental responsibilities than those he or she had at the time of the appointment.

A person appointed as a standby guardian must accept the appointment for the appointment to be effective.

A person who is appointed as a standby guardian does not have to apply for appointment under s. 51 of the act, and continues to serve as the guardian of the child after the death of the appointing guardian.

Appointing testamentary guardians

Under s. 53 of the *Family Law Act*, a guardian can appoint someone to become guardian when he or she dies.

Appointments are made either by Form 2 or in the guardian's will. For appointments made using Form 2, the guardian must sign the form in the presence of two witnesses, neither of whom is the guardian being appointed. A guardian cannot appoint a guardian to act with any more parental responsibilities than those he or she had at the time of the appointment.

A person appointed as a testamentary guardian must accept the appointment for the appointment to be effective.

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation ^[4]
- *Child, Family and Community Service Act* ^[2]
- *Divorce Act*
- Provincial Court (Family) Rules ^[1]
- Supreme Court Family Rules ^[3]

Resources

- The Joyce model for sharing parental responsibilities (PDF)
- The Horn model for sharing parental responsibilities (PDF)

Links

- Justice Education Society: Parenting After Separation program ^[5]
- Canadian Bar Association BC Branch: Custody and access, guardianship, parenting arrangements and contact ^[6]
- Legal Services Society Fact Sheet: How to become a child's guardian ^[7]
- Legal Services Society's Family Law Website: Guardianship, parenting time and parental responsibilities ^[8]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

References

- [1] <http://canlii.ca/t/85pb>
- [2] <http://canlii.ca/t/51znt>
- [3] <http://canlii.ca/t/8mcr>
- [4] <http://canlii.ca/t/8rdx>
- [5] <http://www.justiceeducation.ca/programs/online-parenting-after-separation>
- [6] <http://clicklaw.bc.ca/resource/1246>
- [7] <http://clicklaw.bc.ca/resource/2639>
- [8] <http://clicklaw.bc.ca/resource/1631>

Custody and Access

When married spouses with children younger than the age of majority separate, decisions must be made about how the children will be brought up, who they will live with, and how they will be cared for. For many people, arguments about parenting issues like these are the most difficult parts of ending a relationship. Under the *Divorce Act*, which applies just to married spouses, these issues are addressed through orders about custody and access.

This section talks about custody and access. It discusses the factors that govern awards of custody and access and the types of orders about custody and access that can be made.

Introduction

The federal *Divorce Act* talks about the care of children in terms of custody and access. Custody is the right to have the child with you and the right to make parenting decisions about the child, such as deciding where a child goes to school, how a sick child is treated, whether a child is raised in a religion, and what sports the child plays after school. Access is the schedule of the child's time between spouses.

Custody can be held by more both spouses; this is called *joint custody*. Having joint custody doesn't mean the child's time is equally split between the spouses' homes, but it does mean that they are both assumed to be good parents and that both will participate in making parenting decisions.

Access generally refers to the schedule of the spouse with the least amount of time with the child. There are no fixed rules about what access should look like. The factors that the court usually thinks about when making decisions about access include:

- the distance between the spouses' homes,
- the quality of the child's relationship with both spouses,
- the history of the child's care before the spouses separated,
- the child's age and stage of development,
- any arrangements that have already been made for siblings, and
- any limitations on a spouses' parenting capacity.

A spouse's access to a child is entirely different and separate from his or her obligation to pay child support. Child support is not a fee paid to exercise access, nor is it a fee charged to allow access. Child support is paid by one spouse to the other to help cover the costs associated with raising the child and to help ensure that the child has as positive and as enriching a childhood as possible. Access, on the other hand, is the privilege of a spouse to visit and spend time with his or her child, so that the child can have the benefit of a strong, loving and meaningful relationship with both spouses.

Other people, usually relatives of the child like a grandparent, can have custody or access to a child. To apply for an order for custody or access, people who aren't spouses must first get the court's permission, and then make their application. Applications like these aren't very common.

The *Divorce Act*

The *Divorce Act* describes children as *children of the marriage*, and s. 2(1) of the act defines a child of the marriage as the child of one or both spouses, providing that the child is under the age of majority at the time, or older but unable to withdraw from the care of his or her parents. The *Divorce Act* is only available to parents who are or used to be married to each other, and the person making the application under the act must have been "habitually resident" in the province in which the application is made for at least one year.

These are the important sections of the *Divorce Act* which talk about custody and access:

- s. 2: definitions
- s. 4: the court's jurisdiction to make custody and access orders
- s. 5: the court's jurisdiction to change orders
- s. 16: custody and access orders
- s. 17: variation proceedings

Who can apply for custody and access

In general, anyone who has a connection to a child may apply for custody of the child. Normally, the people who apply for custody are the biological or adoptive parents of a child, but grandparents and other adults involved with the child may also apply for custody if they wish.

Spouses

According to s. 16(1) and (4) of the *Divorce Act* any person or persons can be granted custody of or access to a child. Where that person is not a spouse, he or she must apply to the court under s. 16(3) for permission to apply for a custody or access order. The court will grant custody and access to people other than parents and stepparents in the right circumstances.

People other than parents and stepparents

While the *Divorce Act* is clear that anyone can apply for the custody of a child, the court will presume that the biological parents, adoptive parents, and stepparents of a child are entitled to raise the children unless there is a clear reason why this should not be the case. Again, as in all matters touching on children, the court's decision will rest wholly on what is in the best interests of the child, not what is in the interests of the child's parents or those of third parties.

The general rules dealing with competing custody claims between a non-parent and a parent are these:

- The natural or adoptive parents of a child have a presumptive right to the custody of that child, except where they have abandoned the child or demonstrated a serious lack of fitness to have custody, as might be the case in situations of abuse or neglect.
- Custody should only be given to third parties when the natural or adoptive parents are unwilling, unable, or unfit to care for the child.
- The wishes of the natural or adoptive parents should be heeded unless there is a serious reason why they shouldn't be, as might be in the case of a threat to the child's health and safety.

The common theme here is that there must be a real and substantial concern about the fitness of the natural or adoptive parents' ability to care for a child before that child is taken away from them and given to a third party.

Children may however have an interest in remaining involved and in contact with the other people in their lives, such as grandparents, cousins, aunts, uncles, long-term caregivers, and so forth. Grandparents, and other people who aren't parents, can apply for access to children on their own, with or without the cooperation of the parents.

More information about the interests grandparents and other non-parents may have in a child is provided in the first section of this chapter.

Factors in custody awards

There are really two sets of factors that the court will consider in making an order for custody: the factors set out in the legislation and the additional factors that have developed through the courts. As far as the legislation is concerned, s. 16(8) of the *Divorce Act* provides that:

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

The courts have expanded these factors into the following general principles:

- The parent most likely to be granted sole custody is the person who was the children's primary caregiver during the relationship, assuming that it's necessary to make an order for sole custody for some reason.
- Each parent's character, fitness and ability to parent may be considered in determining custody, depending on the circumstances of the case and as long as issues like this are genuinely important and relevant.
- The court may consider each parent's mental and physical capacity in determining custody, depending on the circumstances of the case and again as long as issues like this are genuinely important and relevant.
- Siblings will usually be kept together, although they can be separated when it would be in their best interests to live apart.
- Where the children are in a stable and satisfactory setting, the court will be reluctant to alter the status quo, unless the long-term interests of the children outweigh the benefits of disturbing their present stability.
- The court will generally take into account the preferences of children who are 10 or 11 years old or older, but the court will not be bound to follow the children's wishes.

There is no guaranteed way to predict the outcome of a battle for custody. Some people believe that the courts will prefer giving custody of children to their mothers; others believe that the courts have adopted a more modern approach which focuses on parenting rather than on gender. Either way, the critical factor in a custody award is the best interests of the child, and the parent who is obviously the primary caregiver will usually be the person with whom it is in the child's best interests to remain.

Factors in access awards

Section 16(10) of the *Divorce Act* says this about making orders for custody and access:

In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the 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.

This subsection has come to be known as the *maximum contact* principle, for the obvious reason. However, the idea that the nature and extent of a spouse's time with the child must be consistent with the child's best interests is just as important as the idea that the child should have as much contact with each parent as is possible. It is not in a child's best interests to have extensive visits with a parent who is abusive, trash-talks the other parent, has poor parenting skills, is addicted to drugs or alcohol, or has a history of being uninvolved in the child's life.

The following are some of the factors the courts will consider in making an order for access.

- **Age of the child:** The younger a child is, the more likely it is that an access award will be for short but frequent time periods only. The older a child is, the more likely it is that access will be granted for overnight visits and for more

than one day in a row. Younger children often require more constant physical attention and more extended periods of time with the custodial parent.

- **Distance between homes:** If one parent lives far away from the other parent, the court may grant access on holidays or long weekends alone. Younger children, in general, do not have the tolerance for long road trips or extended air or ferry travel. Even school-age children may find extended travel times uncomfortable and disrupting.
- **Work schedules:** Access schedules must accommodate parents' work schedules. If a parent is off work and available to care for the children when the other parent is at work, the parent who isn't working ought to have the children. Parents' availability also dictates the timing of pick-ups and drop-offs and responsibility for the children when they're at school.
- **Conduct of a spouse:** If a parent is unable to meet the child's needs or behaves inappropriately, access to the child may be restricted. In the past, access has been denied to non-custodial parents with a history of alcoholism, abuse, or paedophilia, or who have abducted the child or attempted to alienate the child from the other parent.
- **Health of a spouse:** If a parent has health problems that affect his or her ability to care for the child or his or her relationship with the child, a court may limit access.
- **Preferences of the child:** The court will consider the wishes of the child once they reach about ten to twelve years of age, although there really is no magic age and the court will not be bound by the child's wishes. Younger children are generally assumed to be too emotionally and intellectually immature to make a reasoned decision about access.

There really is no "standard" pattern of access. All of these factors usually get taken into account when an access schedule is designed, and in general an access schedule can be as creative as the flexibility of the spouses and common sense allow.

This chapter has a chart of different parenting schedules that accommodate some of these concerns in the section Parenting after Separation.

Types of custody order

Custody orders are either one of two types. They are either *interim orders*, made after a court proceeding has started but before it has concluded, or they are *final orders* made following a settlement or a trial. In general, any kind of order that can be made on a final basis can also be made on an interim basis.

Interim orders

Interim orders are usually intended to provide a rough structure to the legal relationship between the parties and their children that will last until the matter is finally resolved at trial. Interim orders are not meant to be perfect orders and are often made on less than perfect evidence. The result at trial may be the same or different than the situation in the interim.

An interim custody order is not a final determination of the issue and while the same considerations are applied in making an interim order as they are in a final order, a greater emphasis is placed on the child's immediate and short-term best interests. As a result, the courts will often preserve the existing situation, the status quo, and leave the child with whichever parent he or she is mostly living with, rather than disturb the child and require a change of homes. In other words, if the father left the family home when the parties separated, leaving the children with their mother, the court will likely allow that situation to stand until the final decision is made.

It can be difficult to change the children's living circumstances once a stable arrangement has been reached, and both parents should be very careful and consider their options if things come to the point where one parent has to move out of the family home. Interim orders can, however, be changed. Generally, a parent will apply to vary an interim order where there has been a change in circumstances that has affected the best interests of the child. Where there has not been such a

change in circumstances, the interim order will usually stay as it was.

Sole custody

A parent with sole custody has the child's primary residence and is responsible for the child on a day-to-day basis.

For some couples, sole custody is ideal. In such cases, one parent, typically the parent who was not the children's primary caregiver during the relationship, has less of a personal interest in being with the children all of the time than the other parent, and is quite content to resign custody. In other cases, the parents live too far apart from each other, or have such a poor relationship with each other, that any other order wouldn't work.

For other couples, sole custody is necessary to protect the children from the conflict between their parents. Where emotions run too high, and the parties find themselves simply incapable of communicating with each other without fighting and exchanging insults, sole custody may be necessary to shield children from their parents' conflict and give them as much stability as possible.

Joint custody

An order for joint custody gives each parent custody of the children. In such cases the parents need to work together and cooperate in raising the children. The children may still spend more time — sometimes a lot more time — at one parent's home than the other, but both parents will be the children's joint custodians and their joint guardians.

It used to be the case that where the parties had trouble communicating with one another, the courts would automatically make an order for sole custody. This view has pretty much disappeared, and the courts will usually allow even highly conflicted parents to have joint custody, as long as they share a fairly common idea of how the children should be brought up and are mature enough to keep their disputes between themselves. In a 1996 case from our Court of Appeal, *Robinson v. Filyk* ^[1], 1996 CanLII 3310 (BC CA) the court said that there should be no presumptions in favour of or opposed to joint custody, nor any presumption that joint custody should be allowed only where the parents are able to get along and communicate with each other:

"It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of a child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from the individual justice to which every child is entitled."

However, our Supreme Court of British Columbia commented on *Robinson* in a 2010 case called *B.T. v. B.L.* ^[2], 2010 BCSC 1813 saying that the courts have since "moved away from presuming that if parties have difficulty communicating, joint custody is not appropriate," suggesting that there may in fact be an unspoken, unlegislated presumption in favour of joint custody.

Whether parents have joint or sole custody depends more on their relationship and approaches to parenting than it does on how much time each parent has with the children. A parent can see the children only on every other weekend, or live in another province altogether, and still have joint custody with the other parent. Joint custody is not about an equal sharing of the children's time.

When spouses have joint custody, they need to work together and cooperate in raising the children. This can sometimes be difficult, particularly when there is a lot of conflict in the spouses' relationship with one another. Before the *Family Law Act* came into effect, the rights and obligations involved in joint custody were usually addressed through a guardianship order under the *Family Relations Act*, in particular through two models of joint guardianship, the Horn model and the Joyce model. The *Family Law Act* doesn't talk about guardianship the way the old law did and can't be used to spell out spouses' rights and obligations in the same way. However, since joint custody involves the need to work together and cooperate in making parenting decisions, the models can still work. They just need to be changed a bit.

The Joyce model for joint custody

The Joyce model, created by Mr. Justice Joyce, is fairly detailed and requires spouses to consult with one another on all important decisions affecting the child and to make their best efforts to work together to reach a solution that is in the best interests of the child. When spouses can't agree on a decision, the Joyce model might say that one spouse will have the last word, or it might say that the spouses will try to mediate the issue, consult a child psychologist about the issue, or ask a judge for an order on the issue.

Here's the standard version of the Joyce model adapted for spouses who have joint custody:

The spouses will have joint custody of the child on the following terms:

1. in the event of the death of a spouse, the surviving spouse will have sole custody of the child,
2. each spouse will have the obligation to advise the other spouse of any matters of a significant nature affecting the child,
3. each spouse will have the obligation to discuss with the other spouse any significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction, and general welfare,
4. the spouses will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions,
5. in the event that the spouses cannot reach agreement on a significant decision despite their best efforts, the spouse with the primary residence of the child will be entitled to make those decisions and the other spouse will have the right to apply for an order respecting any decision the spouse considers contrary to the best interests of the child, under s. 16(1) of the *Divorce Act*, and
6. each spouse will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.

You can download a version of the adapted Joyce model in PDF format in the resources section at the bottom of this page.

The Horn model for joint custody

The Horn model, created by Master Horn, is more about spouses' rights to get information about the child, usually about the child's schooling, health, and extracurricular activities. The Horn model implies that the spouse with whom the child mostly lives will be entitled to make decisions about the child as he or she sees fit, with the other spouse having a right to get information about the child and be consulted about important decisions involving the child.

Here's the standard version of the Joyce model adapted for spouses who have joint custody:

The spouses will have joint custody of the child and the spouse without the child's primary residence will have the right:

1. to be informed of the child's medical and dental practitioners,
2. to contact the child's medical and dental practitioners and obtain the child's medical and dental records,
3. to be consulted with respect to the selection of the child's alternative caregivers, such as daycare and preschool,
4. to consult with the children's alternative caregivers and teachers,
5. to be informed of events at the child's schools or daycare so that the parent without primary care may attend,
6. to be informed of parent/teacher nights so that the parent without primary care may attend,
7. to be consulted with respect to any significant health issues relating to the child, and
8. to be consulted with respect to any significant change in the child's social environment.

You can download a version of the adapted Horn model in PDF format in the resources section at the bottom of this page.

Shared custody

Shared custody is a term used by the Child Support Guidelines to describe a kind of joint custody situation in which the children spend an equal or almost equal amount of time with each parent. Where parents have shared custody, the children will usually spend a certain amount of time with one parent at that home and a similar amount of time with the other parent at their home. Shared custody can require that the children switch homes every three or four days, every other week, every two weeks, or every month; the amount of time the children spend with each parent will depend on the circumstances of each case, the age of the children, the parents' work schedules, and the schedules of the children's activities.

In many ways, this is an ideal form of custody since the children spend an equal amount of time with each parent, and have an equal opportunity to bond with each parent. Shared custody usually requires that:

- the parents live fairly close to one another,
- the parents have adequate communication skills with one another,
- both parents are able to put the children's needs ahead of their own,
- the children are old enough to be able to tolerate the disruption of living in two different homes, and
- the arrangement is in the best interests of the children.

Of course, there are downsides to this sort of order. The strain of communicating so frequently with the other spouse can be a bit of a burden; it can be costly to maintain a full set of clothing, shoes, toiletries and supplies at each house; and, no matter what, the children are still moving from one house to another each week.

Split custody

Split custody is a term used by the Child Support Guidelines to describe a kind of parenting situation in which one or more of the children live with mostly with each parent. The parents may have sole custody of the children in their care or they may have joint custody of all of the children, regardless of where the children live.

This is a fairly unusual order as it requires the separation of siblings and there is a risk that they may grow apart from each other as time passes. These sorts of orders are only made where there is clear evidence that it is in the best interests of all of the children to fracture the family unit, such as when the siblings are constantly fighting or at each other's throats, or when one child has a particular attachment to a parent not wholly shared by the other children. In such cases, a needs of the child assessment, prepared under s. 211 of the *Family Law Act*, confirming that the children should be split apart is essential.

Types of access order

Orders for access are either of two types of order: interim orders and final orders. *Interim orders* are made before trial, and *final orders* are made either by a judge after trial or with the agreement of the parents without a trial.

Interim orders

The section on Interim Applications in Family Matters in the chapter Resolving Family Law Problems in Court discusses interim orders more fully. Interim orders are intended to be a sort of rough-and-ready solution to the legal problems spouses face after they have separated, and are really only meant to last until a final decision is made following trial or a settlement of the action. Interim orders are short-term solutions intended to deal with the immediate problems about

where a child will live and the role each spouse will play in raising the child. Interim access will be decided after a decision has been made about the child's primary residence.

While an interim order will be made based on the same considerations that apply to final orders, a lot of weight is usually given to the status quo — the parenting arrangements in place at the time the application for the interim order is made — in order to minimize the amount of disruption the child has to deal with while the spouses' legal issues wind their way through the court system.

However, the wrongful conduct of spouse will not establish a status quo that the court will respect. If a parent is seeing a child too little or if the other parent is withholding access, the court will act on an interim basis to expand the time the parent has with the child; if a parent has taken off with the child, a court may order the parent and child to return.

Specified and unspecified access

Every order for access, whether interim or final, will say that a spouse will have either a set schedule of time with the child or something much more ambiguous that really isn't a schedule at all. Some orders will provide for both a set schedule of access and "such other access as the parties may agree."

Unspecified access is usually described as "liberal and generous access" in orders and family agreements. This sort of access is appropriate where the spouses can communicate with each other reasonably well and each is prepared to accommodate the other. Where there is any tension between the spouses relating to the children, such an order may not be appropriate, particularly if there is a chance that one parent will withhold the child from the other. In fact, it may be a recipe for disaster.

Specified access is probably the more common kind of access. Specified access orders state at what times and dates a spouse will have the child. These orders can be quite complex, dividing holidays, birthdays, Mothers' Day and Fathers' Day, special school days, and so on. Specified access orders can encompass pretty much every kind of arrangement that you can think of, or be limited and general. A typical specified access order might provide that a spouse will see the child every other weekend, from a certain time on a certain day until a certain time on another day, on a couple of weeknights between certain times, and on certain holidays in alternating years.

In general, the more difficult the spouses' relationship is following separation, the more likely it is that the order will specify the access schedule on very detailed terms. Some people just need a set of rules to live by.

A chart showing a number of different parenting schedules is available in the section Parenting after Separation.

Conditional access

A spouse's access to his or her child can be made conditional upon the parent doing or not doing something. If a parent fails to meet any of the conditions on which he or she may have access to the child, the parent's access to the child may reasonably be denied.

In general, the court must have some fairly serious concerns about a parent's lifestyle or behaviour before an access order will be conditional. Conditional access orders have been made in cases such as the following:

- a parent was a heavy smoker (the condition being not to expose the child to second-hand smoke),
- a parent used drugs or alcohol (not to use drugs or alcohol while with the child and for a period of 24 hours before access), and
- a parent was a dangerous driver (not to drive with the child in the car).

In theory, access can be made conditional for pretty much any kind of genuinely bad behaviour on the part of a parent that poses an actual risk to the child.

Supervised access

Access may be restricted where there is a concern that the visits may result in harm to the child. In extreme cases, the court may require that a spouse's access be supervised by a third party. Such supervision may be by a grandparent, another relative, or by a person who specializes in supervising access. There are even companies that provide supervised access services.

The courts are generally reluctant to require supervision as a condition of a spouse seeing a child, but they will do so where:

- there has been a history of child abduction or attempts to abduct the child,
- there is a history of abuse against the child or the other parent,
- the parent has attempted to poison or alienate the child against the other parent or otherwise interfere with the child's relationship with the other parent, or
- there are serious concerns about the parent's ability to properly care for the child, which may include mental and physical illness.

In general, supervised access is intended to be a short-term solution to a problem, rather than a permanent condition of access. Remember that it is up to the spouse who says someone's access should be supervised to prove why it should be supervised.

Resources and links

Legislation

- *Divorce Act*

Resources

- The Joyce model for joint custody (PDF)
- The Horn model for joint custody (PDF)

Links

- Justice Education Society: Parenting After Separation program ^[3]
- Canadian Bar Association BC Branch: Custody and access, guardianship, parenting arrangements and contact ^[4]
- Legal Services Society's Family Law Website: Access ^[5]
- Legal Services Society's Family Law Website: Custody ^[6]
- Clicklaw Common Question: We can't agree about who the children should live with ^[7]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/1f031>
- [2] <http://canlii.ca/t/2f34j>
- [3] <http://www.justiceeducation.ca/programs/online-parenting-after-separation>
- [4] <http://clicklaw.bc.ca/resource/1246>
- [5] <http://clicklaw.bc.ca/resource/1608>
- [6] <http://clicklaw.bc.ca/resource/1891>
- [7] <http://clicklaw.bc.ca/question/commonquestion/1007>

Changing Family Law Orders and Agreements Involving Children

There really is no such thing as an absolutely final order or agreement involving children. All orders and agreements involving children can be changed, but, in general, something new must have happened since the original order or agreement was made that affects the best interests of the children.

This section talks about changing orders for custody and access under the *Divorce Act* and about changing orders and agreements about parenting arrangements and contact under the *Family Law Act*. It also discusses relocation, a special problem that comes up when a guardian wants to move, usually with the children, to a different town, province or country.

Introduction

Changing an order is called *varying* an order. An order can only be varied by a new order. Changing an agreement is called *amending* an agreement. An agreement can be amended by making a new agreement, usually called an *addendum agreement* or something to the same effect, or by the court setting the agreement aside and making a different order in its place.

Parents usually want to vary an order or agreement because something has changed for the parents. The court, on the other hand, is only interested in varying an order or agreement because something has changed for the children. The court will not vary an order or agreement just because one parent is annoyed with the other parent; something new must have happened that affects the child's best interests since the last order was made, or the court will leave the old arrangements alone.

The process for applying to vary an order will depend on whether the original order was made under the federal *Divorce Act* or the provincial *Family Law Act*, and, if under the *Family Law Act*, whether the order was made by the Supreme Court or the Provincial Court. Almost the same general considerations that apply to varying orders apply to setting aside agreements.

The *Divorce Act*

Under s. 5 of the *Divorce Act*, the Supreme Court has the jurisdiction to vary a *Divorce Act* order for custody or access made anywhere in Canada as long as the person making the application, the *applicant*, ordinarily lives in British Columbia when the application is made or if both spouses have agreed to have the application heard here. However, if the child has deeper roots and greater social ties in the other province or territory, the court is likely to transfer the matter to be heard there.

Section 17 gives the court the authority to hear and decide variation applications. Under this section, the court may vary, cancel, or suspend orders dealing with custody and access. Section 17 also sets out the test for the variation of custody and access orders, and the principle that it is in a child's best interests to have maximum contact with each parent. Section 17 says this:

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

It is up to the applicant to show that there has been a change in the "condition, means, needs or other circumstances of the child" since the last order was made or the court won't change the order.

The *Family Law Act*

The rules in the *Family Law Act* about varying orders and setting aside agreements are different from each other, and also change depending on the subject of the part of the order or agreement that is sought to be varied or set aside.

Varying orders

Both the Supreme Court and the Provincial Court have the jurisdiction to vary orders and set aside agreements for guardianship, parenting arrangements, and contact. *Parenting arrangements* means the parts of an order or agreement that talk about parental responsibilities and parenting time. As a rule of thumb, applications to vary orders can only be brought to the court that made the original order. An order of the Supreme Court can only be varied by the Supreme Court and an order of the Provincial Court can generally only be varied by the Provincial Court.

Section 47 sets out the test to vary orders about parenting arrangements:

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

The test to vary orders about contact is at s. 60, and says exactly the same thing, just with the word "contact" in place of the phrase "parenting arrangements".

The general test under the *Family Law Act* to vary orders is at s. 215(1). It applies when there isn't a specific test required for a particular order the way ss. 47 and 60 are required for orders about parenting arrangements and contact. Since

there's no specific to test to vary orders for guardianship, it's the general test that will apply:

Subject to this Act, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

Whenever the court is asked to make an order about guardianship, parenting arrangements, and contact, s. 37(1) requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at s. 37(2).

Beyond this, it's difficult to say what the court will consider when changing orders about guardianship, parenting arrangements, or contact with a child. The *Family Law Act* is too new for us to know how the court will handle questions like these.

Setting aside agreements

Under the *Family Law Act*, the court cannot vary or amend a valid agreement. When the court is convinced that an agreement must change, the court will set aside the parts of the agreement that are causing the problem and make an order in place of the parts set aside. Section 214 of the act says this:

(1) If an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement.

(2) A court may incorporate into an order all or part of a written agreement respecting a family law dispute made by the parties to the proceeding and, unless the court orders otherwise,

(a) the order replaces that part of the agreement that is incorporated, and

(b) the remainder of the agreement remains effective.

(3) Unless the court orders otherwise, if an agreement and an order made after the agreement provide differently for the same subject matter,

(a) the order replaces the part of the agreement that provides differently for the same subject matter, and

(b) the remainder of the agreement remains effective.

The legal test that the court must apply to set aside part of an agreement changes, depending on the subject of the part in question. Most of the time, the court will be concerned that the agreement is in the best interests of the child.

Changing orders about custody

A 1996 case of the Supreme Court of Canada called *Gordon v. Goertz* ^[1], [1996] 2 SCR 27, sets out the factors a court must consider when hearing an application to vary orders for custody or access made under the *Divorce Act*:

- The parent applying for a change in the custody or access order must first prove that there has been a material change in the circumstances affecting the child.
- If this threshold is met, the judge on the application must make a fresh assessment about what is in the best interests of the child, considering all of the relevant facts relating to the child's needs and the ability of the each parent to satisfy the child's needs.
- This assessment is based on the findings of the judge who made the previous order and the new circumstances.

- The assessment does not begin with a legal presumption in favour of the parent with whom the child mostly lives, although that parent's views are entitled to great respect.
- The focus is on the best interests of the child, not the interests, rights and entitlements of the parents.

In other words, the applicant must show that there has been a serious change in circumstances that affects the child's best interests before a court will even consider the application. Once this hurdle is crossed, the court will look at all of the circumstances before making a decision, as if the case was being heard for the first time. Most importantly, this means that there is no automatic presumption in favour of the status quo.

Cases where an order for custody has been varied include circumstances such as where:

- The change is in the best interests of the children in the long run.
- The parent with the children's primary residence has attempted to alienate the children from the other parent.
- The parent with the children's primary residence has repeatedly frustrated the other parent's access to the children.
- The child has been apprehended by child protection workers.
- The child has been abused by the parent with the children's primary residence.
- A mature child has expressed a wish to live with the other parent.

The courts are unlikely to change custody where the children are happy in an existing stable and secure setting.

Changing orders and agreements about guardianship and parental responsibilities

The *Family Law Act* has rules about who is presumed to be a guardian. When someone is presumed to be a guardian, that person *is* a guardian, without the need for an order. The only people who must have an order making them a guardian are the people who don't fit into those presumptions, like aunts and uncles, grandparents, and other people who have established a caring relationship with a child.

People who are guardians, whether by a court order or as a result of the presumptions of guardianship, manage the care and raising of child by exercising *parental responsibilities*. Under s. 40(2) of the act, parental responsibilities are presumed to be shared by all guardians until an order or an agreement says otherwise, and s. 40(3) says:

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

Orders about guardianship and parental responsibilities can be varied by another order. Agreements about parental responsibilities can be changed if the parties make another order, or, if they can't agree, the court may set aside the agreement and replace it with an order about parental responsibilities.

Guardianship

Under s. 51(1) of the *Family Law Act*, the court may make an order appointing someone as a guardian of a child or make an order "terminating" someone's guardianship of a child. This section doesn't say what the court should consider when terminating someone's guardianship. However, s.37 (1) says that:

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.

Section 215 provides a general test to change orders that applies when no specific test is provided:

... a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

In other words, to vary an order appointing a person as guardian, the applicant will have to show that there has been a change in circumstances and explain why it is in the best interests of the child to remove the person as guardian.

Parental responsibilities

The *Family Law Act* provides a test to vary orders about parental responsibilities and a test to set aside agreements about parental responsibilities. Section 44(4) talks about agreements:

... the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

Section 47 talks about orders:

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

Under both tests, the court must also consider why the proposed result would or wouldn't be in the best interests of the child.

Changing orders and agreements about access, parenting time and contact

Orders and agreements about parenting schedules are most commonly varied because: one of the parties has been frustrating the schedule; a party is constantly late or cancels visits frequently; the child is older and is more able to spend more time with the visiting parent; a party has moved and the old parenting schedule is no longer convenient; or, the child wishes to see the visiting party more or less often.

The case of *Gordon v. Goertz* ^[1] also applies to changing access orders under the *Divorce Act*: the applicant must show that there has been a serious change in circumstances that affects the child's best interests before a court will even consider the application, and, once this hurdle is crossed, the court will look at all of the circumstances before making a decision about access as if the matter was being heard for the first time, with no presumption in favour of how things used to be.

Under ss. 47 and 60 of the *Family Law Act*, the court may vary an order for parenting time or contact if it is satisfied that:

... since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

Sections 44(4) and 58(4) allow the court to set aside an agreement about parenting time or contact if it is:

...satisfied that the agreement is not in the best interests of the child.

When considering applications like these, both the *Divorce Act* and the *Family Law Act* require the court to consider the best interests of the child rather than the needs or interests of the parties.

Vague parenting schedules

Problems often crop up when an order or agreement says only that a parent will have "liberal and generous" time with a child, or sets a schedule that is too vague. In situations like this, it's too easy for a schedule to be frustrated. What is "liberal and generous" time anyway? Who decides what is "liberal" and what is "generous"? Say an order or agreement says this:

"Sally will have parenting time from Friday to Sunday."

When exactly does Sally's access start? When does it end? Who is supposed to pick the child up and drop her off? Is the Sunday the Sunday immediately following the Friday or the Sunday a week later? A better order or agreement would say:

"Sally will have parenting time from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. Sally will be responsible for picking the child up on Fridays and Bob will be responsible for picking the child up on Sundays."

Even better would be an order or agreement that says:

"Sally will have the child from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. If the Friday is a statutory holiday or a school professional development date, Sally will have the child from Thursday at 4:00pm. If the Monday following the Sunday is a statutory holiday or a school professional development day, Sally will have the child until Monday at 6:00pm.

"Sally will be responsible for picking the child up at the beginning of her access to the child and Bob will be responsible for picking the child up at the conclusion of Sally's access to the child.

"In the event that Sally is unable to care for the child during a scheduled access visit, Sally will give at least two days' notice to Bob.

"On Fathers' Day, Sally's parenting time with the child will be suspended from 10:00am to 2:00pm, during which time Bob will have the child.

"Sally's parenting time with the child will be suspended during the summer, winter and spring school holidays, during which periods the following holiday access schedule will prevail..."

Where there has been a history of difficulties, the court will generally be quite open to further specifying the terms of access.

Reducing time with a child

Cases where the parenting schedule in an order or agreement has been varied to reduce a person's time with a child include in circumstances where:

- a party has moved far enough away as to make the original access schedule impossible to comply with,
- a mature child over the age of 12 or so has expressed a wish not to see the person,
- a party has suffered a mental or physical illness, such that the children's health and welfare are at risk in his or her care,
- the parties' relationship has worsened to the point that they can no longer cooperate,
- a party has attempted to interfere with the child's relationship with the other party, and
- the party's time with the child is proving harmful to the child's mental or physical health and welfare.

Where there are allegations involving mental health issues, parenting capacity, or the children's wishes, it is often essential to have a psychologist or psychiatrist provide an evaluation or a needs of the child assessment that supports the allegations. Needs of the child assessments and views of the child reports are discussed in more detail in the first section in the Children chapter, under the heading "reports and assessments".

Increasing time with a child

Of course, parenting schedules can also be changed to increase the amount of time a person has with a child. Circumstances where this has happened include where:

- A party was interfering with the child's relationship with the other party, so that more time was required to restore the relationship.
- A party was interfering with and unreasonably limiting the time provided to the other person in an order or agreement.
- A child is older and able to spend more time away from a parent.
- A child over the age of eleven or twelve or so has expressed a wish to see more of the other person.

These are just a few of the circumstances in which a person's time with the child can be increased from the amount given in an order or agreement. As long as there has been a change in circumstances since the order or agreement was made and the increased time is in the children's best interests, access arrangements should be adjusted.

Relocating with or without a child

It sometimes happens that a parent who has the children for most of the time, whether because of a court order or a separation agreement, wants to move out of town. The parent who wants to move generally wants to move because:

- There is an employment opportunity.
- The parent is in a new relationship with someone from out of town.
- The parent wants to be closer to family.
- There is a unique educational opportunity for either the parent or the children.
- There is a unique medical or therapeutic opportunity for either the parent or the children.

Normally, the parent on the other end of the stick doesn't want the children to move since any move out of the local area will hamper that parent's ability to see the children as frequently, and the lessening of contact may harm the child's relationship with that parent. This is especially true when a parent seeks to move to another province or another country. Even within British Columbia, a relatively short move from Richmond to Chilliwack, for example, can impair a parent's schedule with the child.

These problems, which used to be called *mobility issues*, are handled under the *Divorce Act* and the *Family Law Act* in different ways.

The *Divorce Act* and *Gordon v. Goertz*

Relocation under the *Divorce Act* is about applying to vary an order for custody or access. Inevitably, a move of even only a few hours away can frustrate a spouse's access to a child, and for the moving spouse to avoid being in breach of an order for custody or access, the spouse will need to apply to the court for an order adjusting the arrangements for custody and access to allow the move. The most important case on this issue is *Gordon v. Goertz* ^[1], discussed above. The reasoning from that case is roughly this:

- The parent applying for a change in the custody or access order must first prove that there has been a material change in the circumstances affecting the child.
- If this threshold is met, the judge on the application must make a fresh assessment about what is in the best interests of the child, considering all of the relevant facts relating to the child's needs and the ability of the each parent to satisfy the child's needs.
- This assessment is based on the findings of the judge who made the previous order and the new circumstances.
- The assessment does not begin with a legal presumption in favour of the parent with whom the child mostly lives, although that parent's views are entitled to great respect.
- The focus is on the best interests of the child, not the interests, rights and entitlements of the parents.

It is always very difficult to say whether the court will allow a parent to move with the children or not. The case law following *Gordon v. Goertz* ^[1] is quite contradictory and the best that can usually be said, apart from pointing out some general principles, is that a parent with the children's primary residence has almost a 60% chance of being allowed to do so. In 2011, Professor Rollie Thompson of the law school at Dalhousie University gave a presentation to local lawyers updating the case law on mobility issues in this province, and what he learned was this:

- The parent with primary care is able to move about 50% of the time in Canadian cases these days, down from 60%, but moves are permitted about 57% of the time in BC.
- Moves are allowed about half the time at trial, but are allowed about three-quarters of the time when the application is brought as a variation of a trial decision.
- Moves were refused in eight of nine cases where the parents had shared custody of the children, but were allowed in 17 of 18 cases (after counting appeals) where the parent wishing to move was primarily responsible for the care of the children. Where there wasn't a parent who was clearly responsible, the move was allowed in 54% of cases.
- Moves were allowed three-quarters of the time when the children were aged 0 to five, declining to about half the time for children aged six and older.
- Appeals from decisions allowing a move rarely succeed. Appeals from decisions refusing permission to move succeeded 66% of the time.

The tough part about all of this is that it's all fine and dandy to know what happens to people on a *statistical* basis, but statistics don't tell you anything about what is going to happen if *you* want to move! However, some of the circumstances that courts have found to favour or reject a proposed move are these:

| Factors in Favour | Factors Against |
|-------------------|-----------------|
|-------------------|-----------------|

| | |
|---|---|
| <ul style="list-style-type: none"> • The spouse seeking the move has better job prospects or a guaranteed job at the proposed destination. • The spouse has a support network of family and friends at the new home. • There is some benefit at the new home not available at the old home, like better schools or medical programs. • The spouses have resources available to them that will allow the other spouse to visit the children frequently, like a lot of money or being an employee of an airline. • The children aren't particularly close to or have no relationship with the spouse who will be staying behind. | <ul style="list-style-type: none"> • The children have lived in their present setting for a significant amount of time and have established roots in their community. • The move will damage or terminate the other spouse's relationship with the children. • The move is motivated by a wish to alienate the children from the other spouse. • The parent seeking the move has no particular ties to the destination, or the move is proposed solely for that spouse to be in a new relationship. • There is no way to balance the effect of the move with more extended time with the other spouse, such as extended summer access, or access over the whole of the winter holiday. |
|---|---|

It is almost impossible to predict the result of an application to move under *Gordon v. Goertz* ^[1]. Because relocation issues are among the most hotly argued and difficult issues there are in family law, the assistance of a lawyer is highly recommended.

The rules under the *Family Law Act*

The situation is much different under the *Family Law Act*. One of the most important changes this law has introduced are new legal obligations for guardians who are planning on relocating and a new test to determine whether a guardian should relocate if another guardian objects.

Here's how it works.

First, under s. 66, a *guardian* who plans a move, with or without the child, that will have a "significant impact" on the child's relationship with a guardian or other people with a significant role in the child's life must give written notice of the proposed move at least 60 days before the move, to all other *guardians* and *persons with contact* with the child. (The guardian who is moving can apply to court for an exception to this requirement.) The notice must state the place the guardian plans on moving to and the date of the move. This requirement applies whether a guardian is planning on moving with a child or by him- or herself.

Second, under s. 68, a *guardian* who objects to the proposed move must file an application in court to stop the move within 30 days of getting written notice of the move. The parties are required to try to resolve any disagreement about the move on their own, but this doesn't prevent a guardian from applying to stop the move. Only guardians can object; people with contact cannot.

Third, if the parties can't resolve their differences about the move, the *moving guardian* must prove, under s. 69(4) that:

1. he or she has proposed to move "in good faith," and
2. he or she has proposed "reasonable and workable" arrangements to preserve the child's relationships with other guardians and persons with significant roles in the child's life.

If the moving guardian can do this, the move is presumed to be in the child's best interests unless the *objecting guardian* can convince the court otherwise.

The test is a bit different if the moving guardian and the objecting guardian share the child's time equally or almost equally. In that case, the *moving guardian* must prove, under s. 69(5) that:

1. he or she has proposed to move "in good faith,"
2. he or she has proposed "reasonable and workable" arrangements to preserve the child's relationships with other guardians and persons with significant roles in the child's life, and
3. the move is in the child's best interests.

The meaning of *good faith* is discussed at s. 69(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;
- (d) any restrictions on relocation contained in a written agreement or an order.

If the move is allowed, the *objecting guardian* may ask the court to vary the old arrangements for parenting time and, under s. 70(2), the court is required to "seek to preserve, to a reasonable extent, parenting arrangements under the original agreement or order."

Although a person with contact lacks the ability to apply to stop the moving guardian from relocating, he or she may apply under s. 67(2) for an order for contact or to vary an order for contact "for the purpose of maintaining the relationship between the child and a person having contact with the child."

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society Family Law in BC Website: How to change a family law order (Supreme Court and Provincial Court) ^[2]
- Legal Services Society Family Law in BC Website: Fact sheet on when you can change a final order ^[2]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/1fr99>

[2] <http://www.familylaw.lss.bc.ca/guides/change/cantAgree/index.php>

Estranged and Alienated Children

To *alienate* means to make separate. To *estrangle* means to make indifferent. In family law, both terms relate to a breakdown in a child's relationship with a parent.

Children can become estranged from one parent for a good reason that has nothing to do with the behaviour of the other parent. In some cases, a child's relationship with one parent can be damaged by the actions of the other parent, sometimes in the course of a custody battle and sometimes intentionally. These children are said to have been alienated from the other parent.

This section will provide an introduction to the problem of alienated and estranged children, and discuss what the experts have to say about a largely discredited theory called Parental Alienation Syndrome. It will also look at ways of dealing with alienated and estranged children during parenting disputes, and provide a selection of helpful online and printed resources.

Introduction

The end of a romantic relationship is always difficult for parents. It can be just as difficult, if not worse, for their children. How children deal with the end of their parents' relationship has to do with two things: the age and maturity of the children, and how their parents manage the breakdown of their relationship.

Children don't see things in terms of "custody" or "parental responsibilities" when their parents' relationship ends. All they know is that something has gone wrong. Mom and dad are yelling at each other a lot, and then, one day, mom or dad isn't there anymore. Young children won't understand these adult problems. Children who are in primary school will have a better idea, since they'll have friends whose parents have separated. Pre-teens and teens will have a much more grown-up grasp of things as they'll have lost relationships of their own, and be able to appreciate the idea that their parents' relationship has ended. How children cope with their parents' separation changes as they grow older and more mature.

Things are a lot different for parents. A significant relationship has ended, and in the midst of all of the emotions that go along with that — grief, anger, jealousy, love and loss — they might find themselves also having to deal with some extremely difficult legal issues. It's even worse where the parents wind up fighting about things in court.

Litigation can have a very profound impact on people. At its core, litigation is an adversarial process: each parent is fighting the other in order to "win," and where there's a winner there's always a loser. This sort of approach to a dispute often polarizes parents and encourages them to take extreme positions. What makes this so much worse is that the parents are both fighting about something they cherish dearly, their children, and they are both fighting against someone whom they used to deeply love.

In circumstances like these, it can be easy to forget how important it is that the children maintain a positive, loving relationship with the other parent. It can also be easy to overlook the importance of managing the children's exposure to and perception of their parents' conflict. One parent's view of the other becomes clouded by hatred, malice and spite, and nothing the other parent can do is ever right. This attitude is almost impossible to shield from the children. Whether intentionally or unintentionally, the children are inevitably exposed to these negative views which, without interference, can come to colour the children's own views of the other parent.

Children's experiences of separation

It is important to remember that while one parent's thoughtless comments about the other parent can have an impact on how a child sees the other parent, so too will the child's own experience of the separation. This can include:

- blaming the parent who left for breaking up the family,
- seeing a parent as injured by the actions of the other parent,
- sympathizing with an emotionally upset parent, and
- missing and feeling sad for the parent that they see less often.

These feelings may have nothing at all to do with any blameworthy conduct on the part of either parent, but they can cause a child to feel closer to one parent than the other. Further, there a number of normal reasons why a child might feel closer to one parent even in families that haven't separated, such as:

- similarities in the temperament of the child and one of the parents,
- the parent's gender,
- interests the child shares with a parent, and
- how the parent handles discipline.

There are, of course, ways that parents can behave, intentionally and unintentionally, that will encourage a child to drift towards one parent and away from the other that are blameworthy. Remember, however, that there are normal reasons why a child's experience of divorce may align with one parent over the other that have nothing to do with a parent's conduct.

Resisting visits with a parent

When a child begins to drift apart from a parent, the first sign that this might become a serious problem often occurs when the child begins to express a reluctance to spend time with the other parent. It is important to distinguish a simple reluctance from a more serious problem like estrangement or alienation. It is also important to distinguish between a reluctance that stems from a child and a reluctance that is fostered by a parent. In a sense, this is the key difference between estrangement and alienation.

Normal reasons why a child might resist parenting time or contact include:

- age-appropriate separation anxieties,
- inability to cope with the transition between homes, especially where there is a lot of conflict between the parents,
- not wanting to leave an upset parent at home, and
- not liking the other parent's parenting style.

Of course, any resistance to separation is difficult for both parents. For the parent sending the child on the visit, it can be heart wrenching to force the child out the door. For the parent receiving the child, it can be devastating to hear — from the other parent or the child — that the parenting time or contact is unwelcome, and to experience the rejection that this entails.

These "normal" reasons why a child would be reluctant to see a parent can be aggravated by the unintentional conduct of each parent. Separated parents have a positive duty to nurture their child's relationship with the other parent. In the context of parenting time and contact, this means encouraging the child to look forward to seeing the other parent. In general, this means actively fostering the child's relationship with the other parent and refraining from making negative remarks about the other parent.

In high-conflict situations, even parents who understand this basic duty can unconsciously telegraph their feelings about the other parent to the child. Children are not stupid; they know something's not right. Even young children will pick up on non-verbal clues to a parent's feelings.

This sort of unintentional communication of emotion includes:

- making faces, grimacing, groaning, cringing or shuddering when the other parent is mentioned,
- arguing with the other parent when the children can see or hear the dispute,
- making negative comments about the other parent when the children are within earshot,
- using an emotionless or negative tone of voice when speaking to the children about the other parent, and
- reacting in a flat or negative manner when the children discuss the other parent or their activities with that parent.

Even though in these examples nothing is actually being said to the children to discourage their relationship with the other parent, they will pick up on the implications these behaviours suggest: there is something bad about one parent which is hurting the other parent. This sort of behaviour will inevitably encourage and reinforce any resistance the child might have to seeing the other parent.

When a child begins to express a reluctance to visit the other parent, both parents must act to stop the problem from getting worse.

For the parent who has the child most often, this means that you must:

- work harder at encouraging the child to look forward to the visits,
- make sure that you are not a part of the problem by unconsciously telegraphing your problems with the other parent,
- make an effort to remind the child about the other parent's positive traits,
- consider getting the child in to see a counsellor about the separation, and
- seriously consider taking a parenting after separation course.

For the parent whom the child is resisting seeing, this means that you must:

- work harder at making the child feel welcomed and listened to in your home,
- re-examine your approach to parenting issues, particularly if you were the disciplinarian during your relationship with the other parent,
- make sure that you are not insulting or mocking the other parent when the child is within earshot, and
- seriously consider taking a parenting after separation course.

None of these solutions may be effective if the child's opinion and emotions are too entrenched, if the parents are simply too angry with one another to cooperate effectively, or if one of the parents is actively working to undermine the other parent's relationship with the child.

When things go too far, or when a problem is left unchecked, a child's simple preference for one parent can develop to an extreme point, where the child is estranged or alienated from the other parent.

Knowing when there's a problem

An otherwise "normal" resistance to parenting time or contact can cross the line when the child's opinion of the parent and his or her emotional attachment to that parent begins to change. Temper tantrums about a visit, and expressions of rage and hate should send a loud and clear signal that both parents have to work a lot harder to help the child through his or her experience of the separation.

Mild expressions of a change in the child's attachment to a parent include:

- Expressing ambivalence about visiting the parent (not caring one way or the other about seeing the parent).
- Grumbling about having to go to see the other parent.
- Stating a preference for an activity (playing a game, seeing friends and so forth) over seeing the other parent.

More serious expressions of a change in the child's attachment to a parent include:

- Expressing a preference for one parent over the other, and a general ambivalence about the other parent.

- Expressing a preference for one home over the other.
- Expressing a worry about missing the parent the child is leaving.
- Being upset that an activity (playing a game, an outing, seeing friends and so forth) will be interrupted by the visit.
- Stating that visits with other parent are boring.
- Being reluctant to speak to the other parent on the telephone.

Still more serious expressions of a change include:

- Stating that he or she "doesn't like" the other parent.
- Occasionally putting the other parent down.
- Expressions of concern for the well-being of the parent the child is leaving for the visit (older children).
- Crying before the visit (younger children).
- Complaining that "it's not fair" to have to visit (older children).
- Offering promises (studying harder, doing more chores and so forth) in exchange for not having to go on the visit.
- Claiming that the other parent doesn't parent properly (bad food, unfair discipline, unwanted outings and so forth).
- Refusing to talk to the other parent when he or she telephones.

The most serious expressions of a change in the child's attachment to a parent include:

- Pitching temper tantrums before leaving for the visit (younger children).
- Becoming enraged about being forced to go to the other parent (older children).
- Stating that he or she "hates" the other parent.
- Threats about running away or involving the police (older children).
- Pleading to do anything except go on the visit.
- Making bizarre and unlikely claims about the other parent's conduct (abuse, neglect and so forth).
- Constantly making insulting comments about the other parent or putting the other parent down ("he's such a jerk," "she can't do anything right," and so forth).

Even mild indications that a child is growing emotionally distant from a parent are disturbing and warrant some attention by both parents. When a child is clearly heading from feeling ambivalent about a parent to feeling hatred towards that parent, parents should seriously consider getting the child professional help from counsellors who specialize in helping children cope with and adjust to the separation of their parents. It is often helpful for the parents themselves to find some counselling and guidance on how to approach parenting time and contact issues with the child.

Estranged children

The difference between an estranged child and an alienated child is that an estranged child has grown apart from the parent for reasons that are, to be blunt, reasonable and realistic. An alienated child, however, is the victim of one parent's efforts to destroy the child's relationship with the other parent.

An estranged child is either absolutely ambivalent about the other parent or enraged by the other parent. These feelings are, however, justified by the child's experience of the separation or by the child's experience of that parent.

These children are usually estranged as a result of:

- witnessing violence committed by that parent against the other parent,
- being the victim of abuse from that parent,
- the parent's persistently immature and self-centred behaviour,
- the parent's unduly rigid and restrictive parenting style, and/or
- the parent's own psychological or psychiatric issues.

The point here is that the child's experiences make the child's rejection of a parent *reasonable*, and are an adaptive and protective response to the parent's behaviour.

The feelings of alienated children, however, are neither reasonable nor the result of the rejected parent's conduct.

Alienated children

Alienated children reject a parent without guilt or sadness and without an objectively reasonable cause. Their views of the alienated parent are grossly distorted and exaggerated.

Alienation is most easily defined as the complete breakdown of a child's relationship with a parent as a result of a parent's efforts to turn a child against the other parent. Typically, alienation is only a problem when the parents are involved in extremely bitter and heated litigation as a result. Not every case of high conflict litigation involves alienation, but it does happen. A 1991 study by the American Bar Association found indications of alienation in the majority of 700 high-conflict divorce cases studied over 12 years.

This sort of intentional alienation is absolutely wrong and virtually unforgivable. In some circumstances, alienation can amount to child abuse. As J.M. Bone and M.R. Walsh put it in their article "Parental Alienation Syndrome: How to detect it and what to do about it," published in 1999 in the Florida Bar Journal, 73(3): 44-48:

"Any attempt at alienating the children from the other parent should be seen as a direct and willful violation of one of the prime duties of parenthood."

The parent most likely to attempt to alienate a child from the other parent is the parent who has the child for most of the time, usually because of an interim order or some other sort of temporary arrangement.

The sorts of behaviours that suggest an intention to alienate a child from the other parent include, among other things:

- making negative comments about the other parent to the child,
- stating or implying that the child is in danger when with the other parent,
- grilling the child about his or her activities, meals and living conditions when with the other parent,
- stating or implying that the activities, meals and living conditions offered by the other parent are deficient or problematic,
- setting up activities that the child will enjoy during times when the child is with the other parent,
- telling the child that it's up to him or her to decide whether to visit the other parent, and
- stating or implying that the child is being abused or maltreated by the other parent.

The consequences of parental alienation or attempted alienation can be quite profound. Alienation at its best is a form of psychological programming; at worst, it's brainwashing. Alienation may result in the permanent destruction of a child's relationship with a parent and in long-lasting psychological problems.

In their article, Bone and Walsh conclude that when alienation has been identified, the solution is to deal with it immediately:

"When attempted [parental alienation syndrome] has been identified, successful or not, it must be dealt with swiftly by the court. If it is not, it will contaminate and quietly control all other parenting issues and then lead only to unhappiness, frustration, and, lastly, parental estrangement. ...

While any application which flows from a suspicion of alienation will be costly and worsen the conflict between the parents, it is urgent that the alienation be stopped immediately if its long-term impact is to be avoided."

A few notes from JP Boyd

I am not a psychologist, a psychiatrist or a counsellor. As a result this section should be read with a grain of salt, as it is based on my observations of my clients' experiences, a bit of research, and some common sense. For the same reason, be cautioned that this section should not be used as an authority for the propositions it sets out.

I also wish to acknowledge that the bulk of this section was drawn from two sources in particular: Dr. Deirdre Rand's 1997 article, "The Spectrum of Parental Alienation Syndrome (Part II) ^[1]" in the American Journal of Forensic Psychology; and, a 2001 article by Drs. Joan Kelly and Janet Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome ^[2]", published in Family Court Review. Both articles are excellent and should be read if you believe that estrangement or alienation is an issue in your family.

What the experts say about parental alienation

The alienation of children from parents in the course of high-conflict family law litigation was first noticed by the mental health community in 1976. In 1987, Dr. Richard Gardner gave this problem the label "Parental Alienation Syndrome" (PAS), which he used to describe a disorder in children that occurred in the course of a custody dispute.

Dr. Gardner's interpretation was not without controversy and has continued to be studied, reviewed and revised by the mental health community. In fact, I think it's fair to say that PAS, as a theory, has largely been discredited. No one doubts that parental alienation can occur when parents separate; the questions largely concern whether PAS is a diagnosable "syndrome" at all, and current thinking on alienation has become quite nuanced. The most recent significant work on parental alienation comes from Drs. Joan Kelly and Janet Johnston, but since Dr. Gardner came up with his formulation of PAS first, that's where we'll start.

Gardner's Parental Alienation Syndrome

In 1997, Dr. Deirdre Rand published an article called "The Spectrum of Parental Alienation Syndrome (Part II) ^[1]" in the American Journal of Forensic Psychology, summarizing and updating Dr. Gardner's theory. In that article, Dr. Rand describes PAS as the child's formation of an "alignment" with one parent against the other. Think of "alignment" as meaning an alliance, or a sense of allegiance, in which a child comes to share the views and emotions of one parent over those of the other parent.

A study by J.R. Johnston and L.E. Campbell in 1988 found a measurable degree of alignment between children and one parent in 35 to 40% of the high-conflict cases they studied. In a 1993 article in *Children of Divorce who Refuse Visitation*, Johnston reported finding strong alignments in 28 to 43% of 9- to 12-year-olds in high-conflict cases, with another 29% showing symptoms of a mild alignment.

According to Dr. Rand, children align differently depending on their ages:

- **2- to 3-year-olds:** Mostly show age-appropriate separation anxiety from their primary parent. This anxiety worsens when the primary parent is emotionally disturbed.
- **3- to 6-year-olds:** Alignments shift depending on which parent the children are with. Children in this age range have not yet learned to comprehend two different points of view, and cannot understand why one parent says one thing and the other parent says another.
- **6- to 7-year-olds:** Children in this age range are sensitive to hurting their parents, and often have conflicting loyalties between one parent and the other.
- **7- to 9-year-olds:** Children are able to understand each parent's point of view and understand how one perspective can conflict with another.

- **9- to 12-year-olds:** Children in this age range are the most vulnerable to PAS, as they are old enough to establish a strong alignment with one parent, and are old enough to try resolving conflicts of loyalty by "picking" one parent over the other.
- **Teenagers:** Children's alignments often continue into their mid-teens. Many teens are able to take a more mature and independent view of their parents' fight, but a significant number maintain their alignment and continue to reject one parent in favour of the other.

According to Drs. Rand and Gardner, children are about twice as likely to form alignments with their mothers than they are with their fathers, meaning that mothers are twice as likely to engage in alienating behaviour.

Dr. Rand says that PAS is a risk whenever parents must litigate a custody dispute. This risk increases when one or both parents make claims that attack the integrity, moral fitness, or character of the other parent. Such claims are typically hard to defend, and puts one parent on the defensive while giving the other parent a sense of moral superiority.

She notes that the statistical risk of PAS increases when: the parent perceived to be responsible for the breakdown of the relationship becomes involved in a new relationship shortly afterwards; and, a parent leaves the relationship precipitously. In my view, a third risk factor occurs when a parent's immediate family vigorously supports the parent's cause and encourages ill-will toward the other parent.

Drs. Rand and Gardner identify five types of behaviour that are characteristic of PAS:

- **Rejecting:** The parent rejects the child's need for a relationship with both parents. The child fears abandonment and rejection by the alienating parent if positive feelings are expressed about the other parent.
- **Terrorizing:** The alienating parent bullies the child into being terrified of the other parent, and punishes the child if the child expresses positive feelings about the other parent.
- **Ignoring:** The alienating parent withholds love and attention from the child.
- **Isolating:** The alienating parent prevents the child from participating in normal social activities with the other parent and that parent's friends and family.
- **Corrupting:** The alienating parent encourages the child to lie about and be aggressive toward the other parent. In very serious cases, the alienating parent will recruit the child to assist in deceptions and manipulative behaviour intended to harm the other parent.

To this list, I would add two more categories:

- **Distracting:** The alienating parent sets up oppositional activities, goals or interests, some of which conflict with the other parent's time with the child. (For example, enrolling the child in a sports team and placing a high value on the child's participation such that the child is upset to miss a game or practice when with the other parent, or telling the child that he or she won't make the team if the child doesn't attend all the games or practices including those scheduled during the other parent's time.)
- **Resigning:** The alienating parent ceases to accept responsibility for the child's time with the other parent, and appears to leave it up to the child to decide whether to go or not go. This forces the child to make the choice to see the other parent, knowing that the alienating parent doesn't want the child to go at all, putting the child in a loyalty conflict.

Reaction to Gardner's Parental Alienation Syndrome

As you can imagine, lawyers loved the idea of Parental Alienation Syndrome, especially in the US where it became a rather trendy strategy in high-conflict cases. The American Bar Association's 1991 study found evidence suggesting PAS in the majority of 700 high-conflict custody cases they studied over the course of 12 years.

While lawyers might have loved the theory, it did raise lots of other problems. Men's rights groups liked it because the majority of parents perpetrating PAS were women, and Gardner's work appeared to give them the scientific backing that would turn the tide in courts they perceived to be biased in favour of women. Women's groups hated it as a sexist and an unscientific piece of claptrap. The courts didn't like it because implementing Dr. Gardner's recommendations would require them to place the child in the home of the "hated" parent, which was plainly the last thing the alienated child wanted.

The mental health community has been split on PAS for a number of reasons:

1. There is no empirical support to give PAS status as a diagnosable syndrome.
2. The theory focuses almost exclusively on the alienating parent as the cause of the child's rejection.
3. PAS is overly simplistic and frequently misapplied.

Contemporary perspectives on alienated children

In their 2001 article "The Alienated Child ^[2]", published in Family Court Review, Drs. Kelly and Johnston propose a reformulation of Dr. Gardner's theory that would focus primarily on the alienated child rather than on the alienating parent, on the principle that there are many different factors that can cause a child to be alienated from a parent apart from a malicious parent.

Drs. Kelly and Johnston view a child's relationships with his or her parents as falling on a spectrum that runs from the child wanting a positive relationship with both parents to the child being pathologically alienated from one parent:

| | |
|---|---|
| POSITIVE RELATIONSHIP with both parents | Child prefers contact with both parents |
| AFFINITY with one parent | Child prefers contact with both parents |
| ALLIANCE with one parent | Child prefers one parent, and is ambivalent about the other |
| ESTRANGED from one parent | Child rejects one parent and may either be ambivalent about that parent or express a strong dislike for that parent |
| ALIENATED from one parent | Child rejects one parent and expresses a strong dislike for that parent |

Central to this reformulation of Dr. Gardner's theory are the ideas that:

- the child is the focus of investigation, not just one of the parents,
- children can become alienated from a parent for a good and justifiable reason, which the authors call *estrangement*, and
- there are more potential causes of a child's alienation than only a malicious parent who is actively trying to interfere with the child's relationship with the other parent.

Drs. Kelly and Johnston do not reject Dr. Gardner's theory of the malicious parent, but they do broaden the scope of things that should be considered when evaluating for parental alienation.

The impact on children

The study by Johnston and Campbell described children with strong alignments as "forfeiting their childhood" because of the adult role they are forced to play when they become the alienating parent's nurturer, ally and support system.

Dr. Rand notes that:

"Divorce almost inevitably burdens children with greater responsibilities and makes them feel less cared for. Children of chronically troubled parents bear a greater burden. ... The needs of the troubled parent override the developmental needs of the child, with the result that the child becomes psychologically depleted and their own emotional and social progress is crippled."

While the process of alienation is underway, children are subject to a tremendous conflict of loyalties, which compounds the burden of nurturing an emotionally troubled parent, particularly when the alienation is intentional. When the parents were together, their children loved them both, and children naturally desire for this to continue even when their parents aren't together. Alienating conduct essentially asks children to pick sides, to choose one parent permanently and irrevocably over the other parent.

In G.F. Cartwright's article "Expanding the Parameters of Parental Alienation Syndrome ^[3]," published in the American Journal of Family Therapy in 1993, a number of long-term psychological problems were found in children in alienation situations, including:

1. depression, anxiety and/or stress,
2. delayed emotional maturity,
3. psychosomatic illnesses, and
4. long-term feelings of guilt and loss.

In A. Lampel's article "Children's Alignment with Parents in Highly Conflicted Custody Cases ^[4]," published in the Family and Conciliation Courts Review in 1996, these psychological problems were found to include:

1. being angrier than non-alienated children,
2. being less well-adjusted, and
3. being less able to conceptualize complex situations.

Finally, when the process of alienation is complete, the child will have chosen sides. The child's relationship with the other parent may be permanently impaired. While many children afflicted by alienation will recover in their mid- to late-teens and reach out to the other parent, some never do, and their relationship with the other parent is permanently destroyed. To quote from the judge in a 2005 Ontario case, *Cooper v. Cooper* ^[5], 2004 CanLII 47783 (ON SC):

"I find that [the mother's] sabotaging actions have been knowing, wilful and deliberate. As a result of [her] behaviour, the children have little or no relationship with the father who loves them, who has tried to be a good father, and who has been a good provider throughout their lives."

Alienated parents

Parents often find themselves feeling closer to the children following separation than they did during the relationship. Dr. Rand says that fathers in particular find a greater reward in parenting as a result of the loss, loneliness, and feelings of failure that can follow from the breakdown of the relationship. Accordingly, the impact of parental alienation is particularly traumatic to the targeted parent.

Backing off

D.S. Huntington, in an article published in 1986 in *Divorce and Fatherhood*, noted that some parents can be driven off by a child's apparent rejection and refusal to visit. J.W. Jacobs, in a different article in the same book, says that targeted parents may also "voluntarily" withdraw from the child's life where, in their view, the child would suffer if the custody issues were pursued, or if the child would be exposed to additional conflict between the parents.

Contributing to the problem

Johnston has described ways that a targeted parent can inadvertently contribute to the child's alienation by displaying the sorts of behaviours that the alienating parent has taught the child to expect. These sorts of behaviours include: being cold and emotionally distant; being rigid and controlling; being insensitive to the child's needs; and, not being empathetic. These sorts of behaviours may reinforce the alienating parent's position and make the environment provided by the alienating parent compare favourably to that of the targeted parent.

False claims of abuse

In cases that are profoundly high conflict, false claims may be made, usually by the alienating parent, that the other parent has sexually or physically abused the child. Sometimes this is the fruit of the paranoia with which the alienating parent views the other parent, when a diaper rash turns into sexual assault and a bruise from falling off a jungle gym turns into proof of a beating. Sometimes, however, false claims are a part of the campaign to alienate the other parent when the alienation is intentional.

For the targeted parent, claims of this nature are devastating because they are so very difficult to disprove and they attack the moral fitness of the parent in a fundamental and humiliating way. While the claim is being defended, however, the parent may spend months without seeing his or her child. Even if the claim can be disproven, the parent may find that so much time has been lost that his or her relationship with the child is damaged. (Note that even unproven claims may result in arrest and possible criminal charges. Even where there are no criminal charges, a parent who has been arrested is invariably released following arrest on a promise not to contact the other parent or the child.)

Interestingly, K.L. Ross and G.J. Blush, in an article published in 1990 in *Issues in Child Abuse Allegations*, observed that falsely accused parents typically displayed passive behaviour in contrast to the accuser's excitable and hysterical behaviour. An American attorney Dr. Rand mentions that the falsely accused parents she represents in parental alienation cases are typically emotionally and financially stable people, who were often the child's primary parent before separation.

Dealing with estranged or alienated children

When a child is becoming estranged or alienated, or when parental alienation is suspected, the situation must be dealt with as soon as possible. In most cases, these sorts of problems occur in the context of ongoing litigation, and the problem can usually be dealt with in the context of that litigation.

Needs of the child assessments

Section 211 of the *Family Law Act* allows a court to order that a needs of the child assessment, formerly called a custody and access report, be prepared. If the other parent will not agree to the preparation of a needs of the child assessment, you must apply for an order that the report be prepared.

Proper needs of the child assessment are prepared by a psychologist or a psychiatrist, or another mental health professional, who interviews each of the parents separately, and then interviews the child twice, once in the presence of each parent. The assessor may also give the children and the parents certain common psychological tests, such as personality evaluations and parenting inventories. Most often it's only the parents who are tested. The assessor will then prepare a report that sets out his or her observations and recommendations.

In making an order that a needs of the child assessment be prepared, the court can simply say "a report will be prepared" or it can be more detailed and discuss which person will prepare the report, when it will be finished, and who will pay for it. Most importantly, the order can identify particular issues that the assessor is to address in the report. Where a report is sought because of suspected parental alienation, the order should expressly state that the assessor is to see whether alienation is or is not happening.

Fixing the problem

Frankly, it may be impossible to fix a child's alienation from one of his or her parents even when alienation has been identified by a psychiatrist. In a 1988 article by N.R. Palmer published in the *American Journal of Family Therapy*, Palmer quotes a Florida judge who dealt with an alienation case:

"The Court has no doubt that the cause of the blind, brainwashed, bigoted belligerence of the children toward the father grew from the soil nurtured, watered and tilled by the mother. The Court is thoroughly convinced that the mother breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their father. Worse, she slowly dripped poison into the minds of these children, maybe even beyond the power of this Court to find the antidote."

Dr. Gardner's solution was to remove the child from the care of the alienating parent. This is, in most cases, a drastic solution which forces the child to live full-time with the parent he or she has been taught to dislike and distrust. It may still be appropriate in the right circumstances. This is what the Supreme Court did in the 2009 case of *A.A. v. S.N.A.* ^[6], 2009 BCSC 303 when it found that the mother had "continued to undermine the relationship between [the child] and her father" and "acted in ways that are detrimental to [the child's] psychological healing," and ordered that the child have no contact with her mother at all for one year. This kind of solution remains the exception rather than the rule.

In most cases, however, the best that can be done to "cure" the problem is to obtain an order requiring that the child, the alienated parent, or both the child and the parent see a family counsellor skilled in dealing with the psychological effects of separation. The court can specify who the counsellor will be, how frequent the sessions will be, and who will pay for them. There is no guarantee that counselling will fix the problem since the source of the problem lies in the conduct of the alienating parent, but counselling is a less drastic step and will be easier to obtain than an order changing the children's home.

In a small number of cases, it may prove impossible to ameliorate an alienated child's views about the targeted parent. These cases are tragic and a legal solution may not be available. When the alienation becomes deeply entrenched, the issue about which parent bears the blame for the children's views is irrelevant. You can lay blame, but that won't change the fact of how the children feel. In situations like this, the targeted parent may have no choice but to wait until the children become mature and independent enough to seek out the parent and talk about their childhood.

The Fall 2008 edition of *AFCC News*, an organ of the Association of Family and Conciliation Courts, discusses a ground-breaking program for alienated and estranged children called Breaking Barriers Camp. The program involved all family members in intensive therapy in an overnight camp setting, at a facility called Common Ground Center in Starksboro, Vermont, with enormous amounts of support available to encourage reunification between parents and their children. The program, by the article's account, was a stunning success, with four of five families leaving with mutually agreed plans to continue working on the re-established parent-child relationship.

Resources on Parental Alienation Syndrome

The following lists of resources are not, of course, encyclopaedic. There are doubtless many valuable studies, articles and websites which I have overlooked; doing your own research is always recommended.

Academic materials

The January 2010 edition of *Family Court Review* ^[7], published by the Association of Family and Conciliation Courts, is entirely devoted to the issue of alienated and estranged children. If you can get your hands on a copy, you should. It offers an up-to-date look at current court practices and the latest literature on the subject and was edited by two prominent Canadians, Professor Nick Bala, a law professor at Queen's University, and Dr. Barbara Jo Fidler, a psychologist and mediator based in Toronto.

The following articles were suggested as recommended readings on child alienation and estrangement by Dr. Joan Kelly at a June 2005 seminar in Vancouver.

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- Johnston, J. R. & Kelly, J. B. (2004) "Commentary on Walker, Brantley & Rigsbee's 'A critical analysis of parental alienation and its admissibility in the family court'." *Journal of Child Custody*
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- Kelly, J. & Emery, R. (2003) "Children's adjustment following divorce: Risk and resilience perspectives." *Family Relations*
- Kelly, J.B. & Johnston, J.R. (2001) "The alienated child: A reformulation of parental alienation syndrome." *Family Courts Review*
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- Warshak, R. A. (2003) "Bring sense to parental alienation: A look at the disputes and the evidence." *Family Law Quarterly*
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Online information

The web is full of resources about parental alienation. Much of the information available online is, however, crap. Look about the web and educate yourself about alienation, but be cautious about the sources of what you're reading. Stick to information published by academics, lawyers, psychiatrists and psychologists, and avoid anonymous websites, websites sponsored by special interest groups that are likely to be biased, sensationalist websites, and websites that don't give a source for their data or their conclusions. The most reliable sort of online information is that which has been reproduced from a professional journal.

A good starting point for online research is the website of the Shared Parenting Information Group ^[8], a UK organization, which has a good discussion of the subject and plenty of useful links.

A final note of caution. Many of the groups you'll find online that offer information on alienation and PAS, such as Fathers Are Capable Too, seem to regard PAS as a men's rights or father's rights issue. In part this is because the majority of alienating parents are mothers. However, some of these sites go too far and identify feminism, or rather their prejudice against feminism, with the small number of women who engage in alienating behaviour. Fathers also engage in alienating behaviour. Take care in your sources of information and make sure you're reading between the lines.

Resources and links

Legislation

- *Divorce Act*
- *Family Law Act*

Links

- "The Spectrum of Parental Alienation Syndrome (Part II) ^[1]
- "The Alienated Child: A Reformulation of Parental Alienation Syndrome ^[2]"
- "Expanding the Parameters of Parental Alienation Syndrome ^[3]"
- "Children's Alignment with Parents in Highly Conflicted Custody Cases ^[4]"
- Family Court Review ^[7]
- Shared Parenting Information Group ^[8] (UK)

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://www.secuestro-emocional.org/pas/randp2.pdf>
- [2] <http://jkseminars.com/pdf/AlienatedChildArt.pdf>
- [3] <http://www.secuestro-emocional.org/pas/cartwr93.pdf>
- [4] http://www.canadianrc.com/Parental_Alienation_Syndrome_Canada/lampel96.pdf
- [5] <http://canlii.ca/t/1jgqq>
- [6] <http://canlii.ca/t/22pjw>
- [7] <http://onlinelibrary.wiley.com/doi/10.1111/fcre.2010.48.issue-1/issuetoc>
- [8] <http://www.spig.clara.net/>

Child Support

Child Support

Child support is money paid by one parent or guardian to the other to help cover the expenses associated with raising the children. The amount of child support payable is usually fixed according to tables contained in the Child Support Guidelines, which sets support according to the number of children and the income of the person paying support. While there are some exceptions to the Guidelines, the amount of child support payable is almost always the amount set out in the tables.

This section discusses the basics of child support, and child support orders under the *Divorce Act* and the *Family Law Act*. It briefly looks at how to get a child support order inside and outside of British Columbia. It also looks at the income tax implications of child support, what happens when someone entitled to receive child support goes on social assistance, and the rights of children to claim child support.

Other sections in this chapter look at the Guidelines in more detail. They also discuss exceptions to the Guidelines, how to make changes, and how to deal with arrears of child support.

Introduction

After parents separate, they usually find that their individual financial situations have gotten worse. Instead of the family income paying for one rent payment, one phone bill, one electricity bill and so forth, the same amount of income must now cover two rent payments, two phone bills and two electricity bills. If a child lives mostly with one parent, that parent will inevitably have to pay for more of the child's expenses for things like school fees, food and clothing. Child support is intended to help distribute the cost associated with raising a child between the child's parents and other people who may be responsible for supporting the child.

Child support is a payment made by one parent or guardian, the *payor*, to the other parent or guardian, the *recipient*, to help meet the costs the recipient bears as a result of the child's needs, and the payment of child support consequently helps to maintain or improve the child's living conditions. Child support is not a supplement to spousal support; it's money that is paid for the benefit of the child, not the parent with whom the child lives. Child support is not a fee paid in exchange for time with the child; child support is entirely different from and unrelated to parenting time, contact, or access.

Child support is payable on the principle that both parents have a duty to financially contribute to their child's upbringing. The simple fact of biological parenthood triggers this obligation, even if the payor never sees the child and has no role in the child's life. Child support can also be payable by stepparents and people who are guardians and not parents, although the rules are slightly different for these people and their obligation is often tempered by a biological parent's obligation.

An order for child support can be made under s. 15.1 of the federal *Divorce Act* or s. 149 of the provincial *Family Law Act*, or a couple can agree on child support in a separation agreement. Either way, the amount of support awarded must, with only a few exceptions, conform to the rules set out in the federal Child Support Guidelines.

The Guidelines contains a series of tables, particular to each province, which set out the amount payable based on the payor's income and the number of children for whom support is being paid. There are some exceptions to this basic rule,

and they are described later in this chapter. The tables were most recently updated on 31 December 2011. For most people, the changes resulted in an increase in the amount of child support payable.

Both the *Divorce Act* and the *Family Law Act* require the court and parents or guardians to give child support priority over spousal support when both child support and spousal support might be payable. In other words, if there isn't enough money to pay both, child support will take precedence.

The Divorce Act

The *Divorce Act* only applies to people who are or were married to each other, including a parent and a stepparent who are married to each other. A court can only make an order for child support under the *Divorce Act* if it has or had the jurisdiction to make an order for the spouses' divorce: the spouses must be or have been legally married, and the spouse making the application must have lived in the province where the application is made for at least one year. Applications under the *Divorce Act* can only be heard by the Supreme Court.

Qualifying for child support

In the *Divorce Act*, children are referred to as *children of the marriage*, and a child must fall within the act's definition of a "child of the marriage" in order to be eligible for support. There are a couple of important definitions in s. 2(1) that apply in determining whether a child is a child of the marriage:

"age of majority", in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age;

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

As well, s. 2(2) of the act says that:

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.

Taken together these definitions mean that:

1. child support can be owing from an adoptive parent, as well as a natural parent,
2. child support can be owing from stepparents (spouses who "stand in the place of a parent"),
3. child support is payable until a child reaches the age of majority in the province where the child lives, and
4. child support can be payable after the child reaches the age of majority if the child cannot withdraw from his or her parents' care.

On this last point, the *Divorce Act* says that an adult child can continue to be eligible for child support as long as he or she cannot "withdraw from the charge" of his or her parents. The two main reasons why a child might not be able to withdraw are because the child is going to college or university, or because the child has a serious, chronic illness that prevents him or her from becoming self-supporting. The factors a court will consider in determining whether a child's academic career qualifies him or her as a "child of the marriage" include the following:

1. the age of the adult child,
2. whether the academic program is full- or part-time, and whether the program is connected to the child's future employment,
3. the child's ability to contribute to his or her own support through part-time work, student loans, grants, bursaries and the like,
4. the child's academic performance and dedication to his or her studies,
5. the spouses' financial situation, and
6. any plans the spouses may have made for the child's post-secondary schooling while they were still together.

In general, the courts will allow an adult child to benefit from child support for one program of post-secondary study — one degree or one diploma — so long as the child is enrolled full-time. Where one or both of the parents have a very high income and had always expected, during the marriage, that the child would take an advanced degree, child support can be payable for more than one degree program.

As far as "age of majority" is concerned, keep in mind that it is the provinces that have the authority to set the age of majority, not the federal government. In British Columbia, the age of majority is 19. In other provinces the age of majority is 18.

Statutory provisions

The primary sections of the *Divorce Act* dealing with child support are these:

- s. 2: definitions
- s. 4: jurisdiction to make child support orders
- s. 5: jurisdiction to change orders
- s. 15.1: child support
- s. 15.3: child support has priority over spousal support
- s. 17: variation proceedings

The *Family Law Act*

A parent or guardian can apply for child support under the *Family Law Act* whether the parties are married spouses, unmarried spouses or in another unmarried relationship, or if they were in no particular relationship with each other at all. People other than parents can also apply for child support if they are caring for a child, including grandparents who are guardians of their grandchildren and people who have been appointed as a guardian of a child.

Both the Supreme Court and the Provincial Court can make orders for child support under the *Family Law Act*.

Qualifying for child support

Definitions play an important role in determining eligibility and responsibility for child support under the *Family Law Act*, just as they do under the *Divorce Act*. Section 147 of the *Family Law Act* says that each parent and guardian of a child is responsible for the support of that child, and s. 146 defines *child*, *parent* and *guardian* as follows:

"child" includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities 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 section 147 (4) [duty to provide support for child];

Section 146 gives a definition of *stepparent* for the definition of parent and says that:

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

However, s. 147 puts some really important limits on support for minor children, and on when stepparents are and aren't responsible to pay child support:

(1) Each parent and guardian of a child has a duty to provide support for the child, unless the child

(a) is a spouse, or

(b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

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

(a) the stepparent contributed to the support of the child for at least one year, and

(b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.

Section 149(3)(b) also says that an order can't be made against a stepparent until the stepparent and parent have separated.

As you can see, these definitions cast a very wide net and it's fairly easy to qualify as a parent who must pay child support. A few important points come from the case law on these definitions:

- All parents are responsible to pay child support, regardless of the nature of the parents' relationship with each other.
- Child support can be payable by guardians and stepparents.

- The definition of "stepparent" includes anyone who has been the spouse of a parent and contributed to the support of his or her child for at least one year.
- The phrase "contributed to the support of the child for at least one year" does not mean for one whole, continuous calendar year.
- Any application for child support from a stepparent must be brought within one year of the date of the stepparent's last contribution to the support of the child and can only be made after the stepparent and parent have split up.
- Child support can be payable by more than one parent, guardian, and stepparent at the same time.
- A duty to pay child support can end before a child turns 19 if the child becomes a spouse or leaves home.
- Child support can be payable after the child turns 19 if the child is unable to withdraw from the care of his or her parents because of illness, a reasonable delay in finishing high school, or the child's pursuit of post-secondary education.

On this last point, the factors a court will consider in determining whether a child's academic career continues to qualify the child for support include the following:

- the age of the adult child,
- whether the academic program is full- or part-time, and whether the program is connected to the child's future employment,
- the child's ability to contribute to his or her own support through part-time work, student loans, grants, bursaries and the like,
- the child's academic performance and dedication to his or her studies,
- the financial situations of the child's parents, guardians and stepparents, and
- any plans the parties may have made for the child's post-secondary schooling while they were still together.

In general, the courts will allow an adult child to benefit from child support for one program of post-secondary study — one degree or one diploma — so long as the child is enrolled full-time. Where one or both of the parties have a very high income and had always expected that the child would take an advanced degree, child support can be payable for more than one degree program, but this is the exception rather than the rule.

Stepparents and child support

The *Family Law Act* says that stepparents can be responsible for paying child support just as biological and adoptive parents are responsible for paying child support. This has meant that in some cases, multiple people who meet the act's definitions of *parent* and *stepparent* can be responsible for paying child support for the same child at the same time. In fact, there are a few cases in which parents have engaged in a number of long-term relationships, each of which were long enough to attract a child support obligation from the successive partners of those parents.

A 2004 case of the British Columbia Supreme Court, *H.J.H. v. N.H.H.* ^[1], 2004 BCSC 179, a case decided under the old *Family Relations Act*, offers some guidance for stepparents trying to stick-handle around this issue. In this case, the parties had been married for less than three years when they separated. Each had been previously married, and the problem centred around the wife's child from a previous relationship and whether the husband should have to support the child. The court found that the husband, who qualified as a stepparent under the act, was not responsible for paying support, because of the combined effect of the following factors:

1. the marriage was short,
2. the stepparent's relationship with the child broke down shortly into the marriage,
3. the stepparent had no ongoing relationship with the child, and any such relationship with the child was opposed by the parent,

4. the stepparent had a "modest" income, out of which the stepparent was already responsible for paying support for two children from the previous marriage,
5. the child's biological parent was paying support, and
6. the parent had extended health and dental coverage for the child through the parent's employment.

The *Family Law Act* helps to clear up some of these confusing issues. Section 147(5) says:

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

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

(b) extends only as appropriate on consideration of

(i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and

(ii) the length of time during which the child lived with the stepparent.

In most cases, stepparents aren't let off the hook entirely. Most of the time, the court will take a biological or adoptive parent's obligation into account when assessing child support against a stepparent, look at the obligation of any non-parent guardians, and require stepparents only to make a sort of top-up payment rather than pay the full amount required by the Guidelines.

Securing a child support obligation

Under s. 170, the court may make a number of additional orders when it is making an order for child support that can help to ensure that child support continues to be paid, including after the death of the payor. The court may:

1. order that a charge be registered against property,
2. require a payor with life insurance to maintain that policy and specify that a spouse or a child will be the beneficiary of the policy, or
3. order that child support continue to be paid after the payor's death and be paid from his or her estate.

Before the court makes an order that requires child support to be paid from the payor's estate, under s. 171(1), the court must consider:

1. whether the recipient's need for support will survive the payor's death,
2. whether the payor's estate is sufficient to meet the recipient's needs, taking into account the interests of the people who stand to inherit from the payor's estate and the creditors entitled to be paid from the payor's estate, and,
3. whether any other means exist to meet the recipient's needs.

Child support when the payor dies

When a payor dies, the recipient can apply to court for an order under s. 171(3)(b) that the payor's support obligation will continue and be paid from his or her estate.

When a recipient applies to continue a support obligation or if a support order says that the obligation will continue past the payor's death, the payor's *personal representative*, the person managing the payor's estate and will, has the right to defend the recipient's application or to vary or terminate a continuing obligation.

Statutory provisions

The primary sections of the *Family Law Act* dealing with child support are these:

- s. 1: definitions
- s. 146: more definitions
- s. 147: duty to pay child support
- s. 148: agreements about child support
- s. 149: orders about child support
- s. 150: determining how much child support should be paid
- s. 152: varying orders about child support
- s. 170: securing a child support obligation
- s. 173: child support has priority over spousal support

Getting a child support order

There are five things the court must consider before a child support order can be made:

- Does the person asking for the order have the right to claim child support?
- Is the child entitled to receive child support?
- Is the person against whom the order is sought obliged to pay child support?
- How long should the child receive receive support?
- How much support should the child receive?

First, the court must decide that the person applying for a child support order, the *applicant*, is able to make the application. Usually, this is just a matter of fitting into the definitions given in the legislation. Under the *Divorce Act*, the applicant must be a spouse who has lived in the province in which they the application is made for at least one year. Under the *Family Law Act*, the applicant can be anyone included in the definitions of *parent* or *guardian*, and, if the claim is being made against a stepparent, the claim must be made within one year after the stepparent last contributed to the child's upkeep and after the stepparent and parent have separated.

Second, the court must find that the child qualifies as a *child* as defined by the *Family Law Act* or as a *child of the marriage* as defined by the *Divorce Act*, and under the *Family Law Act*, the court must also find that the child is not a spouse and has not withdrawn from the care of his or her parents or guardians.

Third, the court must find that the person against whom the claim is made is liable to pay child support. This is also a matter of fitting within the definitions.

If the first three conditions have been met, the court must then figure out how much the payor should pay. This is pretty easy for parents, but can be more difficult for guardians who are not parents and for stepparents. The court must first make a finding as to the payor's annual income, usually with the help of the parties' financial information, and then fix the amount of support payable according to the tables set out in the Child Support Guidelines based on the number of children and the payor's income. There are exceptions to this basic rule, which this chapter discusses in the section Exceptions to the Child Support Guidelines.

Fifth, the court will look at how long the payor's obligation should last. This issue is not always argued about, as both the *Divorce Act* and the *Family Law Act* have cut-off dates after which children are no longer eligible to receive support. Most orders and agreements limit themselves by providing that child support shall be paid "until," for example, "the child is no longer a child of the marriage as defined by the *Divorce Act*," "the child is no longer a child as defined by the *Family Law Act*," or "the child reaches the age of 19." The question of a termination date for support usually only crops up where the child is an adult engaged in post-secondary studies or is otherwise "unable to withdraw from the charge" of

his or her parents, and the court must then consider the factors described earlier.

Getting an order inside British Columbia

A parent or guardian who is seeking a child support order can apply for that order in either the Supreme Court or the Provincial Court. Whichever court the parent or guardian wants to proceed in, he or she must start a court proceeding. The process for starting a court proceeding is described in the chapter Resolving Family Law Problems in Court, in the section Starting a Court Proceeding in a Family Matter.

Getting an order outside British Columbia

A parent or guardian living with a child in British Columbia who wants to get child support from someone living outside of the province has three choices:

1. start the application process here, in British Columbia, using the provincial *Interjurisdictional Support Orders Act* ^[2],
2. start a court proceeding in the place where the other parent lives, or
3. start a court proceeding here under the *Divorce Act* or the *Family Law Act*, get a child support order, and try to enforce that order in the place where the other parent lives.

The *Interjurisdictional Support Orders Act* allows a person who lives in British Columbia to start a process that will result in an order being made in the jurisdiction in which the other parent lives. The applicant fills out a bunch of paperwork here, and gives it to the provincial Reciprocity Office. A staff member will forward that package to the Reciprocity Office ^[3] where the other parent lives, and the court there will have a hearing, on notice to the other parent, which may result in a child support order being made. The law that will apply is the law where the other parent lives, which will not be the *Family Law Act* or the *Divorce Act*.

Only certain jurisdictions have agreed to the *Interjurisdictional Support Orders Act* process. If the place where the other parent lives hasn't made an agreement with British Columbia about child support orders, someone who wants to get a child support order will normally have to start a court proceeding in the place where the other parent lives. This will require hiring a lawyer in that country, and the law that will apply will be the laws of that country, not the *Family Law Act* or the *Divorce Act*.

The countries that will cooperate with a proceeding under the *Interjurisdictional Support Orders Act* are: South Africa, Zimbabwe, Austria, the Czech Republic, Germany, Gibraltar, Norway, the Slovak Republic, the United Kingdom and Northern Ireland, the United States of America and its protectorates, the Special Administrative Region of Hong Kong, Singapore, Australia, Fiji, Papua New Guinea, New Zealand, and Barbados and its dependencies. See the Interjurisdictional Support Orders Regulation ^[4] on CanLII or the BC Laws ^[5] website, for the current list.

The British Columbia Reciprocity Office, along with all of the forms required by the *Interjurisdictional Support Orders Act*, can be found at www.isoforms.bc.ca ^[6].

Income tax considerations

It used to be the case that the person paying child support could claim an income tax deduction for his or her support payments, while the recipient had to claim it as taxable income. On 25 April 1997, the federal *Income Tax Act* ^[7] was amended to do away with this rule, and now child support payments are neither deductible for the payor nor taxable for the recipient.

These changes do not apply to court orders or family agreements that were made before 1 May 1997, when the Child Support Guidelines came into effect. If those orders or agreements are varied at any point after 30 April 1997, however, the new rules will apply and the provisions for child support will become tax neutral.

The portion of a lawyer's bill attributable to obtaining, increasing, or enforcing a child support order is tax deductible. The cost of defending a claim for child support is not deductible. Read the Canada Revenue Agency's Interpretation Bulletin IT-99R5 ^[8] for the fine print.

To claim this deduction, the lawyer must write a letter to the CRA setting out what portion of his or her fees were attributable to advancing a child support claim. If you intend to ask your lawyer for a letter like this, you must tell your lawyer as soon as possible, preferably the moment the lawyer takes your case, so that he or she can keep a log of time spent on the child support claim.

Child support and social assistance

When a parent who is entitled to receive child support goes on welfare, the government agrees to provide support for that parent and his or her child. If there is someone else who might be obliged to support the child, such as another parent or guardian, the provincial government would prefer that this person pick up the tab rather than the taxpayer, and the government will usually come knocking on the other parent's door.

Recipients of social assistance applying for child support

If you are applying for social assistance or are receiving social assistance in British Columbia, you are required to sign a form that allows the government agency responsible for social assistance to take whatever steps are required to collect any child support payments you may be entitled to and keep the child support it collects. This is called *assigning* your child support rights. You may be allowed to keep a portion of the child support that the government collects in addition to your social assistance payments. Your case worker will tell you how much.

The collection of child support payments for people on social assistance is run by the Family Maintenance Program ^[9] (FMP). (This is a different organization than the Family Maintenance Enforcement Program, which enforces child support payments between parents.) FMP has the authority to pursue child support however it sees fit and can apply for orders or apply to vary child support orders on your behalf. You will be required to cooperate with FMP's actions, but they will be responsible for managing any court applications they begin.

Applying for child support from a recipient of social assistance

You can apply to receive child support from a parent who is receiving social assistance, but don't expect to get much for your trouble. The Guidelines does not require that a parent pay child support if the parent's annual income is less than \$10,800 per year.

Even if you're not likely to get a lot of money out of the other parent, it may be a good idea to make the application and get an order, since the order will at least establish the payor's obligation to provide child support. It's often easier to ask for an increase in the amount payable later on, when the payor is back on his or her feet, than it is to apply for an original child support order. As well, some people who might be normally responsible to pay support, like a stepparent, may lose their obligation to pay support under the *Family Law Act* if the application isn't made within a year of the person's last contribution to the child's support. It can be critical to get an order that child support be paid early on.

Children's right to claim child support

In almost all cases, it is the parent who claims child support on behalf of a child, not the child. However, the right to benefit from the payment of child support belongs to the child, not the parent. It follows from this that if child support is the right of the child, children should be able to ask for support on their own, without having to go through a parent.

When there is an order between the parents

A parent can only be subject to a single order to pay child support for a particular child, and if there is an order between the parents to pay child support, an adult child cannot obtain a new order. The adult child can, however, apply to enforce the old order if his or her parents are not complying with the order and arrears of support are owed.

When someone does not pay child support, or pays less than he or she is required to pay, *arrears* build up. The arrears are the sum of the money that should have been paid according to the court order but wasn't paid. Arrears are a *judgment debt*, just like any other debt owing because of a court order that requires someone to pay money to someone else. Judgment debts can be enforced under the provincial *Court Order Enforcement Act* ^[10], which allows the debtor's wages and benefits to be garnished, and allows real property and personal property to be sold to pay off a judgment debt. Interest, calculated under the *Court Order Interest Act* ^[11], is owing on judgment debts.

A child who is the subject of a child support order can apply to enforce any arrears as a judgment debt. The child can apply to enforce the old order starting when he or she reaches the age of majority, 19 in British Columbia, and becomes an adult able to sue someone.

There is a limit to children's ability to enforce arrears. According to s. 3(3)(f) of the provincial *Limitation Act* ^[12], the claim must be brought within 10 years of the child first being able to apply to enforce the judgment debt. In other words, the claim must be made before the child turns 29. The case that discusses this is *Schmitke v. Schmitke* ^[13], 1993 CanLII 642 (BC SC) a 1993 decision of the Supreme Court, in which the judge concluded that:

"...the right to bring an action for the enforcement of child maintenance is the right of the child. Since the child is 'a person under a disability' within the meaning of s. 7 of the *Limitation Act*, the running of time is postponed so long as she is a minor."

When there isn't an order between the parents

Nothing prevents a child from applying for child support, as long as the child would normally be entitled to receive child support. The explanation that follows is a bit complicated, so be patient.

First, the child cannot apply for child support under the *Divorce Act*, because that act only applies to *spouses*, defined as people who are or who used to be married to each other. Under s. 15.1 of the act, the court can only order "a spouse" to pay child support. The only other law that might apply is the *Family Law Act*. Section 147(1) says that "each parent and guardian of a child" is responsible for supporting that child; s.149(2)(b) says that child can apply for a support order.

Second, for so long as the child's parents are together and the child continues to live with them, the child will not be entitled to ask for a child support order as the court will assume that the child's needs are being met.

Why would the court make this assumption? Think of it like this: the *Divorce Act*, the *Family Law Act* and the Child Support Guidelines say that all of a child's parents and guardians are liable for supporting the child. In fact, s. 215^[14] of the *Criminal Code* makes it an offence to fail to provide a child with the "necessaries of life." The legislation on family law issues also assumes that the payment of support by one parent under the Guidelines is not going to be a complete payment of all of the child's needs. Section 1(b) of the Guidelines says that the purpose of the Guidelines is to ensure that children benefit "from the financial means of both spouses after separation." In other words, payment according to the Guidelines child support tables are not assumed to cover all of a child's costs, and the parent receiving the support payments is assumed to contribute towards the child's needs as well.

Third, a child seeking a child support order must qualify as a *child*, as defined by s. 147 of the *Family Law Act*, in order to claim child support. Although the court cannot grant a child support order if the child doesn't qualify as a child within the meaning of the act, children under the age of 19 are under a *legal disability*, which means they cannot start a court proceeding and apply for child support on their own.

This leaves two options. Either the child is 19 or older and applies for support as an adult child "unable to withdraw" from the care of his or her parents and therefore still qualifies as a "child" entitled to receive support, or the child is a minor and applies for support through a *litigation guardian*, formerly known as a guardian *ad litem*. The first option would probably work, but the second is problematic as the court must approve the appointment of litigation guardians and it would likely refuse to do so if the child still lived with one of his or her parents.

Let's look at two examples to see how this all works.

Example #1

Let's say the parents are separated and the child is living with one of his or her parents.

In a case like this, the parent with whom the child is living has the responsibility of applying for support. As the child is under the age of 19, the child cannot start a court proceeding without the assistance of a litigation guardian. However, since the parent the child is living with is responsible for applying for child support and litigation guardians must be appointed by the court, the court would be likely to refuse to appoint a litigation guardian on the basis that the application is just a smoke screen for the parent's obligation to apply on behalf of the child.

If a child is older than 19 but still qualifies as a *child* under s. 146 of the *Family Law Act* (typically because the child is ill or disabled and cannot work or because the child is going to college or university), the child could certainly apply for child support. The child is over the age of majority and is able to start an action without a litigation guardian.

The adult child will, however, have to prove that he or she is in financial need. The court will not make a support order automatically. Having a job or being in a married or unmarried spousal relationship with

someone will undermine the adult child's chances of success.

Example #2

Now let's say that the child is younger than 19 and is not living with his or her parents.

In a case like this, the parents would be responsible for paying support to the child but the child would have to start an action to claim child support, and would have to be represented by a litigation guardian. Even assuming that the court is prepared to appoint a litigation guardian, getting a child support order is not necessarily a slam dunk.

There are a few cases when minor children — children under the age of majority — have been found not to be entitled to receive child support. Typically, this happens when a child has chosen to move out, has found a job, and is living independently of his or her parents. A financially self-sufficient child who has left his or her parents' home may not be entitled to receive child support payments from them, especially if the child has refused to maintain a relationship with his or her parents.

Making things worse, under s. 147(1) of the *Family Law Act*, children who are spouses or have voluntarily withdrawn from their parents' or guardians' charge may not be eligible for child support.

Summary

That was all a bit complicated. Here's what it boils down to:

- Children will not be able to apply for a child support order when there's an existing child support order.
- If arrears have accrued under an existing child support order, the child can apply to collect those arrears as a judgment debt under the *Court Order Enforcement Act*, but only after the child has turned 19. The claim must be brought within 10 years of the child becoming able to make the claim.
- Children can only claim new child support orders under the *Family Law Act*. They cannot apply under the *Divorce Act*.
- Children who live at home with both parents cannot apply for child support.
- A child who brings a claim for child support must qualify as a *child* within the meaning of s. 146 of the *Family Law Act*.
- Children who have left home and live with neither parent will have to establish financial need before the court will make a child support order. The court will not make the order automatically, and may not make the order at all if it decides that the child left home voluntarily.
- Adult children will also have to show financial need before the court will make a support order.

If you are a child thinking of making a claim for child support, you really should speak to a lawyer. This area of the law is not straightforward at all.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines ^[15]
- *Criminal Code* ^[16]
- *Interjurisdictional Support Orders Act* ^[2]
- Interjurisdictional Support Orders Regulation ^[4]
- *Income Tax Act* ^[7]
- *Court Order Enforcement Act* ^[10]
- *Court Order Interest Act* ^[11]
- *Limitation Act* ^[12]

Links

- Department of Justice: List of reciprocals offices by province ^[3]
- The British Columbia Reciprocals Office ^[6]
- Canada Revenue Agency's Interpretation Bulletin IT-99R5 ^[8]
- Family Maintenance Program ^[9]
- Canadian Bar Association BC Branch: Script on child support ^[17]
- Legal Services Society Family Law Website: What the child support guidelines are and how they work ^[18]
- Legal Services Society Family Law Website: Child support ^[19]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 18, 2013.

References

- [1] <http://canlii.ca/t/1gfgq>
- [2] <http://canlii.ca/t/8413>
- [3] http://www.justice.gc.ca/eng/pi/fcy-fea/sup-pen/enf-exe/info_cont.html
- [4] <http://canlii.ca/t/84vn>
- [5] <http://www.bclaws.ca/default.html>
- [6] <http://www.isoforms.bc.ca>
- [7] <http://canlii.ca/t/7vb7>
- [8] <http://www.cra-arc.gc.ca/E/pub/tp/it99r5-consolid/>
- [9] <http://www.eia.gov.bc.ca/publicat/bcea/fmp.htm>
- [10] <http://canlii.ca/t/84h5>
- [11] <http://canlii.ca/t/84h6>
- [12] <http://canlii.ca/t/845q>
- [13] <http://canlii.ca/t/1dkms>
- [14] <http://canlii.ca/t/7vf2#sec215>
- [15] <http://canlii.ca/t/80mh>
- [16] <http://canlii.ca/t/7vf2>
- [17] <http://www.clicklaw.bc.ca/resource/1235>
- [18] <http://www.clicklaw.bc.ca/resource/1666>
- [19] <http://www.clicklaw.bc.ca/resource/1618>

Child Support Guidelines

Often simply referred to as the Guidelines, the Child Support Guidelines^[1], SOR/97-175, is a federal regulation, adopted by all of the provinces except Quebec, that describes the rules that the courts must apply when making an order for child support.

The most important feature of the Guidelines is the child support tables that fix the amount of support payments according to the annual income of the person paying support and the number of children the support is to be paid for.

The Guidelines cover every aspect of child support, including the calculation of income, how children's special expenses are paid for, the amount of support payable when the parents have the children for an almost equal amount of time, and the amount payable when one or more of the children live full-time with each parent.

This section talks about the basic principles of the Guidelines, the sharing of special and extraordinary expenses, the calculation of income, imputing income, and the circumstances in which the income of a parent's or guardian's new partner may be taken into account. It also provides an example of the contents of a typical child support order.

Basic principles

It used to be the case that the party claiming support, the *recipient*, had to jump through all sorts of hoops to show the amount of support the child needed and prove that the person being asked to pay support, the *payor*, had the means to pay that amount. These days, the amount of a child support order or an agreement for child support is based on the amounts set out in the tables attached to the Child Support Guidelines. The Guidelines have generally reduced the amount of time and money that parents spend fighting about child support, whether they're in court arguing about an order, or are negotiating the amount of support for a separation agreement.

The Guidelines tables were most recently adjusted on 31 December 2011. The amount of child support required of lower earning parents was reduced and the amount of support for higher earning parents was increased, although none of the changes were particularly dramatic. If you are relying on a printed version of the child support tables to figure out how much child support should be paid, make sure that your materials reflect the new table amounts.

The Guidelines' key presumption is set out in s. 3(1):

Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

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

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

This is, however, only a presumption, and can be challenged or *rebutted*, as is discussed in this chapter's next section, Exceptions to the Child Support Guidelines. In the vast majority of cases, however, the amount of child support payable is calculated using the payor's gross annual income at the time the order is made.

Over time, of course, the payor's income may go up or down. Both the payor and the recipient can make an application to change the original order so that the amount of child support reflects the payor's current income. The payor would typically make the application if his or her income has fallen, while the recipient would make the application when the payor's income has increased. To avoid a situation where parents are continually making trips back to court to seek an adjustment of child support, it's a good idea to include a term that requires both parties to regularly exchange income information in an agreement or order for child support, so that child support can be adjusted from time to time without

having to go to court.

Another of the Guidelines' important presumptions is that the amount of support payable is set according to the number of children to which each particular support order relates. If a payor has two children from one relationship and three from another, the first order will be based on the Guidelines amount for two children and the second will be based on the amount for three children. The payor's obligation is not based on the Guidelines amount for the total number of five children.

Finally, the amount of support payable is based only on the payor's income. In most situations the recipient's income is not a factor, nor is the income of the payor's new spouse or partner.

Special and/or extraordinary expenses

The basic amount of child support a parent pays is presumed to cover a very wide scope of common day-to-day expenses associated with raising children: the child's share of the rent, the hydro and gas bills, shoes, groceries, diapers, clothes, toothpaste, school field trip fees and so forth. The basic amount of support is not always presumed to include certain other kinds of expenses that are infrequent but expensive, such as the cost of daycare or orthodontic work. In addition to the basic amount of support payable, a payor may also be required to cover a portion of these other expenses, so long as they qualify as *special and/or extraordinary expenses* under the Guidelines.

Special and/or extraordinary expenses are defined in s. 7(1) of the Guidelines:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

Section 7(1.1) clarifies (1)(d) and (1)(f), and says that for these subsections "extraordinary expenses" means:

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
- (ii) the nature and number of the educational programs and extracurricular activities,
- (iii) any special needs and talents of the child or children,
- (iv) the overall cost of the programs and activities, and
- (v) any other similar factor that the court considers relevant.

Special expenses are shared between the payor and recipient. These provisions of the Guidelines are intended to ensure that, if either parent incurs significant additional expenses for the child's needs or activities, *both* parents will share the cost on the principle that it is in children's best interests to have such needs met or to participate in such activities.

If an expense is found to qualify as a special and/or extraordinary expense under the s. 7(1) and (1.1) definitions, the court may make an order that both parties pay additional amounts, on top of the usual Guidelines basic amount of support, to cover all or a portion of the cost of the expense.

Qualifying expenses as "special and/or extraordinary"

Just because an expense appears to fall into one of the categories listed in s. 7 of the Guidelines doesn't necessarily make it a shareable special and/or extraordinary expense. As well, just because an expense has been incurred doesn't mean it will automatically be shared; if you're not sure whether a planned expense will qualify as a shareable special expense, get some legal advice or talk to the other parent first.

According to s. 7(1) of the Guidelines, the court must not only find that an expense fits into one of the categories listed above, but also consider:

1. the "reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation," and
2. the necessity of the expense in relation to the child's best interests,

The court must bear in mind the special test for primary- and secondary-school education and extracurricular activities required by s. 7(1.1). Here's a helpful summary from a 2010 case from our Supreme Court, *Piper v. Piper* ^[2], 2010 BCSC 1718:

"Under s. 7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed or whether the expense exceeds her ability to pay without any consideration of the factors enumerated in s. 7(1.1)(b). If the income cannot cover the expense, the expense is deemed to be extraordinary and the court's next analysis turns to consideration of the factors enumerated in s. 7(1) which, of course, brings into consideration the parties' means and pre-separation spending pattern."

Reasonableness

When the court is asked to consider a particular expense, it should first decide whether the expense is reasonable according to the parties' means. For lower income parents not many things are going to be considered reasonable:

- Orthodontics, providing they are medically necessary.
- Daycare, providing the daycare is required to enable a parent to work outside the home.

For parents with more money, more expenses will qualify as special expenses:

- Cosmetic orthodontic work.
- Dance, music and art classes, and summer day camps.
- Less expensive team sports, like soccer, baseball and basketball.
- Basic high-school graduation costs, such as tickets and gown or tuxedo rentals.
- Basic post-secondary education costs, such as tuition fees for a local college or university, student fees and textbook costs.

For parents with lots of money, almost every big-ticket expense is probably going to qualify as a special expense:

- Multiple week summer camps and trips abroad.
- Expensive team sports, like hockey and horseback polo, and expensive solo sports like skiing and scuba diving.
- Post-secondary education costs, including meal plans and residence costs.

Necessity

Sometimes the needs of the child will outweigh the cost of the expense to the child, and an expense will qualify as a special expense whether at a hardship to the parents or not.

- Medical costs, including costs that aren't covered by MSP such as autism therapies.
- Counselling services, where the counselling is necessary for the child's mental health.
- Tutoring services, where the child needs the extra help to get through school.
- Lessons or coaching in arts and sports, where the child has a special talent that should be nurtured.

A driver training course, for example, is unlikely to qualify as a special expense under the heading of necessity, since you can learn to drive and obtain a driver's licence without it, as was decided in a 2011 Supreme Court case, *M.S.J. v. J.M.J.* ^[3], 2011 BCSC 245. On the other hand, if a semester with Sylvan Learning Centre will mean the difference between passing or failing a grade, the tutoring would be considered a necessity.

Sharing qualifying expenses

Under s. 7(2) of the Guidelines, expenses that qualify as special and/or extraordinary expenses are shared by the parties in proportion to their incomes, after deducting any contribution to those costs made by the child or the government, through things like grants or tax deductions. The idea here is to look at the total pot of money available to the child — the income of the payor plus the income of the recipient — and to figure how much each party's share of that pot is, and then pay the child's special expenses according to each parent's share.

The easiest way to calculate a parent's *proportionate share* is to add the incomes of both parents together and then figure out what percentage each income is of the total. Here are two examples.

Example #1

If one parent earns \$75,000 per year and the other \$25,000, the total pot available to the child is \$100,000. Of that sum, the first parent contributes 75% and the second parent 25%. As a result, the first parent would be ordered to pay 75% of qualifying expenses, and the second parent 25%.

Example #2

If one parent earns \$48,000 per year and the other \$62,000, the total of their incomes is \$110,000. The first parent's income is 43.6% of the total, and the other parent's income is 56.4% of the total. The first parent would have to pay 43.6% of all qualifying special expenses, and the second would have to pay 54.6% of those expenses.

The cost that is being shared is the *net cost* of an expense, in other words, the amount that is actually being paid after any third-party contributions have been applied to reduce the expense. Daycare costs, for example, are usually partly subsidized by the government with certain tax deductions. If \$1,000 is spent on daycare, but the government chips in a \$200 tax benefit, the amount of the expense shared between the parents would be \$800, not the full \$1,000.

Note that the income of a parent's new spouse or partner can be taken into consideration in determining a parent's "means" in sharing a special expense. In the 2000 Supreme Court case of *Baum v. Baum* ^[4], 2000 BCSC 1835 the court held that the s. 7(1) consideration of the "means of the spouses" should be interpreted broadly as including all sources of income available to the paying parent, including the income of a parent's new partner.

The calculation of income

Before the court even looks at the Child Support Guidelines tables it has to decide what the payor's income is. The tables set out the amount of child support payable according to the payor's income. The Guidelines require that the court use the most up-to-date information available. Sections 15 to 20 of the Guidelines set out the rules the court must apply in determining income.

According to Rule 5-1 of the Supreme Court Family Rules ^[5] and Rule 4 of the Provincial Court (Family) Rules ^[6], when someone makes an application for child support, the payor or both the payor and recipient are required to disclose their financial circumstances using a court form called a Financial Statement. Financial statements require each party to set out their income and expenses, and assets and liabilities. Certain income documents must be attached to a financial statement, typically:

1. the last three years' worth of tax returns (what's required is the complete income tax and benefit return, not tax return "summaries" or "informations"),
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing his or her earnings to date, or if the party isn't working, then his or her most recent WCB statement, social assistance statement, or EI statement, and
4. business records like financial statements and corporate income tax returns, if the party has a company.

The basic rule of thumb is that a party's income for the purposes of the Guidelines is the amount stated at line 150 of the payor's most recent tax return, although there are important exceptions that apply when a person's income is from self-employment. A party's income includes all of the party's income, not just income from a job. *Income* might include bonuses, rental income, company dividends, government benefits, interest from an investment and so forth, as well as employment and self-employment income.

Section 2(3) of the Guidelines requires that the most current income information be used; this can include a calculation of income based on paystub evidence. Most of the time income is based on the most recent tax year, since the income information for that year is complete. This means that there is usually a one-year lag between the amount of support being paid and the payor's income. However, if a payor's current income can be known with certainty, such as if the payor is an employee without bonus or commission income, child support can be determined using the payor's current income.

Government benefits

Payments from WCB, Employment Insurance, CPP, Old Age Security, and welfare all count as income under the Guidelines. If a party is receiving these payments as a temporary substitute for employment income, the party's income may be assessed at his or her usual income. A temporary period on welfare, for example, won't entitle a payor to have his or her income assessed at that unusually low level.

Fluctuating income

Where a party's income changes from year to year for reasons beyond the party's control, such as fluctuating commission sales or bonuses that are assessed by an employer, the court may take the party's income over the past three years into consideration in setting the payor's income. In certain circumstances, the court may fix the party's income as the *average* of his or her income over the last three years.

Unexpected losses and gains

Where a payor has suffered an unexpected loss, such as a corporate loss or an investment loss, or enjoyed an unexpected gain, such as from cashing in RRSPs or selling stock, the court has the discretion to decide to take this into consideration in setting the payor's income, and potentially not consider the loss or gain.

Court awards

If a payor has received an award from a civil court proceeding such as for wrongful dismissal or for personal injury, the court may attribute the portion of the award allocated for *lost wages* to a payor's income. The whole amount of the award, including the parts relating to pain and suffering, will not be seen as income for the purposes of the Guidelines, just the part intended to compensate for lost wages.

Windfalls

Money received from an inheritance, the sale of a house, or a lottery win does not count as income under the Guidelines. It might be family property that spouses have the right to share in, but it isn't income for the purposes of child support.

Imputing income

To *impute* income means to attribute income to a payor above that which the payor claims he or she earns, usually for making a support award based on that higher amount. Typically, someone asks the court to impute income to a payor where:

1. the payor works in the service industry, for example as a restaurant server or a taxi driver, and receives tip income that is not reported on income tax returns,
2. the payor has quit or been fired from his or her job,
3. the payor moves from full- to part-time work without a very good reason,
4. the payor is self-employed and either receives unpaid benefits from his or her company (like a company car, paid meals or a free cell phone), or doesn't report the full amount of money taken from the company,
5. the payor has refused to provide full and complete financial disclosure, or
6. the payor has or will have income from a trust.

If the court decides to impute income to a payor, child support will be payable at the Guidelines rate for the higher income. The parties' proportionate responsibility to contribute to the cost of any qualifying special and/or extraordinary expenses may be based on imputed income, including income imputed to the recipient.

The court can decide to impute income for the purposes of calculating child support in other circumstances, such as when the payor is underemployed and unemployed, is income splitting with a new partner, or lives in a place with a lower tax rate than usual.

Underemployment and unemployment

Section 19(1) of the Guidelines says that:

The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;

In other words, the court may decide that a payor has a different income than that which the payor says he or she has if:

1. the payor has quit a job in order to avoid paying child support,
2. the payor has taken lower-paying work than he or she used to have, or is capable of holding, in order to minimize the amount of child support payable,
3. the payor has hidden or appears to have hidden some of his or her income,
4. the payor is not using resources at hand that could generate income, such as a vacant house that could be rented out or savings that could be invested, or
5. the payor has tried to reduce his or her income by claiming unreasonable deductions.

If you are going to make an argument that income should be imputed to someone, you will have to prove that one or more of the conditions described in s. 19(1) exist. In the case of underemployment or unemployment, you will also have to show that the payor has acted in *bad faith*, and is unemployed or underemployed intentionally. If a party's underemployment or unemployment is caused by child care responsibilities, the court will not usually impute income.

It's not enough merely to *argue* that one of the conditions listed in s. 19(1) exist, you have to be able to *provide evidence* that the condition exists. The following factors were cited by the court in a 2003 Supreme Court case, *Nahu v. Chertkow* ^[7], 2003 BCSC 1285 in determining whether a payor is intentionally underemployed or unemployed:

1. the payor's education, training and work experience,
2. the payor's previous earnings and past borrowing of funds during unemployment,
3. the payor's work history,
4. the payor's spending patterns and lifestyle,
5. the payor's efforts to upgrade his or her education and work qualifications,
6. the nature and quality of the payor's attempts to obtain employment, and
7. any evidence that the underemployment or unemployment is motivated by ill will towards the recipient.

This last point, about the payor's ill will, has to do with the idea that the payor is able to earn more but chooses not to. In the 1999 Supreme Court case *Hanson v. Hanson* ^[8], 1999 CanLII 6307 the court had this to say on the subject:

"1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is 'no answer for a person liable to support a child to say that he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor' ...

"2. When imputing income on the basis of intentional underemployment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as the availability of work, freedom to relocate and other obligations.

"3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be earned on the job. ... [C]ourts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

"4. Persistence in [poorly paid] employment may entitle the court to impute income.

"5. A parent cannot be excused from his or her child support obligations [to pursue] unrealistic or unproductive career aspirations.

"6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income."

"Grossing up" income

Section 19(1) of the Guidelines also says that:

The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax.

Under these sections of the Guidelines, payors who have a lower income tax obligation than usual, such as certain First Nations persons living on reserve who might pay no federal taxes, or persons who live in another country with a lower tax rate, can have their income *grossed up* to reflect this tax advantage when child support is determined.

The grossing up process essentially involves figuring out the amount of money the payor would have to earn to have the same after-tax income at the tax rates normally applicable to residents of British Columbia. This will result in income being imputed to the payor for the purposes of calculating child support, with a consequent increase in the amount of child support that will be payable.

The math behind grossing up someone's income is a bit complex. Essentially, the idea is to figure out the amount of income the person would have to earn before taxes to receive the amount he or she earns net of taxes. Think of it like this:

Say Mr. A earns \$100,000 per year. As a resident of British Columbia, Mr. A pays income tax at, for example, 40%. This means that Mr. A's income, net of taxes, is \$60,000 per year.

Mr. B also earns \$100,000 per year. Mr. B, on the other hand, lives in Texas, and has an income tax rate of, for example, 25%. This means that Mr. B's net income is \$75,000 per year.

Income for the purposes of the Guidelines would normally be calculated for both Mr. A and Mr. B at a gross income of \$100,000. In reality, though, Mr. A has a lot less money after income taxes are paid than Mr. B does. Mr. B actually has a lot more money than Mr. A, and ought to pay child support based on this additional money.

Mr. B's income would be "grossed up" to figure out what income he would have to earn in BC to have an after-tax income of \$75,000. Since he would pay income tax at a rate of 40% here, the court would consider Mr. B to have a gross income of \$125,000 for the purposes of child support, since tax of 40% on a gross income of \$125,000 leaves a net income of \$75,000.

Mr. A and Mr. B both have incomes of \$100,000 per year. Mr. A will pay his base amount of support at that income, but Mr. B will pay at a grossed up income of \$125,000 to reflect what he would have to earn in BC to have the after-tax income of \$75,000 he has living in Texas.

Grossing up a payor's income can be a bit tricky, and requires a knowledge of the income tax laws applicable to First Nations payors earning income on First Nations reserve lands and to payors earning income outside of Canada. If you have a problem in this area, you should consider retaining a lawyer to help you.

Child support and parents' new partners

Parents and guardians usually move on with their lives after the relationship that produced their children has ended. They will meet new people and enter into new romantic relationships. Parents and their new partners are often concerned about how their relationship will impact on the parent's obligation to pay child support. The parent might be concerned to know whether the new partner's income will be added to his or her income in calculating child support. The new partner will want to know whether he or she is now on the hook for support and must contribute to the parent's payments or towards the parent's children.

Basic child support payments

The income of a parent's new partner is not relevant to the payment of child support, nor is a payor's new partner obliged to pay child support. The new partner will not inherit the child support obligation in the event the payor dies, and the recipient of support won't be able to pursue the new partner for continuing or supplemental payments.

For the purposes of calculating the base amount of child support a parent must pay — that is, the parent's basic obligation under the Child Support Guidelines, before special and/or extraordinary expenses — the court will only look at the parent's income. The income of the new partner is not taken into account.

Undue hardship claims

Section 10 of the Child Support Guidelines allows parties to argue that the base amount of support set out in the Guidelines tables is too low or too high and would cause *undue hardship* if the table amount was paid. Payors will claim that the base amount is too high, while recipients will argue that it is too low. This chapter discusses exceptions to the Guidelines more thoroughly in the section, *Exceptions to the Child Support Guidelines*.

If undue hardship is claimed, the court will look at the standard of living of each parent's *household*, rather than the standard of living of each parent alone. This means that the court, in deciding whether there is undue hardship, will look at the total expenses and total income of each parent's household, including the income of each parent's new partner. This will not cause the new partner to be liable to pay support; it just means that his or her income will be added to the parent's income to see whether the usual table amount of support payable is unduly high or low.

Incomes in excess of \$150,000

The tables provided in the Child Support Guidelines set out the amount of support owing by payors who earn up to \$150,000 per year. The Guidelines provide a mathematical formula for figuring out what parents earning more than \$150,000 must pay, while payors earning less than \$10,800 pay nothing.

Section 4 of the Guidelines deals with parents who earn more than \$150,000 each year. Under this section, the income (or lack of income) of a parent's new partner may be taken into account in deciding whether the formula gives a fair result. The calculation of support owing by parents with incomes in excess of \$150,000 is discussed in more detail in *Exceptions to the Child Support Guidelines*.

Section 4(b)(ii) of the Guidelines says that when considering the amount payable above the basic amount for a payor whose annual income is \$150,000, the court should apply the formula but take into account:

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

In other words, the income of a new partner can be taken into account under the general heading of "financial ability" of a spouse in determining whether the formula amount is fair.

Special expenses

Section 7 of the Guidelines allows for sharing of the children's special and/or extraordinary expenses between the parents, as discussed above. In figuring out how much a parent should have to contribute to these expenses, the court is required to take into account, among other things "the reasonableness of the expense in relation to the means of the spouses and those of the child."

A parent's new partner's income can be taken into consideration in assessing the "means of the spouses," which is exactly what the court did in the 2000 Supreme Court case of *Baum v. Baum* ^[4], 2000 BCSC 1835. In that decision, the court held that *means of the spouses* should be interpreted broadly as including all of the means available to the paying parent, including the income of his or her new partner.

Again, the new partner will not be responsible to pay child support or a share of the children's special expenses as a result; only the payor's obligation will be affected by the new partner's income.

Death of the payor

A number of readers have asked whether they will have any responsibility to make child support payments if their partner, a parent or guardian under an obligation to pay child support, dies. The simple answer to that question is no, they will have no responsibility. The fact that they are in a relationship with a paying parent doesn't necessarily mean that they will have a duty to keep paying support if that parent dies.

While that is a good general rule, and one you can probably rely on, it is possible that a claim could be made against the new partner as a *stepparent* of the child under the *Family Law Act*. The act says that all parents, guardians, and stepparents are required to support their children, but s. 147 says that stepparents who are obliged to pay child support must have contributed to the support of the child for at least of one year. In other words, a new partner who marries a paying parent may have an obligation if he or she has contributed to the support of the child. Again, while this is technically possible, orders against new partners following the death of the paying parent are extremely rare.

Agreements and orders for child support

Orders for child support

An order for child support typically contains the following elements:

1. a statement of the names and birthdates of the children for whom support will be paid,
2. a declaration of the payor's income,
3. an order as to the Guidelines amount payable,
4. an order about the exchange of income information, and
5. a statement of the date on which child support will no longer be payable.

These elements look like this in a typical order made under the *Divorce Act*:

UPON the Court being advised that the children of the marriage are
Jesse Ann Doe, born on 1 March 1998, and
Sandra Alexandra Doe, born on 1 April 2000;

AND UPON the Court finding that the Claimant's income for the purposes
of the Child Support Guidelines is \$72,000.00 per year;

THIS COURT ORDERS that:

1. The Claimant, Jane Doe, payor, shall pay to the Respondent, John Doe, recipient, the sum of \$1,092 per month, commencing on the first day of April 2013 and continuing on the first day of each and every month thereafter until such time as the children are no longer "children of the marriage" as defined by the *Divorce Act*; and,

2. The Claimant shall provide to the Respondent a copy of her tax return on the first day of May 2014 and continuing on the first day of May for each and every year thereafter until such time as the children are no longer "children of the marriage," and the Claimant shall provide to the Respondent a copy of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment within two weeks of her receipt of the same, continuing until such time as the children are no longer "children of the marriage."

Under the *Family Law Act*, the order would look like this:

UPON the Court being advised that the children are
Jesse Ann Doe, born on 1 March 1998, and
Sandra Alexandra Doe, born on 1 April 2000;
AND UPON the Court finding that the Claimant's income for the purposes
of the Child Support Guidelines is \$72,000.00 per year;
THIS COURT ORDERS that:

1. The Claimant, Jane Doe, payor, shall pay to the Respondent, John Doe, recipient, the sum of \$1,092 per month, commencing on the first day of April 2013 and continuing on the first day of each and every month thereafter until such time as the children are no longer "children" as defined by the Family Relations Act; and,
2. The Claimant shall provide to the Respondent a copy of her tax return on the first day of May 2014 and continuing on the first day of May for each and every year thereafter until such time as the children are no longer "children" as defined by the *Family Law Act*, and the Claimant shall provide to the Respondent a copy of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment within two weeks of her receipt of the same, continuing until such time as the children are no longer "children."

The point of the last clause of each of these sample orders is to require the payor to annually provide evidence of his or her income to the recipient so that both parties can decide whether an increase or a decrease in the amount payable is appropriate.

When parents have *shared custody* or *split custody* of their children, the amount paid is dependant on both parties' incomes. The same is true where special expenses are being contributed to; the proportion of those expenses each party will pay depends on both of their incomes. In cases like these, the last clause would be changed to require both parents to exchange their income information on an annual basis, not just the payor, and the court would make a finding about both parents' incomes.

Agreements for child support

Separation agreements, like all family law agreements, have two types of statements. The *recitals* are statements that talk about the parties and their relationship. They explain the parties' background and why they signed their agreement. The *operative clauses* of an agreement are statements that say what each party has promised to do.

The recitals to a separation agreement about child support would include statements like these:

- D. Jane Doe is a plumber working for ABC Plumbing, earning about \$72,000 per year.
- E. John Doe is a graphic artist working for Sunny Skies Art and Design, earning about \$40,000 per year.
- F. Jane and John have two children, Jesse, who is 15, and Sandra who is 13.

The operative clauses about child support might say something like this:

15. Jane will pay child support to John in the amount of \$1,092 per month, beginning on 1 April 2013 and continuing on the first day of each month afterwards while Jesse and Sandra remain "children" as defined by the *Family Law Act*.

16. Jane will give John a copy of her tax return on the first day of May 2014 and continuing on the first day of May of every year thereafter while Jesse and Sandra remain "children" as defined by the *Family Law Act*. Jane will give John a copy of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment she received within two weeks of receiving it for so long as the children are still "children."

Child support tables and calculators

The simplified Child Support Guidelines Tables for British Columbia ^[9] are available from the website of the federal Department of Justice. The federal government has published an online child support calculator ^[10].

The provincial government also operates the BC Child Support Info Line which offers free information about child support and the child support tables. Contact the Info Line at:

Lower Mainland: 604-660-2192

Outside the Lower Mainland: 888-216-2211

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines ^[1]

Links

- Child Support Guidelines Tables for British Columbia ^[9]
- Online Child Support Calculator ^[10]
- BC Ministry of Justice: FMEP Child Support Calculator ^[11]
- Canadian Bar Association BC Branch: Script on child support ^[12]
- Legal Services Society Family Law Website: What the child support guidelines are and how they work ^[13]
- Legal Services Society Family Law Website: Child support ^[14]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/80mh>
- [2] <http://canlii.ca/t/2dpzr>
- [3] <http://canlii.ca/t/2fzs4>
- [4] <http://canlii.ca/t/1fm6b>
- [5] <http://canlii.ca/t/8mcr>
- [6] <http://canlii.ca/t/85pb>
- [7] <http://canlii.ca/t/1pt18>
- [8] <http://canlii.ca/t/1d2x1>
- [9] <http://laws-lois.justice.gc.ca/eng/regulations/SOR-97-175/page-16.html#h-15>
- [10] <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/apps/look-rech/index.asp>
- [11] <http://www.clicklaw.bc.ca/resource/1175>
- [12] <http://www.clicklaw.bc.ca/resource/1235>
- [13] <http://www.clicklaw.bc.ca/resource/1666>
- [14] <http://www.clicklaw.bc.ca/resource/1618>

Exceptions to the Child Support Guidelines

The court has a limited ability to make orders for child support in amounts different than what would normally be required by the Child Support Guidelines tables. In general, unless one of the exceptions built into the Guidelines applies, the court must conclude either that the parents or guardians are making significant direct payments to the children's expenses or that an order under the tables would be unfair before the court will do anything other than make an order following the Guidelines tables.

The same rules apply to parents and guardians who are making agreements about child support. Without one of the Guidelines exceptions or a direct contribution to the children's expenses substituting for the full Guidelines amount, the court is unlikely to uphold an agreement that requires a child support payment less than the Guidelines amount.

This section talks about the most common exceptions to the Guidelines tables: where the payor earns more than \$150,000 per year; where the parents have split or shared custody of the children; where a minor child has become financially independent; and where undue hardship is claimed.

Payors with incomes higher than \$150,000

The tables set out in the Child Support Guidelines only go up to an annual gross income of \$150,000. For incomes over that amount, the Guidelines provide formulas to calculate the amount of child support payable.

However, for payors with very high incomes, these formulas can result in extremely large child support payments, to the point where the payments might begin to exceed what could reasonably be necessary to meet a child's expenses. As a result, s. 4 of the Guidelines gives the court the flexibility to make an order for child support in an amount different than that generated by the formulas:

- Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
- (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age

of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

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

Before departing from the Guidelines formulas under this section, the court must first determine that the formula amount would be inappropriate. If the court makes this finding, it then looks at the circumstances of the individual case and the factors set out in s. 4(b)(ii). While there is a very strong presumption that the Guidelines formulas are appropriate, this presumption can still be challenged, and the court will consider usually these factors in making its decision:

1. the financial circumstances of the parties and the actual circumstances of their children,
2. the actual means and needs of the parties and the children, and
3. whether the sheer magnitude of the child support payments would effectively work as alternative payment of spousal support or as an asset transfer beyond the reasonable purpose of a child support order.

You should bear in mind that there must be clear and compelling evidence that the formula amounts would be unfair. There is a very strong presumption in favour of the Guidelines tables and formulas, and sufficient evidence must be presented to the effect that the support payment would have a result beyond the purpose of child support before the courts will make an order differing from what the Guidelines provide.

The current formulas for calculating the monthly amount of child support owing for payors with incomes in excess of \$150,000 per year are as follows:

- **One Child:** \$1,302 plus 0.78% of income over \$150,000
- **Two Children:** \$2,061 plus 1.22% of income over \$150,000
- **Three Children:** \$2,668 plus 1.56% of income over \$150,000
- **Four Children:** \$3,165 plus 1.85% of income over \$150,000
- **Five Children:** \$3,579 plus 2.09% of income over \$150,000
- **Six or More Children:** \$3,929 plus 2.29% of income over \$150,000

Split custody and shared custody

The fundamental purpose of child support is to help cover some of the expenses paid by the parent or guardian who has the children most of the time, on the assumption that the person who has the children most of the time will bear a greater share of the direct and indirect costs associated with raising the children. Where parents have split custody (each parent has the primary residence of one or more children) or shared custody (the parents share the children's time equally or near-equally), these costs are presumed to be shared more equally. As a result, the Guidelines make an exception to the normal rules. Sections 8 and 9 state that:

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

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be

determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared custody arrangements; and

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

Split custody

Where the primary residence of the children is split between the parents or guardians, the amount of the child support payable is the difference between what each parent would have to pay the other for the support of the children in their care.

Say that parent A's obligation to parent B for the children in B's care is \$1,000 per month, and that parent B's obligation to parent A for the children in A's care is \$250 per month. A would pay \$750 per month in child support, the difference between A's obligation and B's obligation, and B would pay nothing.

Paying the difference between the two amounts is called paying at the *set-off*.

Shared custody

In order to fall within this exception to the Guidelines, the payor must have access to the children for 40% or more of their time. The two big issues here are how each party's time with the children is counted, and how the amount of child support payable should be calculated once the 40% threshold is reached.

Counting time

Problems about counting time involve the rules that will be applied in the calculation, such as deciding which person should get credit for the time the children are in school or whether you should count the time when the children are sleeping. Section 9 is one of the most difficult sections of the Child Support Guidelines as a result. A few broad rules have emerged from the case law:

- If the parents have the children for an exactly equal amount of time, the 40% requirement has been met.
- Holiday periods in which the children spend an unusual amount of time with one parent or the other, shouldn't be used to figure out the average amount of time spent with each parent; rather, the court will look at the average amount of time spent in a typical one- or two-week period.
- The time the children are in school or in daycare will be credited to the parent who has a right of access to or custody of the children for them during that time, on the principle that this person is the parent who would have to care for children on a professional development day or attend the school or daycare in the event of an emergency.
- If a parent's time with the children is specified as concluding at the start or end of the school day, that's when that parent's time concludes, and credit will be divided accordingly.

Of course, as in most issues involving children, each case will be decided on its own unique circumstances.

Calculating support

Once the 40% issue has been dealt with, the court must then decide how much child support ought to be paid, and the court will consider factors such as:

1. the amount each parent would have to pay under the Guidelines tables,
2. the actual needs of the children,
3. the payor's ability to pay,
4. the actual amount of the payor's increased costs incurred as a result of having the children for so much time, and
5. any savings realized by the recipient from the payor's contributions to the children's costs.

Although the court has developed a number of different formulas to calculate the amount of child support payable, where it thinks a reduction under s. 9 is appropriate, in general the set-off calculation used in cases of split custody will be used.

Say that parent A's obligation to parent B for the children in B's care is \$1,000 per month, and that parent B's obligation to parent A for the children in A's care is \$250 per month. A would pay \$750 per month in child support, the difference between A's obligation and B's obligation, and B would pay nothing.

Just because a payor has the children for 40% or more of the time does not mean that a reduction is automatically applied. In 2005, the Supreme Court of Canada released its decision in a case called *Contino v. Leonelli-Contino* ^[1], [2005] 3 SCR 217 and confirmed that the presumption is in favour of the Guidelines tables. The court said that if a payor is to get a reduction from the table amounts, the payor must provide evidence that he or she actually pays increased expenses as a result of having the children for so much time. These expenses may include things like: a higher gas bill for driving the children to their activities, a higher grocery bill, a higher telephone bill, increased costs for clothing and hair cuts, and so forth.

Independent minor children

Eligibility for child support under both the *Family Law Act* and the *Divorce Act* is restricted to children under the age of 19, the age of majority in British Columbia, and to children who are 19 and older and are unable to live independently of their parents. Children are expected, at some point, to live on their own and become self-sufficient. This may occur before a child turns 19, and a parent may be relieved of the obligation to provide support to an independent child in such circumstances.

If a payor can prove that a minor child has voluntarily withdrawn from parental control and is living an adult, financially independent life, the child may not be entitled to benefit from child support. Children have been found to have withdrawn from their parents' care and control when:

1. a child lives with a boyfriend or girlfriend who provides for or helps to provide for the child's needs,
2. a child has moved out from his or her parents' home and refuses to return, or
3. a child lives on his or her own, maintains a job, and pays his or her own bills without relying on money from his or her parents.

Section 147(1) of the *Family Law Act* say that:

Each parent and guardian of a child has a duty to provide support for the child, unless the child

(a) is a spouse, or

(b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered

objectively, intolerable.

A person can be a *spouse* under the *Family Law Act* if:

1. he or she is married,
2. he or she has lived in a marriage-like relationship with another person for at least two years, or,
3. he or she has lived in a marriage-like relationship for a shorter period of time if the couple has had a child together.

Undue hardship

Under s. 10 of the Child Support Guidelines, the court can make an award of child support that is less or more than would be required by the Guidelines tables where a person would suffer *undue hardship* if the Guidelines table amount of child support were paid. The court will be concerned to find that an application for increased support isn't just a way for the recipient to improve his or her income and lifestyle. Likewise, the court will be concerned to find that an application for decreased support isn't simply a way for the payor to duck an unpleasant obligation.

As a result, mere hardship won't do on an undue hardship application. The hardship caused by payment of the table amount must be an undue hardship. According to *Van Gool v. Van Gool* ^[2], 1998 CanLII 5650 (BC CA) a case of our Court of Appeal, *undue* means "exceptional, excessive or disproportionate." In the 1999 Supreme Court case of *Chong v. Chong* ^[3], 1999 CanLII 6246 (BC SC) the court held that establishing undue hardship requires a "high threshold" of hardship, and that problems like a lower standard of living or financial obligations for a new family won't cut it.

Section 10 of the Guidelines says this:

(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

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

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

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

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

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and

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

Note that this list is not exhaustive, meaning that the court may take other factors, in addition to those in the list, into account in deciding applications under s. 10. The test to prove that an order under the Guidelines would cause undue

hardship involves two steps:

1. the court must find that an award under the Guidelines would in fact cause undue hardship to the payor or the recipient under s. 10(1), and
2. under s. 10(3), the court must find that the household standard of living of the parent claiming undue hardship, calculated using the formulas described in Schedule II of the Guidelines, is lower than that of the other parent.

If both these steps have been met, the court will then determine what a reasonable child support order would be in light of the children's needs and the means of the parents. Note that the standards of living being compared are the standards of the household. This includes all sources of income a household has, including income from the parents' new partners, if any.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines ^[4]

Links

- Canadian Bar Association BC Branch: Script on child support ^[5]
- Legal Services Society Family Law Website: What the child support guidelines are and how they work ^[6]
- Legal Services Society Family Law Website: Child support ^[7]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/11xpf>

[2] <http://canlii.ca/t/1f0r2>

[3] <http://canlii.ca/t/1d1px>

[4] <http://canlii.ca/t/80mh>

[5] <http://www.clicklaw.bc.ca/resource/1235>

[6] <http://www.clicklaw.bc.ca/resource/1666>

[7] <http://www.clicklaw.bc.ca/resource/1618>

Making Changes to Child Support

As with all arrangements relating to children, there is no such thing as an absolutely final order or agreement for child support. It is always open to the court to change an order or agreement for child support, providing that the parties' circumstances, or the circumstances of the parties' children, have changed.

Generally speaking, payors will want to apply to have support reduced or terminated when their income has decreased or the children have grown up. Recipients will want to apply to have support increased when the payor's income has gone up or if the children's special expenses have increased.

This section talks about changing orders made under the federal *Divorce Act* and the provincial *Family Law Act*, changing orders that were made before the federal Child Support Guidelines came into effect on 1 May 1997, and changing orders that were made in a different place. This section also discusses claims for retroactive support and the important case of *D.B.S. v. S.R.G.* ^[1], [2006] 2 SCR 231.

Divorce Act Orders

Under s. 5 of the *Divorce Act*, the Supreme Court has the jurisdiction to vary an order for child support as long as at least one of the spouses is normally living in the province where the court proceeding to vary the order is started, no matter which province's courts made the original order.

Section 17 of the *Divorce Act* gives the court the authority to change, cancel, or suspend orders for support made under that act. "Changing" an order is called *varying* the order. Section 17 says this:

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

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

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is

satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

(6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

This all boils down to these principles:

- A court can make an order changing a previous child support order if a change in circumstances has occurred since the order was made.
- Any new order for child support must be made according to the Child Support Guidelines.
- The court may make an order for support different from the Guidelines if a previous order or agreement has made special provisions for the care of the child that would make an order under the Guidelines inappropriate.
- The court may also make an order for support different from the Guidelines if both spouses agree to the order, and reasonable arrangements have been made for the support of the children.

Before the Child Support Guidelines came into effect, an applicant had to show that there had been a serious and unforeseen change in circumstances before the court would hear an application to vary an order for child support. Now, an applicant must only show that there has been a change in income or the child's expenses to show that there has been a change in circumstances.

Section 14 of the Guidelines defines a "change in circumstances" as follows:

For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act ...

Financial statements

When an application to vary a child support order is brought, one or both parties may have to produce their financial information. This information is almost always given in a Financial Statement, which is Form F8 in the Supreme Court:

- The payor must produce a financial statement dealing with his or her income if the payor is paying child support according to the tables.
- Both parties must produce financial statements dealing with income if custody is shared or split.
- Both parties must produce complete financial statements covering income, expenses, assets and liabilities if there is a claim about the children's special expenses, a claim for undue hardship, the payor's income is above \$150,000 per year, or one or more of the children are over the age of majority.

These new financial statements give the court the information it will need to make a new child support order, if it's willing to vary the original order. Links to and examples of Supreme Court forms are available in [Supreme Court Forms & Examples](#).

Statutory provisions

These are the primary sections of the *Divorce Act* dealing with varying child support orders:

- s. 2: definitions
- s. 4: jurisdiction to make child support orders
- s. 5: jurisdiction to change orders
- s. 15.1: child support
- s. 15.3: child support has priority over spousal support
- s. 17: variation proceedings

***Family Law Act* orders**

Section 152(2) of the *Family Law Act* gives a court the authority to cancel, vary, or suspend an order for child support where one of three conditions is met:

- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Section 14 of the Guidelines says what a "change in circumstances" means:

For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act ...

Under s. 148(3), the court may set aside an agreement on child support and make an order for child support in its place "if the court would make a different order" than what the agreement provides.

Financial statements

When an application to vary a child support order is brought, one or both parties may have to produce their financial information. This information is almost always given in a Financial Statement, which is Form F8 in the Supreme Court and Form 4 in the Provincial Court:

- The payor must produce a financial statement dealing with his or her income if the payor is paying child support according to the tables.
- Both parties must produce financial statements dealing with income if custody is shared or split.
- Both parties must produce complete financial statements covering income, expenses, assets and liabilities if there is a claim about the children's special expenses, a claim for undue hardship, the payor's income is above \$150,000 per year, or one or more of the children over the age of majority.

These new financial statements give the court the information it will need to make a new child support order, if it's willing to vary the original order. Links to and examples of Supreme Court forms are available in [Supreme Court Forms & Examples](#). For Provincial Court forms see [Provincial Court Forms & Examples](#).

Statutory provisions

These are the primary sections of the *Family Law Act* dealing with varying orders and setting aside agreements for child support:

- s. 1: definitions
- s. 146: more definitions
- s. 148: agreements for child support
- s. 149: orders for child support
- s. 150: calculating the amount of child support
- s. 152: varying orders for child support
- s. 173: child support has priority over spousal support

Orders made before 1 May 1997

The fact that an order or agreement was made before the Child Support Guidelines came into effect does not mean that a court *must* change the order or agreement to comply with the Guidelines. Although s. 17(6.1) of the *Divorce Act* requires the court to make an order that complies with the Guidelines, this rule does not apply to agreements and orders made before 1 May 1997. Don't be discouraged by this, however, as the court still retains the discretion to apply the Guidelines and generally will.

If the difference between the old order and the order you seek is substantial, which it often will be, and the application is for an increased amount of child support, the court will likely be more willing to apply the Guidelines, as a higher

amount of support is presumed to be in the best interests of children.

Orders made outside British Columbia

It's rarely easy to change an order made outside of British Columbia because of the respect our courts must give to the authority and jurisdiction of the court that made the original order. (There are a bunch of other reasons why it can be hard to change an order made outside of British Columbia, but that's the meat of it.) The process that will apply depends entirely on whether the original order was made under the federal *Divorce Act* or under the family law legislation of the place whose courts made the original order.

***Divorce Act* orders**

Orders that were made elsewhere in Canada under the *Divorce Act* can be changed here under s. 5 of the act, as long as both parties live in British Columbia. Where one party still lives in the province whose courts made the original order, a person living here can apply to change the original order using a cumbersome, time-consuming process described in ss. 18, 19 and 20 of the act:

1. the applicant applies here for a "provisional" order changing the original order,
2. the court sends the provisional order to the place that made the original order,
3. on notice to the other party, the original court holds a hearing to "confirm" the provisional order, and
4. if the provisional order is confirmed, the original order is varied, and if it is not confirmed, the original order remains unchanged.

This process requires two hearings, one here in British Columbia for the provisional order and a second in the original court to confirm that order. The court in the other province may or may not confirm the provisional order, and may choose to send the order back here for more information. Until the provisional order is confirmed, the provisional order has no effect and the original order will continue to be the operative order.

Orders and agreements made under other laws

Orders and agreements that were made elsewhere in Canada under provincial family law legislation or were made in certain countries other than Canada, can be changed by someone living in British Columbia using the provincial *Interjurisdictional Support Orders Act* ^[2]. Governments that have agreed to follow this process under the *Interjurisdictional Support Orders Act* are called *reciprocating jurisdictions*.

The countries that will cooperate with a proceeding under the *Interjurisdictional Support Orders Act* are: South Africa, Zimbabwe, Austria, the Czech Republic, Germany, Gibraltar, Norway, the Slovak Republic, the United Kingdom, the United States of America and its protectorates, the Special Administrative Region of Hong Kong, Singapore, Australia, Fiji, Papua New Guinea, New Zealand, and Barbados and its dependencies.

The process under this act is as follows:

1. the person asking to change the order or agreement, the *applicant*, completes a bunch of forms provided by the provincial Reciprocals Office ^[3],
2. our reciprocals office sends the forms to the court that made the original order or the court of the place where the agreement was made, and
3. on notice of the other party, the original court holds a hearing on the applicant's application and may make an order varying the original order or agreement.

Under this process, there is only one hearing and the hearing is heard by the court that made the original order. The court in the reciprocating jurisdiction may or may not make the order that the applicant wants and may send the application

back to British Columbia for more information. The original order or agreement will continue in effect until the court in the reciprocating jurisdiction varies it.

This new process is intended to simplify things by having just the one hearing. To do that, however, the process relies very heavily on paperwork and the officials of our government and the government of the reciprocating jurisdiction. As a result, applications under the *Interjurisdictional Support Orders Act* can take a long time to process.

Contact details for the British Columbia Reciprocity Office ^[3], along with all of the forms required by the *Interjurisdictional Support Orders Act* can be found at www.isoforms.bc.ca ^[3].

To vary an order of a country that does not participate in the *Interjurisdictional Support Orders Act* process, you will have to apply to vary the order in that country.

Retroactive child support

Someone making a claim for *retroactive* child support is asking for an order that is to work beginning at some date in the past, before the claim was made or heard. Typically, someone receiving child support will ask for an increase in the amount of support payable dating back to when the payor's income went up. If the claim is successful, the payor will be obliged to start making payments in the amount of the new order, plus a lump sum representing the difference between the support that was paid and the support that ought to have been paid. This can sometimes be a significant financial hardship, particularly where the period of retroactive effect is long.

The trend in the recent case law on this subject has been to impose an ongoing duty on payors to disclose their income, whether they are asked for this information or not, and the courts have been increasingly willing to subject payors to retroactive orders for child support.

The basic law: *L.S. v. E.P.*

The case of *L.S. v. E.P.* ^[4], 1999 BCCA 393, a 1999 decision of our Court of Appeal, used to be the most important case on this issue in British Columbia, and still is the most important case for orders made under the *Family Law Act*. In this case, the court set out the factors that should be considered in deciding whether there should or should not be a retroactive order for support:

"A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include:

- (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent;
- (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order;
- (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses;
- (4) an excuse for a delay in bringing the application where the delay is significant; and,
- (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

"Factors which have militated against ordering retroactive maintenance include:

- (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations;

- (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and,
- (3) a significant, unexplained delay in bringing the application."

When hearing an application for retroactive child support, the court would apply these factors in deciding whether a retroactive award was warranted and, if so, how much the award should be for and when the retroactive effect of the order should begin.

A change in the law: *D.B.S. v. S.R.G.*

In July 2006, the Supreme Court of Canada released its judgment ^[1] in four related cases, *D.B.S. v. S.R.G.*, *L.J.W. v. T.A.R.*, *Henry v. Henry* and *Hiemstra v. Hiemstra*, [2006] 2 SCR 231 and significantly clarified the law on retroactive child support. Where it changed the law, the changes weren't all that far from our Court of Appeal's decision in *L.S. v. E.P.* These cases are referred to collectively as just *D.B.S. v. S.R.G.*, the initials of the lead case.

The logic underlying the court's decision ^[1] is this:

Before the Child Support Guidelines came into effect, child support was determined using budgets and a means and needs analysis looking at the *means* of the parents and the real or expected *needs* of the children. After the Guidelines came into effect on 1 May 1997, child support was expressly linked to the income of the payor, and the payor's duty became to pay support at the amount required for his or her income, using the tables attached to the Guidelines rather than budgets and the needs-and-means analysis. As a result, the court held that a duty to pay child support — whether under a separation agreement or a court order — is never final and absolute. No orders or agreements are final on the subject of support, and both parents have the obligation of ensuring that the right amount of child support is being paid on an ongoing basis.

The following is a summary of the important points in this decision.

The rationale for retroactive support

- Both parents have a duty "to ensure that their children are receiving a proper amount of support."
- "While the paying parent does not shoulder the burden of automatically adjusting payments" when his or her income increases, "this does not mean that (s)he will satisfy his/her child support obligation by doing nothing."
- If the payor's income increases and child support does not, "there will remain an unfulfilled obligation" that could warrant a retroactive award of support.

When retroactive child support should be ordered

When there is an existing order

- Child support orders "must be considered presumptively valid."
- "Where the situations of the parents have changed materially since the original order was handed down, that original order may not be as helpful as it once was in defining the parents' obligations."
- An obligation to pay the proper amount of support is "independent of any court order that may have been previously awarded." Where parents fail to adjust the amount of support payable, "a court may order an award that recognizes and corrects this failure."

When there is an existing agreement

- "A payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a parent acting pursuant to a court order."
- "Agreements reached by the parents should be given considerable weight."
- "Where circumstances have changed," such that the "actual support obligations of the payor have not been met, courts may order a retroactive award."

When there is no order or agreement

- There is "no restriction" as to "the date from which the court may order that the award take effect."
- "Courts will have the power to order original retroactive child support awards in appropriate circumstances."

Factors in making retroactive child support awards

- The child must be eligible to receive support when the application for retroactive support is made; "child support is for children of the marriage, not for adults who used to have that status."
- The court has the discretion to award or not award retroactive support, but retroactive awards "need not be seen as exceptional."
- Retroactive child support should not be awarded if the child would not actually benefit from the award or if the award would cause hardship to the payor.
- "A court should strive for a holistic view of the matter and decide each case on the basis of its particular facts."
- The recipient's delay in seeking an increase in support will not favour a retroactive award where the recipient "knew higher support payments were warranted, but decided arbitrarily not to apply."
- The recipient's delay will not be considered if the recipient feared the payor's reaction or lacked "the financial or emotional means to bring an application, or was given inadequate legal advice."
- "Courts should not hesitate to take into account a payor's blameworthy conduct," and courts should "take an expansive view of what constitutes blameworthy conduct."
- Blameworthy conduct is "anything that privileges the payor parent's interests over his/her children's right to an appropriate amount of support," such as hiding income increases or intimidating a recipient from seeking an increase in support.

How far back child support awards should be retroactive

- The date of "effective notice" of the recipient's intention to seek an increase should be the furthest back a retroactive award should go.
- "Effective notice" doesn't mean the date of applying to court, but the date of notice of "any intention by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated" was given.
- Except where there is some blameworthy conduct on the part of the payor, it will "usually be inappropriate" to go further back in time than three years from the date of the hearing.
- Where there is blameworthy conduct, "the presumptive date of retroactivity" will be the time the payor's "circumstances changed materially."

How much retroactive child support should be ordered

- Retroactive awards must ensure that the amount "fits the circumstances."
- "Blind adherence to the amounts set out in the applicable Tables is not required — nor is it recommended."
- "It will be easier to show that a retroactive award causes undue hardship" than it is to show that a normal child support order causes undue hardship.
- A court "should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case."
- In other words, retroactive support may be awarded whenever a payor is paying less than the Child Support Guidelines requires, if his or financial circumstances change following the making of an order or agreement dealing with child support. In making such an order, the court must consider:
 1. any excuse for the recipient's delay in seeking an increase in support,
 2. any blameworthy conduct on the party of the payor,
 3. the circumstances of the child, and,
 4. any hardship that a retroactive award would cause to the payor.
- If a retroactive award is made, the award should be made retroactive to the date notice is given of the recipient's intention to seek an increase in the amount of support, but to a limit of three years. Where the payor's conduct is blameworthy, then the support should be retroactive to the date of the change in the payor's financial circumstances, and may be retroactive beyond the three-year mark.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Supreme Court Act* ^[5]
- Supreme Court Family Rules ^[6]
- *Provincial Court Act* ^[7]
- Provincial Court Family Rules ^[8]
- *Interjurisdictional Support Orders Act* ^[2]
- Interjurisdictional Support Orders Regulation ^[9]
- Child Support Guidelines ^[10]

Links

- The British Columbia Reciprocals Office ^[3]
- Legal Services Society Family Law in BC Website: How to change a family law order (Supreme Court and Provincial Court) ^[11]
- Legal Services Society Family Law in BC Website: Fact sheet on when you can change a final order ^[12]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [11] <http://www.familylaw.lss.bc.ca/guides/change/cantAgree/index.php>
- [12] http://www.familylaw.lss.bc.ca/resources/fact_sheets/changingFinalOrder.php

Child Support Arrears

When a person who is obliged to pay child support fails to meet some or all of that obligation, a debt begins to accumulate and the amount owing is called the payor's *arrears* of child support.

People generally have two different goals when arrears begin to mount up: the person responsible for paying support likely wants the court to reduce or cancel the arrears, while the person receiving the support will want the court to force the payor to pay what's owing.

This section provides an introduction to the problem of child support arrears. It also discusses the reduction and cancellation of arrears and the collection of arrears.

Introduction

If child support is owed under a court order or an agreement, a failure to pay the support owing is a breach of that order or agreement, and, in the case of orders, it's contempt of court as well. The courts and society as a whole place a high value on the financial support of children, and both take an extremely dim view of anyone who defaults on such an obligation in the absence of a very good excuse or some very compelling circumstances.

A person who owes arrears of child support, a *payor*, will likely be interested in the ways that the outstanding amount can be reduced, while a person to whom support is owing, a *recipient*, will be interested in collecting on the arrears.

A person who owes arrears will generally have a difficult time convincing the court to forgive all or some of his or her debt. On the other hand, collecting arrears can be difficult as well, if for no other reason than the fact that you can't get blood from a stone. Unless the payor has another source of funds to draw upon, a recipient may discover that the outstanding support will never be recovered.

Despite these barriers and obstacles, it is possible for a payor to have his or her arrears reduced and, sometimes, cancelled altogether. At the same time, recipients have access to some very powerful and effective enforcement tools to collect outstanding arrears of support.

Orders for support

Orders for the payment of child support are enforceable like any other order of the court. Someone who breaches a Supreme Court order can be punished for contempt of court. As well, under the *Family Law Act*, the Supreme Court and the Provincial Court can:

1. require the payor to provide security for his or her compliance with the court order,
2. pay any expenses incurred by the recipient as a result of the payor's actions,
3. pay up to \$5,000 for the benefit of another party or a child whose interests were affected by the payor's actions,
4. pay up to \$5,000 as a fine, or,
5. if nothing else will ensure the payor's compliance with the order, jail the payor for up to 30 days.

Unfortunately for people who would rather be jailed than pay, s. 231(3)(c) says that:

imprisonment of a person under this section does not discharge any duties of the person owing under an order

Since orders for support require the payment of money, arrears can also be enforced as a judgment debt under the provincial *Court Order Enforcement Act* ^[1] for up to 10 years after the monthly payment of support is no longer required, often when the child reaches the age of majority.

Payors can apply for an order reducing arrears that have accumulated under a court order under both the *Divorce Act* and the *Family Law Act*. Such applications must be made using the act under which the support order was made.

Agreements for support

Arrears that have accumulated under a separation agreement are owed as a result of a contractual obligation to provide support. A separation agreement is a contract that can be enforced in the courts just like any other contract.

Agreements for support are most easily enforced by filing them in court, after which they can be enforced as if they were court orders. Although agreements can still be enforced under the law of contracts, it's a lot simpler to file them in court.

Section 148(2) of the *Family Law Act* says:

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

As a result, the Supreme Court and the Provincial Court can:

1. require the payor to provide security for his or her compliance with the agreement,
2. pay any expenses incurred by the recipient as a result of the payor's actions,
3. pay up to \$5,000 for the benefit of another party or a child whose interests were affected by the payor's actions,
4. pay up to \$5,000 as a fine, or
5. if nothing else will ensure the payor's compliance with the agreement, jail the payor for up to 30 days.

Payors can apply under s. 174 of the *Family Law Act* for an order reducing arrears that have accumulated under an agreement that has been filed in court just like they can for arrears accumulating under an order.

The Family Maintenance Enforcement Program

Although recipients can enforce orders and agreements for child support on their own, most of the time recipients will give that job to the Family Maintenance Enforcement Program ^[2] (FMEP). This a provincial government program under the provincial *Family Maintenance Enforcement Act* ^[3] which has been contracted out to an American company, Maximus (Themis) — not that you'd know this from the government website.

FMEP is a free service for recipients that is largely funded by late fees and penalties charged to delinquent payors.

FMEP has no discretion to change the orders and agreements that are filed with it for enforcement, although it will make important, judge-like decisions about who is and isn't entitled to receive child support. FMEP cannot increase or decrease the amount of a child support obligation and it cannot reduce or cancel arrears of child support.

The reduction and cancellation of arrears

Payors may apply to court to have their arrears cancelled or reduced. Technically, this is in some ways an application to vary the order or agreement for child support under which the arrears accumulated rather than an independent order about the arrears.

Arrears under the *Divorce Act*

Section 17 of the *Divorce Act* says this about varying orders for child support:

(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

The *Divorce Act* does not deal expressly with arrears; applications under the act to reduce arrears are simply variation applications. The test the court will apply is similar to the test it applies for orders made under the *Family Law Act*.

Arrears under the *Family Law Act*

Unlike the *Divorce Act*, the *Family Law Act* deals with the question of arrears directly. Section 174(1) of the act says this:

(1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

(2) For the purposes of this section, the court may consider

(a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,

(b) the reasons why the person responsible for paying support cannot pay the arrears owing, and

(c) any circumstances that the court considers relevant.

(3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

(4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the *Family Maintenance Enforcement Act*, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

A similar section of the old *Family Relations Act* was described as a "complete code" regarding the reduction or cancellation of arrears under that act, meaning that the only ground on which a court could reduce or cancel arrears was "gross unfairness," as set out in s. 96(2). I expect the courts will take the same approach to s. 174 of the *Family Law Act*.

The courts have interpreted "gross unfairness" under the *Family Relations Act* to mean that the payor is not only incapable of repaying the arrears but is also unlikely to be able to repay them in the foreseeable future without suffering severe financial hardship.

If you are asking the court to make an order of reducing arrears, you must be prepared to prove that it would be not just unfair but grossly unfair for you to have to pay off the arrears, and you must be prepared to address the criteria set out in s. 174(2):

- What efforts have you made to pay the child support you were required to pay?
- Why did you wait until arrears had accumulated before you tried to vary the child support order?
- Why can you not pay your arrears now?
- Are there any other circumstances, such as catastrophic business losses or the unintended loss of your employment, changes in the children's residence, or new financial obligations in relation to your family that the court should take into account?

Be prepared to provide to the court a financial statement (Form F8 in the Supreme Court and Form 4 in the Provincial Court) that summarizes all of your assets and income, liabilities and expenses, if you intend to show the court that you cannot pay your arrears. Complete financial disclosure is absolutely essential.

Collecting arrears of support

The collection of debts and enforcement of judgments occupies a whole course at law school and is not a simple matter. The provincial government has, however, established an agency responsible for enforcing support obligations, the Family Maintenance Enforcement Program. Someone who is entitled to receive support under an order or agreement can sign up with this program and the program will tend to the enforcement support without a great deal of further involvement on the part of the recipient.

FMEP is free for recipients. All you have to do is file your order or filed separation agreement with the program and fill out an application form. FMEP will take the matter from there, and the program is authorized by the *Family Maintenance Enforcement Act* ^[3] to take whatever legal steps are required to enforce an ongoing support obligation, and track and collect on any outstanding arrears, plus interest accumulating on those arrears.

Under the *Family Maintenance Enforcement Act* ^[3], FMEP has the authority to commence and conduct any court proceedings that can be undertaken by a private creditor, as well as some unique actions that the program alone can take. Among FMEP's collection powers are:

1. garnishing the payor's wages,
2. collecting from a corporation wholly owned by the payor,
3. redirecting federal and provincial payments owed to the payor, like GST or income tax rebates, to the recipient,
4. prohibiting a payor from renewing his or her driver's licence,
5. directing the RCMP to seize a payor's passport,
6. registering a lien against personal property and real property owned by the payor, and
7. obtaining an order for the payor's arrest.

While it is possible to undertake collection or enforcement proceedings on your own, this will cost money and time and possibly require you to hire a lawyer and bear that expense as well. Since any private collection efforts you might take may interfere with efforts being made on your behalf by FMEP, recipients enrolled with FMEP are required to obtain the permission of the program's director before they can take independent enforcement actions.

You can find more information about enforcing orders in the chapter Resolving Problems in Court within the section Enforcing Orders in Family Matters. You can also find more information at the website of the Department of Justice ^[4], which includes a helpful overview of support enforcement mechanisms in Canada.

Separation agreements

Section 148(3) of the *Family Law Act* allows a party to an agreement, usually a separation agreement, to file the agreement in the Provincial Court or in the Supreme Court. An agreement that is filed in court can be enforced as if it were an order of the court. It is not necessary for a court proceeding to have been started before an agreement can be filed in court.

FMEP will enforce agreements for support, however they require that an original copy of the agreement be filed in court and sent to them with the court's stamp before they can enforce the agreement.

You can find more information about enforcing agreements in the chapter Family Law Agreements, in particular within the section Enforcing Family Law Agreements.

Orders made outside British Columbia

Section 20 of the *Divorce Act* says that an order made in a divorce action has legal effect throughout Canada. It also provides that such an order may be filed in the courts of any province and be enforced as if it were an order of the courts of that province. In other words, if your divorce order was made in Alberta and contains a term requiring child support to be paid, you can register that order in the Supreme Court of British Columbia and it will have the same effect and be enforceable here as if it were an order of the courts of British Columbia.

The provincial *Interjurisdictional Support Orders Act* ^[5] allows orders for child support made under provincial laws elsewhere in Canada, and in certain foreign states, to be filed in our courts and enforced as if they were British Columbia orders. The reciprocating states under the *Interjurisdictional Support Orders Act* are South Africa, Zimbabwe, Austria, the Czech Republic, Germany, Gibraltar, Norway, the Slovak Republic, the United Kingdom, the United States of America and its protectorates, the Special Administrative Region of Hong Kong, Singapore, Australia, Fiji, Papua New Guinea, New Zealand, and Barbados and its dependencies. Reciprocating countries appear in the *Interjurisdictional Support Orders Regulation* ^[6] rather than the act itself.

Foreign orders which are filed in this province may be enforced by FMEP as if they were orders made by the courts of British Columbia.

You can find more information about enforcing orders in the chapter *Resolving Problems in Court* within the section *Enforcing Orders in Family Matters*.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Court Order Enforcement Act* ^[1]
- *Family Maintenance Enforcement Act* ^[3]
- Supreme Court Family Rules ^[7]
- Provincial Court Family Rules ^[8]
- *Interjurisdictional Support Orders Act* ^[5]
- *Interjurisdictional Support Orders Regulation* ^[6]
- Child Support Guidelines ^[9]

Links

- The British Columbia Reciprocity Office ^[10]
- Legal Services Society Family Law in BC Website: How to change a family law order (Supreme Court and Provincial Court) ^[11]
- Legal Services Society Family Law in BC Website: Fact sheet on when you can change a final order ^[12]
- Family Maintenance Enforcement Program Website ^[2]
- Clicklaw HelpMap: Family Maintenance Enforcement Program details ^[13]
- Department of Justice: About support enforcement ^[4]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Spousal Support

Spousal Support

Spousal support is a payment made by one spouse, the *payor*, to the other spouse, the *recipient*, to help with his or her day-to-day living expenses or to compensate the recipient for the financial choices the spouses made during the relationship.

Although anyone who was in a married or unmarried spousal relationship can *apply* for spousal support, it's important to know that there is no automatic *right* to receive support just because of the relationship. Whether spousal support will be paid, and, if so, how much will be paid, always depends on the particular circumstances of each couple.

This section provides an introduction to the law on spousal support. It also looks at what happens when a potential recipient applies for social assistance, and reviews the income tax consequences of spousal support payments. The other sections in this chapter explore issues about spousal support in more detail, including the Spousal Support Advisory Guidelines, making changes to spousal support, and the problem of arrears of spousal support.

An introduction to spousal support

Spousal support is paid for one of two reasons: to help the recipient get by as a single person without the benefit of the payor's income and other household contributions; or to compensate the recipient for financial decisions made by the spouses during their relationship.

No matter if one spouse was working during the relationship or both worked, the fact is that during the relationship there was only one mortgage payment to make, only one hydro bill and only one cable bill. After the relationship ends, there are two rent payments, two hydro bills and two sets of groceries to buy, all of which must be paid out of the same pool of income that supported the family before separation.

To be clear, however, the fact of being in a spousal relationship, whether married or unmarried, does establish a right to life-long support. When a spousal relationship ends, each party needs to become financially independent and self-sufficient as soon as possible. As the judge said in the 1997 Supreme Court case of *Dumais-Koski v. Koski* ^[1], 1997 CanLII 3816 (BC SC):

"Marriage is not a legal institution created for the redistribution of wealth."

Or, as the Alberta Court of Queen's Bench put it in the 2005 case of *V.S. v. A.K.* ^[2], 2005 ABQB 754:

"A person does not acquire a lifetime pension as a result of marriage. Likewise, marriage is not an insurance policy."

A spouse who is self-sufficient, or readily capable of becoming self-sufficient, will not usually be entitled to receive spousal support at the end of a relationship .

The law

Spousal support is available for married spouses and formerly married spouses under the federal *Divorce Act*. Spousal support is available to spouses under the provincial *Family Law Act*, which, for the purposes of child support and spousal support, defines *spouse* as including:

1. people who are married to each other,
2. people who have lived together in a "marriage-like relationship" for at least two years,
3. people who lived together in a marriage-like relationship for less two years and have a child together, and
4. former spouses.

(Incidentally, the law in British Columbia doesn't talk about people who are *common-law spouses* and never has. Once upon a time, people could marry each other and create a legal relationship simply by agreeing to marry, without getting a licence from the government or having a particular kind of ceremony. Because the rights between the spouses came from common law principles, these were known as "common-law marriages." Common-law marriages were valid in England until the *Marriage Act* of 1753, better known by its full flowery name, *An Act for the Better Preventing of Clandestine Marriage*. Please don't use the term "common-law marriage." It doesn't mean what most people think it means and is two-and-a-half centuries out of date.)

Spousal support is available for all spouses, whether of the same or opposite sexes, and can be required by a court order or agreed to by a separation agreement.

Establishing an entitlement to support

There is no automatic obligation to pay spousal support the way there is for child support. As a result, the entitlement of a spouse to receive spousal support will be decided on the particular circumstances of that person and his or her relationship with the other spouse. In general, the court will take into consideration the following factors, among many others.

- **Length of marriage:** The longer the relationship, the more likely it is that an order for spousal support will be made. As well, the longer the relationship is, the stronger the presumption will be that the parties should have an equal or almost equal standard of living at its conclusion.
- **Difference in incomes:** The greater the difference in income between the parties is at the end of a relationship, the more likely it is that an order for spousal support will be made, even if the support will only be paid for a short period of time.
- **Economic disadvantage:** The more economic opportunities a spouse has lost as result of the relationship, such as job skills, job opportunities, raises and promotions, or employability, the more likely it is that an order for spousal support will be made.
- **Earning capacity:** The more one party's earning capacity is reduced because of family obligations like child care or a serious illness, for example, the more likely it is that an order for spousal support will be made.

Amount of support payments

Once a spouse has established that he or she is entitled to receive spousal support, the question becomes how much support the spouse ought to get.

Generally speaking, the amount of an order or agreement for spousal support is calculated by looking at the disposable income of the payor and the reasonable needs of the recipient. If a payor has a gross income of, say, \$2,000 per month, and of that money \$1,500 is spent on taxes, child support, housing costs, utilities and other basic living expenses, the payor's disposable income will be \$500 per month. Spousal support will usually be paid out of that remaining \$500 per month if it's payable at all. Although spouses usually share in the financial consequences of the end of their relationship, the court will not force someone into bankruptcy to provide support for the other spouse, although there certainly are times when a support order will result in the payor racking up debt.

The amount of spousal support payments is now generally calculated using the Spousal Support Advisory Guidelines. The Advisory Guidelines is an academic paper released by the federal Department of Justice which describes a number of mathematical formulas that calculate the amount of spousal support payments based on each person's income, the length of their relationship and the age of their children, and other factors.

Sometimes there is simply not enough money coming in to cover child support, the payor's day-to-day needs, and the day-to-day needs of the recipient. In cases like that, both the *Divorce Act* and the *Family Law Act* require child support to take priority over spousal support, and the amount of spousal support paid simply may not suffice to cover the recipient's needs.

Duration of support payments

Once a spouse's entitlement to receive spousal support is established and the amount of support payments has been fixed, the next step is to look at the length of time for which the support payments should be made. For people leaving long relationships, spousal support might be paid permanently or until retirement. For people in shorter relationships, particularly where the recipient is either working outside the home or capable of working outside the home, support might only be payable for a fixed length of time.

There are a number of different ways that an order or agreement for spousal support can deal with the issue of time.

- **Lump-sum payments:** Instead of ongoing monthly payments, it can sometimes be better to pay a single lump sum for all of the support payments. Of course, the payor has to be able to pay a lump sum like that, and not everyone can.
- **Division of property:** It is possible that the way the family property and family debt is divided could satisfy the goal of a spousal support order. It's also possible that a payor could agree to give the recipient more of the family property in order to avoid a spousal support obligation.
- **Review dates:** An order or agreement can say that when a certain date or event arrives, the amount of spousal support or the recipient's entitlement to receive support will be *reviewed*. This is sometimes easier to accept than a fixed date on which support will terminate, but it does mean that the parties will have to argue about the issue in the future. Again.
- **Escalated payments:** If someone wants to pay spousal support for as short a time as possible but can't make a lump-sum payment, the payor might be able to get an order or agreement requiring greater monthly payments but over a shorter period of time.

The Advisory Guidelines can also be used to calculate a range of time for which spousal support should be paid, in addition to calculating how much support should be paid. Where a couple have children, time is based on the dates the youngest child will enter and exit school, and, sometimes, on the length of the spouses' relationship. Where a couple doesn't have children, time is based on the length of the couple's relationship.

Changing spousal support

It is almost always possible to apply to change an order for spousal support or to renegotiate a separation agreement that requires the payment of spousal support, as long as there has been a change in circumstances since the order or agreement was made.

Recipients might want to change an order or an agreement if:

- their spousal support payments are going to end but their financial situation hasn't improved,
- their financial situation has worsened and they need more support than they did before, or
- something unexpected has happened, like an illness or an accident, that causes them to need support.

Payors usually want to change things if:

- their financial situation unexpectedly worsens,
- the recipient finds work or gets better-paying work,
- the recipient enters a new spousal relationship,
- the recipient's financial situation unexpectedly improves, or
- they have a new legal obligation to support someone else.

If the parties can't agree about if or how a support order should be changed, they will usually have to make an application in court to vary the order. Couples with an agreement often try to negotiate a change and only go to court if they can't agree on the change.

Spousal support and social assistance

If you are applying for welfare or are receiving welfare, you may be required to sign a form that allows the ministry administering social assistance to take whatever steps are required get an order for spousal support on your behalf and, sometimes, keep the spousal support it collects. This is called *assigning* your spousal support rights to the ministry. The point of this is to allow the provincial government to recapture some of the money it spends on social assistance from someone else who might have a legal responsibility to support you.

The collection of spousal support payments for people on social assistance is run by the Family Maintenance Program^[3] (FMP). (This is a completely different organization than the program which enforces child support payments between spouses, the Family Maintenance Enforcement Program^[4].) FMP has the authority to begin court proceedings for spousal support and can apply for new orders for spousal support, or apply to change old orders for spousal support, and it will do this as it sees fit without much involvement on the part of the recipient at all.

FMP and people entitled to receive support

If you might be entitled to receive spousal support, the Family Maintenance Program may make a court application for an order requiring your spouse to pay support. You will not have a say in the matter if FMP decides to do this, and FMP may bring on such an application for so long as you might be entitled to receive support.

FMP will make their application whether you like it or not, and they can require that you cooperate in their application. On the other hand, FMP will be responsible for managing any court applications they begin. You will not have to worry about arguing the application yourself.

You may be allowed to keep some of the support money that the ministry collects on top of your social assistance payments. Your case worker will tell you how much.

FMP and people obliged to pay support

You may have an understanding with your spouse that no spousal support will be payable; you might not have even seen him or her for several years. Nevertheless, if your spouse applies for social assistance, you may find yourself being served with an application for an order that you pay spousal support. This is not something that your spouse may have any control over, so try not to be too mad about it.

When FMP brings on an application for support, they bring it as if they were the person entitled to receive the support, and the application will be dealt with on that basis. It will be your job to defend their application, and you may want to hire a lawyer to do so.

You cannot defend FMP's claim by saying "but my spouse is on welfare, she doesn't need any support from me." That's actually the whole point of FMP's application; they're trying to reduce the government's expenses by looking for money from someone who has or ought to have an obligation to the welfare recipient in the first place.

Spousal support and income tax

A spouse who pays support on a periodic basis is entitled to claim the whole amount of his or her payments as a deduction against his or her taxable income, just like an RRSP contribution. The recipient is obliged to claim the support he or she has received as taxable income, just like employment income, and the recipient will wind up owing money to the government at tax time each year.

To claim spousal support payments as a tax deduction, the order or agreement that obliges the payor to make the spousal support payments must clearly state that the payments are for *spousal support* and the payments must be *periodic* in nature rather than paid as a lump sum. Without these clear statements, the federal *Income Tax Act* ^[5] requires the payments to be treated as child support payments, and child support payments are neither tax deductible for the payor nor taxable income for the recipient.

Lump-sum spousal support payments are neither deductible for the payor nor taxable for the recipient.

Ensuring spousal support is deductible

If you want to ensure that the money you are paying as spousal support is deductible, there are a couple of important points you must pay attention to in order to satisfy the tax man:

- **Court Orders:** The order must clearly state a fixed, periodic sum that is being paid, and this fixed sum must be described as "spousal support."
- **Separation Agreements:** In addition to a term describing a fixed, periodic sum as "spousal support", the agreement must also state that the parties have been separated since a certain date and intend to continue to live separate from each other. Payments for child support and spousal support should never be expressed as a single amount.
- **Unwritten Agreements:** In general, the tax man will not recognize anything other than a written separation agreement or a court order. There are some exceptions to this rule, but you really should arrange your support payments in a formal fashion.

Avoiding unexpected taxes

The payment of spousal support will require the recipient to pay additional taxes each year since the payments received must be reported as income.

A recipient of support may also be subject to other tax consequences that aren't so obvious. One of the more common ways this can happen is if the payor is making the payments indirectly, through a company he or she owns. For example, say that Bob, the owner of Bob's Brewery, writes his spousal support cheques on the company bank account of Bob's Brewery instead of from his personal chequing account. In a case like this, the recipient risks having the payor declare the money to have been paid as a corporate dividend or as salary as if the recipient were a shareholder or employee of the company.

In the case of support declared as salary, the recipient might also face an unexpected bill from EI or CPP for missed payments, as well as for underpaid tax from the Canada Revenue Agency ^[6]. In the case of support paid as a dividend, the payments might be taxed at the corporate tax rate, which may be higher than the recipient's personal tax rate.

The easiest way to guard against unexpected taxes is to ensure that the payments are made by way of a personal cheque drawn on the payor's personal bank account.

Taking taxes into account

When it will be difficult for a recipient to pay the tax owing on spousal support, a couple can agree to deal with these taxes in one of two ways if the recipient is to avoid a big bill in April:

1. the payor could pay more in spousal support to account for the tax consequences, or
2. the payor could simply pay the tax owing by the recipient when the recipient files his or her tax return.

When someone pays more support, the recipient must put the extra amount aside for tax time, or his or her bill to the Canada Revenue Agency will just be that much higher. Since it can be a bit difficult to figure out how much money the recipient will have to pay in taxes, you might want to talk to an accountant to get the number right.

When someone agrees to pay the taxes owing on account of the spousal support and the recipient has other sources of income, it can be very difficult to figure out exactly how much of the recipient's tax bill results from his or her receipt of spousal support. This is another good time to hire an accountant.

Deductibility of legal fees

The portion of a lawyer's bill attributable to *increasing* or *enforcing* a spousal support order is tax deductible. The cost of obtaining a spousal support order or defending a claim for spousal support is not deductible. Read the Canada Revenue Agency's Interpretation Bulletin IT-99R5 ^[7] for the fine print.

To claim these deductions, the lawyer must write a letter to the CRA setting out what portion of his or her fees were attributable to advancing a spousal support claim. If you intend to ask your lawyer for a letter like this, you must tell your lawyer as soon as possible, preferably the moment the lawyer takes your case. It may be impossible to winnow out the portions of an account spent on spousal support after the fact.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Income Tax Act* ^[5]

Documents

- Spousal Support Advisory Guidelines ^[8]
- Canada Revenue Agency's Interpretation Bulletin IT-99R5 ^[7]

Links

- Department of Justice: About spousal support ^[9]
- Family Maintenance Program ^[3]
- Legal Services Society's Family Law Website: Spousal support ^[10]
- Family Maintenance Enforcement Program Website ^[11]
- Canadian Bar Association BC Branch: Script on spousal support ^[12]
- Clicklaw: Various resources on spousal support ^[13]
- DIVORCEmate's free basic spousal support calculator ^[14]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 16, 2013.

References

- [1] <http://canlii.ca/t/1f4h7>
- [2] <http://canlii.ca/t/1pvt2>
- [3] <http://www.eia.gov.bc.ca/publicat/bcea/fmp.htm>
- [4] <http://www.fmep.gov.bc.ca>
- [5] <http://laws-lois.justice.gc.ca/eng/acts/I-3.3/index.html>
- [6] <http://www.cra-arc.gc.ca/menu-eng.html>
- [7] <http://www.cra-arc.gc.ca/E/pub/tp/it99r5-consolid/>
- [8] <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html>
- [9] <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/index.html>
- [10] <http://clicklaw.bc.ca/resource/1641>
- [11] <http://www.fmep.gov.bc.ca/>
- [12] <http://clicklaw.bc.ca/resource/1239>
- [13] <http://clicklaw.bc.ca/global/search?k=spousal%20support>
- [14] <http://mysupportcalculator.ca>

Basic Principles of Spousal Support

Spousal support can be payable, or not payable, because of a family law agreement or because of a court order. When support can't be agreed on, married and formerly married spouses can apply for spousal support under the federal *Divorce Act*. Although both married and unmarried spouses can apply for spousal support under the provincial *Family Law Act*, there are special rules about how a couple qualify as spouses under that act and special rules about when claims for spousal support can be made.

This section provides an introduction to the basic principles of the law on spousal support, and explores how spousal support is awarded under the *Divorce Act* and the *Family Law Act*.

It also discusses the basics of calculating the amount of support to be paid when someone is entitled to receive it, and looks at the sort of support orders the court can make, including interim and final orders.

Introduction

Generally speaking, an order or agreement requiring the payment of spousal support is appropriate where:

1. a spouse has suffered economic loss or hardship as a result of the relationship or the breakdown of the relationship,
2. there is a contract between the spouses that requires that spousal support be paid, or
3. a spouse is in financial need after separation and the other spouse has the ability and disposable income to meet that need.

A person who is claiming spousal support in court will generally wind up making his or her application based on one of these grounds. In determining whether the ground has been proven, the court will look at the factors and requirements set out in the relevant legislation.

The *Divorce Act*

If the claim for spousal support is being made under the federal *Divorce Act*, the parties must be or have been married, and the person asking for spousal support must have lived in the province in which the court proceeding is started for at least a year before the proceeding is started.

The objectives that the court will look at in deciding whether a spouse is entitled to spousal support are set out at s. 15.2(6) of the *Divorce Act*. If a spouse is entitled to spousal support, the factors that the court will review to determine the amount of support and the length of time for which it should be paid are set out in s. 15.2(4). The Spousal Support Advisory Guidelines may also be used to help decide how much support should be paid and for how long it should be paid.

The Family Law Act

If the claim is being made under the provincial *Family Law Act*, spousal support is available for married and unmarried spouses. For unmarried spouses, spousal support may be payable, providing that:

1. the parties lived in a "marriage-like relationship" for at least two years, or
2. the parties lived in a marriage-like relationship for less than two years and have a child together.

Married spouses must start a court proceeding claiming spousal support within two years of the date of their *divorce* or an order *annulling* their marriage. Unmarried spouses must start a court proceeding within two years of the date of their *separation*.

(The *Divorce Act* doesn't have any rule about when an application for support can be brought following divorce; under that law, a spouse is always a spouse entitled to apply for support.)

The objectives that the court will look at in deciding whether a spouse is entitled to spousal support are set out at s. 161 of the *Family Law Act*. If a spouse is entitled to spousal support, the factors that the court will review to determine the amount of support and the length of time for which it should be paid are set out in s. 162.

The *Family Law Act* objectives and factors for spousal support are the same as the *Divorce Act* objectives and factors, and the Spousal Support Advisory Guidelines may also be used to help decide how much support should be paid and for how long it should be paid.

June and Ward Cleaver: An explanation of spousal support

The point of spousal support is to provide assistance to a spouse who is financially dependent on the other spouse, or to a spouse who has been financially disadvantaged as a result of the relationship. Let's use *Leave it to Beaver* as an example.

June and Ward are married and have a very traditional relationship. Ward works in an office downtown and June stays at home caring for Wally and the Beaver.

June, who might well have been a research scientist at NASA before she got married, has chosen to abandon her career to take care of Wally and the Beaver and make sure that Ward has a nice hot dinner waiting when he comes home.

Ward, on the other hand, has been given the opportunity to have a fabulous career. June's labour in the home has freed his time up so that he can go to work and get raises and promotions, without having to worry about getting the Beaver ready for school, preparing meals for the family, or doing the dishes.

Skip forward a few years. Ward discovers that June's relationship with the mail carrier isn't quite as businesslike as he'd thought. Ward and June separate, Wally moves in with his girlfriend and the Beaver stays with June in the former family home. Ward moves into a new apartment with his secretary.

As a result of the way that Ward and June handled their marriage, Ward has been allowed to pursue a successful career and earn lots of money. Ward is in a great position to move on with his life.

June, however, isn't so lucky. Her research skills from her work at NASA are obsolete, her master's degree in orbital dynamics isn't relevant any more, and she has no idea how to operate the fancy new equipment that NASA has bought since she last worked there. Making matters worse, the last entry on her resume is fifteen years old. If June's going to go back to work, it won't be at NASA, it'll be at Tim Hortons.

In this example, June has been financially disadvantaged as a result of the marriage. While Ward is in good shape and his career shows no sign of decline, June has no way to easily re-enter the workforce because her job skills are out-of-date. Of course, they have two great kids, but the best job June will be able to get will be as a Tim Hortons trainee, and that won't pay enough to cover the cost of the mortgage, the gas bill, the phone bill, and all of life's sundry other expenses.

As a result of how Ward and June elected to manage their marriage, Ward will, in all likelihood, have to pay spousal support to June to help her get by and help maintain the house while she upgrades her education and gets some job retraining.

Spousal support and the division of property

The issues of spousal support and the division of the family property are somewhat intertwined. The court usually will only turn its mind to the question of spousal support after the family property, if any, has been divided between the parties. The reason for this is that the object of an order for spousal support may have been adequately addressed or partly addressed by the order the court makes about the division of property.

In such circumstances, there may be no order for spousal support, or the amount of support required may be intended to simply "top up" the order for property division such that the objects of spousal support will be met.

Spousal support, fault and misconduct

Divorce in Canada has been "no-fault" since the *Divorce Act* was updated in 1968, and the *Family Relations Act* followed suit when it was introduced in 1972.

A *no-fault* system means that the conduct of the spouses during their relationship and the reasons why their relationship has ended have nothing to do with whether spousal support is payable, how the children wind up being cared for, or how property and debt are divided. Whether someone was abusive or a cheater, for example, is not relevant to the court's consideration of these issues. In fact, s. 15.2(5) of the *Divorce Act* says:

In making an order [for spousal support] the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

The Supreme Court of Canada, in a 2006 *Divorce Act* case called *Leskun v. Leskun* ^[1], [2006] 1 SCR 920 confirmed that the conduct of the spouses must not be taken into consideration in making a decision about whether spousal support should be paid following the end of their marriage.

The *Family Law Act* takes a slightly different approach. Section 166 says this:

In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably

- (a) causes, prolongs or aggravates the need for spousal support, or
- (b) affects the ability to provide spousal support.

In other words, under the *Family Law Act*, the court cannot consider misconduct in the relationship (the same as under the *Divorce Act*), but the court can look at the parties' behaviour after they separate, and whether the recipient is doing the things that need to be done to become economically self-sufficient or the payor is doing things that undermine his or her ability to pay support.

Securing a spousal support obligation

Under s. 170 of the *Family Law Act*, the court may make a number of additional orders when it is making an order for spousal support that can help to ensure that spousal support continues to be paid, including after the death of the payor. The court may:

1. order that a charge be registered against property,
2. require a payor with life insurance to maintain that policy and specify that a spouse will be the beneficiary or the policy, or
3. order that spousal support continue to be paid after the payor's death and be paid from his or her estate.

Before the court makes an order that requires spousal support to be paid from the payor's estate, under s. 171(1), the court must consider:

1. whether the recipient's need for support will survive the payor's death,
2. whether the payor's estate is sufficient to meet the recipient's needs, taking into account the interests of the people who stand to inherit from the payor's estate and the creditors entitled to be paid from the payor's estate,
3. whether any other means exist to meet the recipient's needs.

Spousal support when the payor dies

When a payor dies, the recipient can apply to court for an order under s. 171(3)(b) of the *Family Law Act* that the payor's support obligation will continue and be paid from his or her estate.

When a recipient applies to continue a support obligation or if a support order says that the obligation will continue past the payor's death, the payor's *personal representative*, the person managing the payor's estate and will, has the right to defend the recipient's application or to vary or terminate a continuing obligation.

The objectives and factors of spousal support

Under s. 160 of the *Family Law Act*, when a spouse applies for spousal support, the court must determine whether he or she is entitled to support by considering the *objectives* set out in s. 161. If the court finds that he or she is entitled to spousal support, the court must then determine how much support should be paid and for how long by considering the *factors* set out in s. 162.

Section 15.2(6) of the *Divorce Act* and s. 161 of the *Family Law Act* set out the objectives for a spousal support order:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (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;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses; and
- (d) as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The first three objectives are fairly straightforward and are self-explanatory. The last one deserves some comment.

The effect of s. 15.2(6)(d) and s. 161(d) is to impose almost an obligation on a recipient to make his or her best efforts to become self-sufficient at some point following separation. A spousal relationship is not intended to be a lifelong meal

ticket; at some point, a dependant spouse must usually become independent.

These sections of the *Divorce Act* and the *Family Law Act* allow the court to set a date on which spousal support payments will end, in the expectation that by the termination date the recipient will have taken whatever steps are necessary to retrain and find a job which allows him or her to meet his or her daily needs.

While termination dates are often subject to change, unless the recipient is of an advanced age, the relationship was extraordinarily long, or the recipient has a serious medical condition or some other factor that prevents him or her from becoming independent, there will likely be an end date to support payments.

Section 15.2(4) of the *Divorce Act* and s. 162 of the *Family Law Act* set out the factors for a spousal support order

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during the period they lived together; and
- (c) an agreement between the spouses, or an order, relating to support of either spouse.

These factors help the court decide how much spousal support should be paid and for how long, but the court will consider facts about the spouses, their relationship and their circumstances in addition to these.

Spousal support and child support

Section 15.3 of the *Divorce Act* and s. 173 of the *Family Law Act* state that child support must take priority over an order for spousal support. When the payor cannot pay both spousal support and child support, the court is required to make an order for child support at the expense of an order for spousal support. Children come first.

Statutory provisions

These are the primary sections of the *Divorce Act* dealing with spousal support:

- s. 2: definitions
- s. 4: jurisdiction to make spousal support orders
- s. 5: jurisdiction to change orders
- s. 15: definition of *spouse*
- s. 15.2: spousal support orders
- s. 15.3: child support has priority over spousal support
- s. 17: varying support orders

These are the primary sections of the *Family Law Act* dealing with spousal support:

- s. 1: definitions
- s. 3: spouses and relationships between spouses
- s. 146: more definitions
- s. 161: objectives of spousal support
- s. 162: factors to determine the amount and duration of spousal support
- s. 163: agreements about spousal support
- s. 164: setting aside agreements about spousal support
- s. 166: misconduct
- s. 167: varying spousal support orders
- s. 168: review of spousal support

Calculating spousal support

It is difficult to predict how much spousal support will be paid in any given case. You can, however, get a rough idea by looking at each spouse's expenses and the disposable income available to each of them, especially the payor. You should also look at the Spousal Support Advisory Guidelines, which lawyers and the court routinely rely on to determine spousal support payments. This chapter discusses these in the section on the Spousal Support Advisory Guidelines.

In order to decide what should be paid, assuming of course that the recipient is entitled to receive support, it is critical that each party prepare a sworn financial statement where a court proceeding has started or not. You must use the Financial Statement (Form F8 in the Supreme Court and Form 4 in the Provincial Court). The financial statements set out each party's income and assets, expenses and liabilities. Exchanging sworn financial statements is an excellent starting point for figuring out the amount of support that ought to be paid.

Calculating spousal support without the Advisory Guidelines

Assuming that the Advisory Guidelines will not be used, you can use this process to get a rough idea about how much spousal support will be paid.

- First, figure out what the reasonable monthly expenses of the recipient are. These needs will include things like paying the rent, utilities, groceries and so forth. *Reasonable expenses* won't usually include things like savings for RRSPs, vacations or days at the spa; these are luxury items, not necessities.
- Second, subtract from the recipient's monthly expenses any income he or she might have. Typical sources of income include employment income, child tax benefits, baby bonus payments and so forth. The shortfall between the recipient's income and his or her expenses will be the amount of the recipient's monthly needs.
- Third, figure out what the payor's reasonable monthly disposable income is. Take the payor's net monthly pay, subtract the payor's reasonable monthly expenses, and subtract any child support payments. The resulting amount will be the payor's monthly disposable income, which is the amount of extra money the payor has each month for discretionary spending, to put into savings or to provide to his or her spouse.
- Fourth, compare the recipient's monthly needs to the payor's disposable income. If the recipient's needs can be met from the payor's disposable income, a support order will likely be made in that amount. If the recipient's needs can't be met from the payor's disposable income, go back to step one and be more conservative with both parties' expenses.

The payor's monthly disposable income is an obvious place to begin talking about how much spousal support he or she can afford to pay. However, if there is a shortfall between the payor's disposable income and the recipient's need, someone needs to trim some expenses somewhere. Ultimately, if a compromise can't be reached, one of the parties may have to accumulate some debt over the short term. This will usually be the party better able to shoulder the financial burden, which is typically the payor.

The court will not bankrupt a payor in order to meet the dependant spouse's needs. Obviously, there must be a balancing. In many cases this means that both parties must adjust their standard of living to be able to live within the pool of income available to them.

Finally, once a starting figure has been reached, it can be important to look at the income tax consequences to the recipient from receiving support and the income tax benefits to the payor from paying it. Then readjust the amount of support to be paid if desired.

The tax consequences of spousal support sometimes suggest that the basic amount should be adjusted. Because support is a deduction for the payor, he or she will pay less taxes and have more money left over at the end of the year; for a recipient, taxes will be owing on the support payments, and he or she will have less money than expected at the end of the year.

These tax issues are usually resolved in one of three ways:

1. the tax consequences of spousal support can be ignored altogether (this is the most common approach),
2. more spousal support could be paid each month to offset the year-end tax consequences, or
3. the payor could agree to pay any tax debt owed by the recipient resulting from the spousal support.

Where an order or agreement for spousal support does not address these tax issues, it is very important that the recipient set aside a portion of the support he or she receives to pay the tax man. Few recipients are able to pay unexpected tax debts without difficulty.

Calculating spousal support with the Advisory Guidelines

Assuming that the Advisory Guidelines will be used, you can visit DIVORCEmate's website for their free spousal support calculator, mysupportcalculator.ca^[2]. This calculator is very good for simple situations, but if there is anything complicated about your circumstances you may want to meet with a lawyer who has bought DIVORCEmate's expensive commercial software. The lawyer should be able to give you some fairly fine-tuned numbers.

This chapter's section on the Spousal Support Advisory Guidelines discusses the Advisory Guidelines formulas in a lot more detail.

Orders and agreements on spousal support

Spousal support is a very grey area of the law, with few hard and fast rules. As a result, every order or agreement dealing with spousal support will be tailored to the particular circumstances of the parties, even orders and agreements that say that no spousal support will be paid.

Interim orders and agreements

Interim orders are temporary orders made once a court proceeding has started. Interim orders are not meant to be permanent. They last until another interim order is made or the proceeding wraps up with a trial or a settlement. Likewise, *interim agreements* are agreements made when settlement discussions have started, and they are meant to last only until a final agreement is negotiated.

The court will think about the same things when it hears an application for an interim spousal support order as it does at the hearing for a final order. At least, that's the general rule. In reality, however, the court usually takes a pretty rough and ready approach to interim applications based on something called the *means and needs* test.

- Does the person making the application, the *applicant*, have a need for support?
- Does the other person, the *respondent*, have the means to pay it?

The court will not usually attempt to determine whether the applicant's need is related to the relationship or its breakdown in making an interim order for spousal support. In a case called *L.C.M. v. M.A.C.M.*^[3], 2005 BCSC 1786 a 2005 decision of our Supreme Court, the judge said that interim spousal support should only be awarded where an obvious case for entitlement is made out.

Spousal support will often be awarded on an interim basis where:

1. there are young children who need a stay-at-home caregiver,
2. the applicant is unemployed at the time of the application and hasn't worked outside the home for a number of years,
3. the applicant is unemployed and faces barriers to employment, such as a lack of training or poor language skills, or
4. the applicant is employed but is unable to pay his or her household bills without help.

Of course, *need* alone isn't enough, and the person against whom the application is brought must have the ability to actually *pay* support. Whether the payor has the means to pay support is usually figured out by looking at the payor's monthly income, less any child support obligations, less his or her reasonable monthly expenses. If there is money left over, if there is *disposable income*, some or all of that money is available to be paid as spousal support.

Depending on the respondent's ability to pay, the amount of spousal support awarded may be enough to equalize the parties' incomes and, sometimes, enough to help the applicant enjoy more or less the same standard of living that he or she enjoyed before the parties separated.

Final orders and agreements: periodic payments

Under the *Divorce Act* and the *Family Law Act*, a court may make an order for spousal support for regular payments, called *periodic payments*, to run for a fixed period of time (a *definite* term), or to run without a particular end date (an *indefinite* term). Whether an order requires that spousal support be paid for a definite or indefinite term will depend on the particular circumstances of each case. In general, however, the longer the relationship was and the older the parties are, the more likely it is that the court will make an indefinite order for spousal support.

Indefinite obligations

Indefinite orders for spousal support are often made where one or more of the following circumstances exist:

1. the parties' relationship was lengthy,
2. the recipient is unable to re-enter the work force because of physical or mental health issues,
3. the recipient is elderly and unable or likely unable to re-enter the workforce,
4. the recipient's child care or other obligations make it impossible for him or to re-enter the workforce, or
5. the consequences of the breakdown of the relationship, including mental health issues such as depression, have left the recipient unable to work.

An indefinite order or agreement for spousal support can also set out the conditions for the termination of that obligation. The most typical of these conditions are that:

1. if the recipient remarries,
2. if the recipient lives with another person in a marriage-like relationship for longer than a certain amount of time,
3. if the recipient obtains employment and earns more than a specified amount,
4. if the payor retires, or
5. if the recipient or the payor dies.

Reviewable orders and agreements

Under s. 168 of the *Family Law Act*, an order or agreement that requires the payment of spousal support can be *reviewable*.

A reviewable order or agreement for spousal support is one that says that spousal support must be paid indefinitely but that the payor's obligation to pay support or the recipient's entitlement to receive it will be reviewed at a later date, called a *review date*. A review date may be a particular day, usually not sooner than two years after the date of the agreement or order, or it may be triggered by a particular event such as:

1. the children leaving home,
2. the recipient recovering from an illness,
3. the recipient becoming employed or finishing a course of training or education,
4. the recipient or the payor reaching a certain age or retiring,

5. the recipient or the payor beginning to receive pension benefits,
6. the sale of a property, or
7. the recipient entering into a new spousal relationship.

When the review date arrives, the obligation to pay spousal support does not automatically expire unless the order or agreement expressly says so. The obligation usually continues until the review finally takes place, whether the review is started by the recipient or the payor.

At the review, either spouse may seek to cancel or extend the support obligation, or to reduce or increase the amount of spousal support paid. The review will usually be based on parties' financial circumstances at the time of the review, but can take into account other factors, like the recipient's health or the recipient's efforts to find employment. A reviewable order or agreement can specify how the review will be conducted, which might be by mediation, a collaborative settlement process, or arbitration. Reviews don't have to happen in court.

Definite-term obligations

Orders or agreements that provide that spousal support is to be paid for a specific period of time are usually made when it is clear that a dependant person has the ability to become self-sufficient within a fairly short amount of time or a payor's resources are plainly limited.

Definite term orders and agreements for spousal support are often made where one or more of the following conditions apply to a relationship:

1. the recipient of support is in a new relationship and the new person's income is expected to contribute to the recipient's needs,
2. the recipient has relevant job training or skills at the time that the relationship breaks down and is expected to return to work in short order,
3. the recipient had a successful career before or during the relationship and is expected to return to work in short order,
4. the recipient merely requires some time to adjust to his or her new living circumstances and will become self-sufficient relatively quickly, or
5. the recipient is ill or disabled at the time of the making of the order or agreement but is expected to recover and re-enter the work force.

The length of time for which support must be paid usually reflects one or more of the following factors:

1. the length of the parties' relationship,
2. the extent and nature of the parties' employment during their relationship,
3. the time the court estimates it will take the recipient to complete job training, if unemployed,
4. the amount of the recipient's income, if employed,
5. the payor's retirement date,
6. the recipient's anticipated length of recovery from an illness, or
7. the age at which the children will enter school or the age at which they can enter daycare.

Final orders and agreements: lump-sum payments

A *lump sum* order or agreement for spousal support requires the payor to make a large, one-time-only payment of spousal support. This kind of spousal support payment is fairly rare, partly because the payment of a lump sum of spousal support is often difficult to distinguish from the division of property, partly because a lump-sum payment may not adequately address the need the payment of spousal support is meant to address, and partly because few payors can afford to make a lump-sum payment.

Whether the court is dealing with an application for lump-sum spousal support rather than the more usual periodic-payment support obligation, the court will usually be concerned that the payment of spousal support isn't going to act as a substitute for the division of family property. The court will also be concerned that a lump-sum payment may not actually help the recipient become financially independent.

Payors are sometimes interested in lump-sum spousal support payments for the reason that the single payment will allow them to wash their hair of the other party and have done with it immediately, rather than having to deal with the other party on an ongoing basis. Recipients are usually interested in lump-sum spousal support payments where the cash is needed to make a down payment or some other payment that will contribute to their future security.

The court may be prepared to make an order for a lump sum, either alone or in addition to a periodic support order, where:

1. the payor has a history of failing to make periodic support payments,
2. the payor has been dishonest or deceitful during the trial, particularly with respect to the extent of his or her finances,
3. there is so much anger and animosity between the parties that the payor is unlikely to comply with an order for periodic payments,
4. the money is necessary to provide a home for the recipient,
5. the money is necessary to give the recipient financial security that cannot be had by periodic payments,
6. the payor is financially well-off and can afford to make the payment,
7. the payor is able to pay a lump sum and the likelihood of the payor being able to make future periodic payments of support is low,
8. the money will promote the recipient's self-sufficiency, or
9. periodic payments will not encourage the recipient to become self-sufficient.

Lump-sum awards are available on interim applications, but such awards are unusual. A lump-sum payment may be ordered if it is clear that: the payment will provide immediate relief for the recipient; ongoing monthly payments will not be necessary; and, the payor has the ability to make the payment.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Documents

- Spousal Support Advisory Guidelines ^[4]

Links

- Free Basic Spousal Support Calculator from DIVORCEmate ^[2]
- ChildView Spousal Support Calculator Software ^[5]
- Department of Justice: About spousal support ^[6]
- Legal Services Society's Family Law Website: Spousal support ^[7]
- Canadian Bar Association BC Branch: Script on spousal support ^[8]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

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- [3] <http://canlii.ca/t/1mtw3>
- [4] <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html>
- [5] <http://childview.ca/>
- [6] <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/index.html>
- [7] <http://clicklaw.bc.ca/resource/1641>
- [8] <http://clicklaw.bc.ca/resource/1239>

The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines ^[1] is an academic paper released by the federal Department of Justice in July 2008. It is not a law and is not expected to become a law.

When someone is entitled to receive spousal support, the Advisory Guidelines describes several different formulas that can be used to calculate how much support should be paid and the length of time it should be paid for.

While no one is required to use the Advisory Guidelines, lawyers and the courts routinely use them in making decisions about spousal support.

This section provides an introduction to the Spousal Support Advisory Guidelines. It discusses what the courts have had to say about the Advisory Guidelines and describes how its formulas work, how they can be restructured for fairness, and what exceptions exist to the formulas.

An introduction to the Spousal Support Advisory Guidelines

In 2001, the federal Department of Justice struck an advisory working group to look into the feasibility of uniform guidelines for the calculation of spousal support. The group was composed of judges, family law lawyers, law school faculty members, and social workers. The group was led by Professors Carol Rogerson and Rollie Thompson, both gifted and highly qualified academics with strong backgrounds in family law.

In January 2005, Professors Rogerson and Thompson released their first paper, *Spousal Support Advisory Guidelines: A Draft Proposal*, for public comment and feedback. After touring the country speaking to judges, lawyers and academics, and monitoring the case law on the draft Advisory Guidelines as it developed over several years, Rogerson and Thompson released their final paper, *Spousal Support Advisory Guidelines*, in July 2008.

The legal status of the advisory guidelines

The Advisory Guidelines is not a law, and people involved in family law disputes are not bound by it. As of July 2008, the Department of Justice said that it had no plans to turn the Advisory Guidelines into a law and didn't intend to do so. I've heard nothing to suggest a contrary intention since.

The Advisory Guidelines in a nutshell

The Spousal Support Advisory Guidelines is an attempt to capture how the majority of Canadian court decisions on spousal support have determined how much support should be paid, and how long support should be paid for, in mathematical formulas. It is not intended to change the law on spousal support, rather it is intended to normalize future decisions about spousal support based upon how the general majority of past court decisions have dealt with the issue.

Influence of existing law

The Advisory Guidelines attempts to reflect current practice under the existing law. The Advisory Guidelines is not based on any particular theory of spousal support; it is an independent attempt to reflect the results currently found in the case law on the subject.

Income sharing

The essential concept underlying the Advisory Guidelines is the calculation of support based on the total disposable income available to both parties, rather than looking at each party's needs and means separately. The formulas work with the total amount of money collectively available to a couple.

Income sharing does not mean an equal division of income, however, and the ranges the Advisory Guidelines proposes when child support is paid is between 40% and 46% of the total disposable income available to both parties. When no child support is paid, the Advisory Guidelines gives the recipient a share of the difference between the recipient's income and the payor's income, which increases with the length of the relationship.

Entitlement to support

The Advisory Guidelines does not deal with whether a spouse is entitled to receive support. Entitlement is, of course, the first question to be decided when dealing with an application for spousal support. The Advisory Guidelines will only be used when a spouse is found to be entitled to spousal support.

Amount of support

When no child support is paid, the length of the marriage is central in determining both the amount of support payable and the duration for which support must be paid: the longer the relationship, the more support is paid for longer. The parties' gross incomes are used to determine spousal support.

Where child support is paid, the amount of support payable will be calculated taking into consideration the payment of child support and the different tax rules relating to spousal support and child support. The parties' net incomes are used to determine spousal support.

Duration of support

In many cases, the Advisory Guidelines sets out a range of years that support will be paid for. In certain cases, such as long marriages, where the dependant spouse is older or when child support is paid, support will be paid for an indefinite period of time.

The key factors in determining the length of time for which support will be paid are the length of the marriage plus any period of time the parties lived together before marriage, the age of the recipient of support and the age of the youngest child.

Upper and lower income limits

The Advisory Guidelines has both floors and ceilings: where a payor's income is below \$20,000, no spousal support will be payable; and, where a payor's income exceeds \$350,000, the payor should pay at the amount for incomes of \$350,000. The payor's income above that ceiling will be taken into account only at the discretion of the court.

Exceptions to the formulas and restructuring the results

To every rule there is an exception, and the Advisory Guidelines is no different. The ranges the Advisory Guidelines formulas produce aren't carved in stone. Factors such as advanced age, illness, debt load and so forth may suggest that the results for amount, duration, or both should be ignored.

The Advisory Guidelines also allows for the restructuring of a support award to pay more for a shorter time, to pay less for a longer time, or to pay it all up front in one lump sum. Restructuring keeps the total amount paid within the results generated by the Advisory Guidelines formulas.

Unmarried spouses

The Advisory Guidelines is written for married or formerly married spouses, because the federal government only has the authority to make rules about spousal support for married couples. The Advisory Guidelines is therefore based on the factors and tests set out in the *Divorce Act* rather than those set out in the different provincial laws about family breakdown and spousal support.

That said, the Advisory Guidelines works just as well to decide spousal support for married spouses and unmarried spouses since the law that applies to determine spousal support for unmarried spouses in British Columbia, the *Family Law Act*, works in exactly the same way as the *Divorce Act*.

The author's view

The Advisory Guidelines has melded seamlessly into family law practice in this province and is routinely used to determine spousal support, whether in the course of litigation, arbitration, mediation, or negotiation. Professor Thompson was exactly correct when he predicted that lawyers and the courts would come to rely on the Advisory Guidelines by custom. Frankly, the Advisory Guidelines offers a seductively easy solution to a difficult problem.

My views on the Advisory Guidelines have mellowed with time, and while many of my basic concerns remain, they have assumed a lesser significance. Arbitrariness is good, I have concluded. After all, the Child Support Guidelines are essentially arbitrary and so are many other principles of family law. Take the shared custody exception for the calculation of child support. Why 40%? Why not 38.5 or 41.3%? The answer to that question is, I think, "why not?" There has to be a tipping point somewhere, and exactly where on the scale that tipping point lies is immaterial as long as it has some rational, defensible foundation.

The point of the arbitrariness of the Child Support Guidelines is to reduce conflict by setting out a fixed sum that must be paid depending on nothing more than the payor's income and the number of children. The same principle applies to the Spousal Support Advisory Guidelines, although the formulas are a lot more complicated. If an arbitrary set of numbers reduces conflict and saves money, I'm all for it, as long as those arbitrary numbers have a certain fundamental reasonableness to them.

DivorceMate's spousal support calculator

Until fairly recently, my enthusiasm for the Advisory Guidelines was primarily tempered by the absence of public, free spousal support calculators. This seemed to me to be an appropriate function of government, particularly as it was government that funded the Advisory Guidelines project, however the Department of Justice had no enthusiasm for the project. Making things worse, the two main manufacturers of spousal support software, DivorceMate and ChildView, would not sell their product to people who weren't employed in the justice system in some capacity.

This all changed in April 2011 when DivorceMate stepped up to the plate with a free public website, mysupportcalculator.ca ^[2]. The website performs child support calculations under the Child Support Guidelines and spousal support calculations under the Advisory Guidelines. The results of the spousal support calculations do not precisely match the results produced by their bells-and-whistles product for professionals and do not account for all of the factors that can impact on the results (such as source of income, tax benefits, deductions and credits, payments to special expenses, and so forth). However, the results will be fine for most people most of the time. DivorceMate deserves much credit for making this resource available, and I thank them for it, whether the resource is a revenue-generating advertising platform or not.

The views of the courts

On 4 July 2005, the British Columbia Supreme Court released its first judgment considering the Advisory Guidelines, in the case of *W. v. W* ^[3], 2005 BCSC 1010. The judge said that the Advisory Guidelines "provide a cross check against the assessment made under existing law", and that the formulas provided in the Advisory Guidelines are "consistent with the law in British Columbia". She then made an order for spousal support using the Advisory Guidelines as "a check," without expressly applying the Advisory Guidelines to determine the issue. The Advisory Guidelines, she held, is not law, and is not intended to become law.

On 19 July 2005, the court released its second judgment on the Advisory Guidelines, *M.S. v. W.S.* ^[4], 2005 BCSC 939. In this case, the judge held, rather emphatically, that the court is not bound by the Advisory Guidelines in determining spousal support and that "equitable distribution can be achieved in a variety of ways and need not be calculated according to a strict formula."

This view was softened later in 2005 by the Court of Appeal in the case of *Yemchuk v. Yemchuk* ^[5], 2005 BCCA 406. In this case, the court held that the Advisory Guidelines reflects the general results seen in the case law on spousal support. While the court stopped well short of saying that the Advisory Guidelines must be used to determine spousal support, it did consider the Advisory Guidelines "a useful tool" and "a factor" to be considered in making an order for spousal support, and made an order for support that was within a hair's breadth of the numbers the Advisory Guidelines formulas produced.

The state of the law in British Columbia

As a result of *Yemchuk*, the law in British Columbia was that the Advisory Guidelines is a factor to be taken into account in fixing the amount and duration of an order for spousal support, but that it is no more than a factor. This changed with *Redpath v. Redpath* ^[6], 2006 BCCA 338, a 2006 decision of the Court of Appeal, in which the court held that it is an appealable error for a judge to fail to consider the results produced by the Advisory Guidelines. This moves things well beyond *Yemchuk*, as now a trial judge *must* consider the Advisory Guidelines formula results in making a decision on spousal support. In 2010 the Court of Appeal went even further in *Domirti v. Domirti* ^[7], 2010 BCCA 472, ruling that an award of spousal support that falls substantially outside the Advisory Guidelines ranges may be an appealable error.

The law in British Columbia, then, is that the results of the Advisory Guidelines calculations must be considered when making a decision on spousal support. The Advisory Guidelines is, in other words, all but mandatory in this province.

(Of course, this also means that lawyers must become proficient in using the Advisory Guidelines formulas or they risk giving their clients and the courts incorrect information. The Without Child Support calculations, discussed later, are not terribly complex, but the With Child Support calculations demand a basic knowledge of the federal and provincial benefits and credits relating to children, the different deductions that apply to employment and self-employment income, received versus taxable dividends, and a few other wrinkles relating to the calculation of after-tax income. Owning the software required to do the Advisory Guidelines calculations isn't enough. Lawyers need to know how to expertly use that software, with tax and income issues in mind, and the software has to do the math and actually perform those calculations correctly.)

The law in other provinces

Many courts in Canada's other provinces and territories have talked about the Advisory Guidelines in much the same way as our courts have, although with varying degrees of enthusiasm. Alberta has led the charge against the Advisory Guidelines and is the province in which it is least likely to be used to determine a spousal support obligation.

Here is a sampling of judicial comment on the Advisory Guidelines.

Woodall v. Woodall ^[8], 2005 ONCJ 253, Ontario Court of Justice, 2005:

"Although the Spousal Support Advisory Guidelines may be of some assistance to the court on an initial application for spousal support, it must be noted that they are advisory only and are not binding on the court. More importantly, the authors of the guidelines make it very clear in the Executive Summary ... that the advisory guidelines do not deal with the effect of a prior agreement on spousal support and that this issue, like entitlement, is outside the scope of the advisory guidelines and would continue to be dealt with under the evolving law guided by the Supreme Court of Canada's recent decision in *Miglin v. Miglin*."

Puddifant v. Fraser ^[9], 2005 NSSC 340, Nova Scotia Supreme Court, 2005:

"Counsel urged the court to consider the Spousal Support Advisory Guidelines. These are not law."

Modry v. Modry ^[10], 2005 ABQB 262, Alberta Court of Queen's Bench, 2005:

"These Guidelines are not mandatory and are only a suggestion. There has been very little judicial analysis of the Guidelines as they are new."

"I suggest that courts will likely use these Guidelines as a bench mark to see what the support amount would be if the Guidelines were applied. Thus it will serve as another method of calculation, which when coincidentally echoing judicial discretion, will become referenced with approval. In other cases where the courts are either astonished by the payment proposition, that is that the math creates a number that is perceived to be too high or inadequate, the courts will shy away from its application."

And, finally, my personal favourite for the judge's powerful and florid language, *V.S. v. A.K.* ^[11], 2005 ABQB 754, Alberta Court of Queen's Bench, 2005:

"The provisions of the *Divorce Act* as interpreted by the Supreme Court of Canada are the law in this country with respect to spousal support. The Spousal Support Advisory Guidelines are the work of two university professors, Carol Rogerson and Rollie Thompson, assisted by a small committee. Those with strong views to the contrary were not involved, nor was there widespread discussion of the guidelines prior to their publication. They have not been enacted by the Parliament of Canada or any Provincial Legislature nor are they the subject of any governmental regulation.

"The Guidelines are a cause for concern. There is no doubt that they are useful for a judge who does not wish to make a thorough and careful analysis of each case and wants a quick answer. However, it is not the role of judges to opt out for an easy answer. Rather judges are bound by the *Divorce Act* and the case law which require judges to do individual justice in each case and not look for a 'cookie cutter' answer.

"As well, the Guidelines are stated to be experimental. It is not the function of courts to experiment on the citizens of this country.

"The authors of the Guidelines state that the Guidelines do not change the law. However, in my view, they attempt to do so. For example, they advocate income sharing which has rarely been accepted in this country except for exceptionally long term marriages. It will not be long before someone will argue that disparity in income equals entitlement. As indicated by Chouinard, J. in *Messier v. Delage*, a person does not acquire a lifetime pension as a result of marriage. Likewise, marriage is not an insurance policy. The Guidelines also ignore the distribution of matrimonial property which the Supreme Court of Canada in *Boston v. Boston*, said was relevant. They ignore the goal of self-sufficiency as set out in the *Divorce Act*. Also they fail to take into account the growing trend, at least in Alberta, towards shared parenting.

"The Guidelines purport not to deal with entitlement. Under the *Divorce Act* there are degrees of entitlement based on a multitude of factors. However, the ranges set out in the Guidelines are not sufficient to cover the many possible degrees of entitlement.

"The Guidelines set an arbitrary and presumptive range for both amount and duration. The onus is reversed requiring the payor to justify an exception to the Guidelines. The presumptive nature of the Guidelines does away with a claim based on evidence.

"The stated purpose of the Guidelines is to bring more certainty and predictability to the determination of spousal support. As a result individual justice is sacrificed for consistency. Every case is different on its facts. There are often many variables. Flexibility and discretion are needed for individual circumstances.

"Judges should exercise extreme caution in using the Guidelines. The *Divorce Act* and the decisions of the Supreme Court of Canada call on judges to undertake a thorough analysis in each case. Not to do so is to disregard the views of the highest court in this country and to make a mockery of stare decisis."

The formulas

The Advisory Guidelines describes two basic formulas:

- One formula for when child support is not being paid (the *Without Child Support Formula*), as might be the case if the couple have no children or if all of the children are adults and financially independent at the time of separation.
- Another formula for when there is a legal obligation to pay child support (the *With Child Support Formula*), whether child support is actually being paid or not.

The main With Child Support Formula is designed for situations where the person receiving spousal support is also the person receiving child support. Since this isn't always the case and the amount of child support that's being paid isn't always the amount required by the Child Support Guidelines, the Advisory Guidelines has a few variations of the With Child Support Formula that will apply:

- when custody of the children is shared (when the parents have the children for an equal or near-equal amount of time),
- when custody of the children is split (when each parent has the primary residence of one or more children),
- when the person receiving spousal support is the person paying child support, and
- when all of the children for whom support is being paid are older than the age of majority.

The *Without Child Support* formula

The Without Child Support Formula is fairly straightforward:

The **amount** of support is 1.5 to 2 percent of the difference between the parties' gross incomes for each year of marriage.

For example, say a relationship is 10 years long, and Party A has a gross income of \$50,000 and Party B has an income of \$20,000. The difference between the parties' incomes is \$30,000. Party B would have share in the difference of 15 to 20 percent (1.5 times 10 and 2 times 10), or between \$4,500 and \$6,000 per year. On a monthly basis, support would be paid at \$375 to \$500.

The **length of time** support will be paid is 0.5 to 1 year for each year of the relationship. If a couple have been together for more than 20 years, or if the age of the dependant party plus the number of years of the relationship equals 65, support will be paid indefinitely.

Using the same example, support would be payable for 5 to 10 years (0.5 times 10 and 1 times 10). If, however, the dependent party was 55 at the time of separation, support would be paid indefinitely (55 years of age plus 10 years equals 65).

The maximum amount payable under this formula ranges from 37.5% of the difference between the parties' gross incomes to 50% of the difference between the parties' incomes, net of taxes and benefits.

The maximum time spousal support can be payable under this formula ranges from an amount of time equal to the duration of the parties' cohabiting relationship to an indefinite amount of time.

The factors this formula uses are:

- the payor's gross income,
- the recipient's gross income,
- the length of time the parties lived together, and
- the recipient's age.

The main *With Child Support* formula

This formula is a lot more complex. In this formula, child support is taken out of the payor's gross income and the recipient's income, taxes are taken into account, and government benefits are added to the recipient's income. The reason why child support is deducted from the recipient's income is to reflect the costs that parents bears in raising the children.

The **amount** of support is 40 to 46% of the payor's individual net disposable income plus the recipient's net disposable income.

The **payor's net disposable income** is his or her gross income, minus taxes and minus his or her child support obligation, including the tax credits he or she receives as a result of paying spousal support.

The **recipient's net disposable income** is his or her gross income, minus taxes and minus his or her notional child support obligation, plus any government benefits he or she receives, less the taxes payable as a result of receiving spousal support.

Say the parties have an 8 year old child, the payor has a gross income of \$50,000 and the recipient has an income of \$20,000. The payor's net disposable income is \$26,710 (\$50,000 minus taxes of \$15,570, minus annual child support of \$5,112, minus EI deductions of \$772, minus CPP deductions of \$1,831). The recipient's net disposable income is \$15,045 (\$20,000 minus taxes of \$4,410, minus notional child support of \$2,052, minus EI deductions of \$396, minus CPP deductions of \$816, plus child tax benefit of \$1,208, plus national child benefit of \$1,511).

The family's net disposable income is \$41,755 (\$26,710 plus \$15,045). 40 percent of the net disposable income is \$16,702; 46 percent of the income is \$19,207. After deducting the recipient's net disposable income, the difference between the recipient's income and 40 percent of the family's disposable income is \$1,657 per year, and \$4,162 for 46 percent.

On a monthly basis, spousal support would be between \$138 and \$346. The total the payor would pay each month would be spousal support plus \$426 in child support.

The **length of time** for which support will be paid ranges from the longest of two formulas used to determine the low end of the range to the longest of two formulas used to determine the high end of the range. If a couple have been together for more than 20 years, or if the age of the dependant party plus the number of years of the relationship equals 65, support will be paid indefinitely.

The **low range** formulas for duration are:

- 1) 0.5 years for each year of the relationship
- 2) the length of time remaining until the youngest child starts full-time school

The **high range** formulas for duration are:

- 1) 1 year for each year of the relationship
- 2) the length of time remaining until the youngest child finishes full-time school

I told you it was complex. To quote Professor Thompson, "this is not a calculation you can do on the back of an envelope, you will need a computer program." This formula requires a detailed understanding of how income is determined under the Advisory Guidelines and of the various government benefits, tax deductions and tax credits that can apply to adjust net income.

I've written a paper on the subject for the Department of Justice, "Obtaining Reliable and Repeatable SSAG Calculations ^[12]," which is available to the public. Be warned: it's a bit dry.

The maximum amount payable under this formula is the range the formula sets out: 40% to 46% of the difference between the payor's net disposable income and the recipient's net disposable income.

The maximum time spousal support can be payable under this formula is an indefinite amount of time.

The factors this formula uses are:

1. the payor's gross income,
2. the recipient's gross income,
3. the length of time the parties lived together,
4. the recipient's age,
5. the number of children child support is payable for, and
6. the number of years until the youngest child starts and leaves full-time school.

The other *With Child Support* formulas

The Advisory Guidelines describe a few other formulas that apply when:

1. all of the children are over the age of majority,
2. the parents have split custody of the children,
3. the parents have shared custody of the children,
4. the children live with the payor, or
5. the children are step-children to the payor.

These formulas use modified or hybrid versions of the Without Child Support and main With Child Support formulas.

Restructuring the results of the Advisory Guidelines formulas

The Advisory Guidelines includes a few ways to accommodate circumstances that might make the formulas' results unfair to the people involved. The Advisory Guidelines requires that the parties first attempt to use the ranges to solve the problem, but allows for the results to be *restructured* if adjustments within the ranges fail to solve the problem.

There are three ways the results can be restructured:

1. pay more spousal support each month, but for a shorter period of time,
2. pay less each month, but pay for a longer period of time, or
3. pay the total amount payable over the period of the award in a single lump sum.

The point of each option is that the total amount payable under the formula results stays the same. The total amount is just paid sooner or later than the results for duration would normally require.

Restructuring will not work if the length of time support is to be paid for is indefinite. In cases like this, the best option is probably to build in a review date, a date on which the recipient's entitlement to receive spousal support will be checked.

Exceptions to the Advisory Guidelines formulas

If adjusting support within the ranges doesn't work and if restructuring support doesn't work, the Advisory Guidelines allows parties to depart from the numbers produced by the formulas to accommodate their special circumstances. The authors of the Advisory Guidelines are clear that these exceptions are to be treated as a last resort.

Greater need for compensation

In shorter marriages, the results produced by the formulas might not reflect a recipient's right to be compensated for a sacrifice made in the course of the marriage. Circumstances that might fall into this exception would include: giving up a job to be with the payor; or, moving across the country to be with the payor and losing a job or a business.

Under this exception, the results produced by the formulas for amount and duration will not apply.

Illness

The length of time the formulas require support to be paid may not be adequate for a recipient who is ill or disabled, or otherwise unable to become self-sufficient.

Under this exception, the results produced by the formula for duration will not apply.

Payment of family debts

A payor who winds up being responsible to pay for debts incurred during the marriage may not be able to meet the payments required by the formula for amount. This will particularly be the case for families whose debts exceed their assets.

Under this exception, the results produced by the formula for amount will not apply.

Other support obligations

In cases where a payor has an obligation to provide support to other people, such as prior spouses or children from previous relationships, the payor may not be able to pay spousal support at the amount required by the formula.

Under this exception, the payor's income is adjusted to deduct the amount of support paid as a result of the previous relationship before calculating the amount spousal support to be paid for the present relationship.

Other exceptions

The Advisory Guidelines allows still other exceptions from the formulas to address situations where a child has special needs that result in the parents having greater expenses than other parents; where a relationship was very short but resulted in significant economic loss to the recipient — like the loss of a career opportunity or an expensive move; where payment of support within the ranges for amount is not sufficient to meet the recipient's needs; and, where the payor's income is not taxed.

If you think your situation falls into one of these exceptions, or one of the exceptions discussed above, you should seriously consider hiring a lawyer for advice about your situation and how the Advisory Guidelines may apply.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Documents

- Spousal Support Advisory Guidelines^[13]
- Spousal Support Advisory Guidelines: Report on Revisions^[14]
- *Obtaining Reliable and Repeatable SSAG Calculations*^[12], by JP Boyd

Links

- DivorceMate's free basic spousal support calculator ^[2]
- Legal Services Society's Family Law Website: Spousal support ^[15]
- Canadian Bar Association BC Branch: Script on spousal support ^[16]
- Department of Justice: About spousal support ^[17]
- SSAG User's Guide ^[18]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Making Changes to Spousal Support

An order for spousal support can be changed by another order. An agreement on spousal support can be changed by another agreement or, if the parties can't agree, by an order.

The test the courts use to decide if an obligation to pay spousal support should change depends on whether the obligation exists because of an order or an agreement. Whichever test is used, there must usually be a good reason why a change is necessary.

This section talks about changing interim orders and final orders for spousal support, changing orders that were made in a different jurisdiction, and changing agreements for spousal support.

Changing interim orders for spousal support

An *interim order* is a kind of temporary order that is made after a court proceeding has started but before the proceeding is finally resolved by a trial or settlement. Changing an order is called *varying* an order.

The Court of Appeal has said that interim orders for spousal support are intended to be temporary, rough-and-ready decisions intended only to tide the parties over until a final order is made, rather than an exhaustive review of the merits of a claim for spousal support. As such, the courts often prefer to allow interim orders to stand when someone wants to change them, and someone asking to vary an interim order cannot expect to just walk into court and have the issue heard again; there must be a good reason why a change in the interim order is required. In the 1999 case *Hama v. Werbes* ^[1], 1999 CanLII 5828 (BCSC), the Supreme Court said that interim order should only be varied when:

"there is a compelling change in circumstances, such that one or both of the parties would be seriously prejudiced by waiting until trial."

This "compelling change" in circumstances must be serious and of such importance that one or both of the parties will be severely disadvantaged unless the matter is addressed immediately. From the point of view of the spouse receiving support, the *recipient*, a compelling change in circumstances might be:

- a loss of supplementary income, such as employment income or WCB benefits, without which the recipient cannot support him- or herself on the amount of spousal support presently being paid,
- an unexpected increase in expenses, such that the amount of spousal support being paid becomes inadequate, or
- an unexpected increase in child care obligations, because of, for example, the extended illness of a child or the birth of a new child, such that the spousal support paid is no longer adequate.

From the point of view of the spouse paying support, the *payor*, a compelling change might be:

- a loss of income, or an unexpected but long-lasting drop in income, such that he or she can no longer afford to make the spousal support payments, or
- an unexpected increase in the payor's child care or child support obligations, such that his or her disposable income has decreased and the spousal support payments cannot be maintained.

If the court agrees and varies the interim order, the new order will also be an interim order and will remain in effect until the issue of spousal support is determined by a final order following trial or a settlement, or until it is varied by another interim order.

The *Divorce Act*

Interim spousal support can be awarded under s. 15.2(2) of the federal *Divorce Act*. Section 17(4.1) of the act allows the court to vary these orders if there has been:

... a change in the condition, means, needs or other circumstances of either former spouse . . . since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Only the Supreme Court can make or vary orders under the *Divorce Act*, and the act only applies to people who are or were married to each other. Applications to vary interim orders are brought by filing a court form called a *Notice of Application*.

The process for making interim applications in Supreme Court is described in the chapter Resolving Problems in Court within the section Interim Applications.

The *Family Law Act*

Spousal support can be awarded under s. 165 of the provincial *Family Law Act*. Section 216(1) of the act allows the court to make interim orders for spousal support, and, under s. 216(3) allows the court to vary such orders:

(3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:

(a) a change in circumstances has occurred since the interim order was made;

(b) evidence of a substantial nature that was not available at the time the interim order was made has become available.

(4) In making an order under subsection (3), the court must take into account all of the following:

(a) the change in circumstances or the evidence, or both, referred to in subsection (3);

(b) the length of time that has passed since the interim order was made;

(c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement

(i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and

(ii) would not necessarily reflect the final arrangement between the parties;

(d) whether a trial has been scheduled;

(e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

Interim orders for spousal support under the *Family Law Act* can be made and varied by both the Provincial Court and the Supreme Court. Only the Provincial Court may vary Provincial Court orders and only the Supreme Court may vary

Supreme Court orders.

Applications to vary Provincial Court orders are made by filing a court form called a *Notice of Motion*. Supreme Court orders are varied by filing a *Notice of Application*.

The process for making interim applications is described in the chapter Resolving Problems in Court within the section Interim Applications.

Changing final orders for spousal support

A final order for spousal support is an order made following the trial of a court proceeding or made by the agreement of the parties as a settlement of the proceeding. Changing an order is called *varying* an order.

In general, a final order is just that, *final*. Without an appeal, a final order represents the end of a court proceeding and cannot be changed. This rule is applied a little less strictly in family law proceedings, and someone who wants to vary a final order for spousal support must be able to show that there has been a serious change in circumstances since the final order was made.

Changing an order refusing support

It used to be the case that a claim for spousal support that was rejected in a final judgment was permanently dismissed, such that any future application for support could not proceed, no matter how things might have changed for someone in financial need.

A 2003 case from the Court of Appeal, *Gill-Sager v. Sager* ^[2], 2003 BCCA 46, called into question just how "final" final orders about spousal support should be. In this case, the court issued a strong caution to trial judges against permanently dismissing a spouse's claim for support. Subsequent cases have interpreted this decision to mean that spousal support claims should never be permanently dismissed, only *adjourned*, so that it will always be open to a spouse to apply for spousal support later on even if the spouse wasn't awarded spousal support at trial.

In practice this means that a final order should not say that a claim for support is *dismissed* but is only *adjourned generally*.

Changing an order granting support

When a party seeks to vary a final order for spousal support, he or she must show that there has been a *material change* in circumstances affecting one or both of the parties. A material change is a significant change. In the 1996 case of *T. (T.L.A.) v. T. (W.W.)* ^[3], 1996 CanLII 1190 (BCCA), the Court of Appeal said that a material change is one which is "substantial, unforeseen and of a continuing nature." In the 1995 case of *G. (L.) v. B. (G.)*, the Supreme Court of Canada said that a material change is one which, if known at the time of the original order, would have resulted in a different order being made.

Section 17(4.1) of the *Divorce Act* says this on the subject:

Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Section 167 of the *Family Law Act* says this:

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

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

(a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;

(b) evidence of a substantial nature that was not available during the previous hearing has become available;

(c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

Although both the *Divorce Act* and the *Family Law Act* agree that a change in the "condition, means, needs or other circumstances" of a spouse is required, the *Family Law Act* provides two additional factors that would allow the court to change an order, when new evidence or proof of a lack of property disclosure is discovered after the last hearing.

Changing reviewable orders for support

Reviewable order for spousal support are orders that impose an obligation to pay spousal support, but allow the order to be reassessed every now and then. Reviewable orders will say something like this:

"The Claimant shall pay spousal support to the Respondent in the amount of \$_____ per month, commencing on the first day of June 2012, and continuing on the first day of each and every month thereafter, subject to a review by either on or after 1 June 2015."

When the review date for an order for spousal support arrives, the payor's obligation to keep making the support payments does not end. The payor's obligation does not end or reduce until the review is held. If neither party is proceeding with the review, the old order continues to be in effect.

A review of spousal support can be handled through negotiation, collaborative settlement processes, mediation, arbitration, or in court. If the one of the parties applies to court for the review, the court will hear the matter *de novo*, a fresh hearing as if the question of spousal support was being determined for the first time. There is no need to establish a change in circumstances at a review hearing.

Changing consent orders for support

A *consent order* is an order that the parties agree the court should make. As such, consent orders have a different status than orders that were argued about, since there is a strong presumption that the parties to the order knew what they were doing when they agreed to the terms of the order, and knew what their circumstances were at the time of the order and what they were likely to be in the future.

The test for changing consent orders for spousal support used to be the "material change" test, referred to above. The question was "has there been a material change in the means and needs connected to the marriage of either spouse that, if known of at the time of the original order, would have resulted in a different order being made?" In the 2003 case of *Miglin v. Miglin* ^[4], 2003 SCC 24, the Supreme Court of Canada decided that the material change test shouldn't apply to changing agreements and consent for support, and described a three-step test to be used when deciding whether a change is warranted:

- Was the order negotiated and entered into fairly, that is, was there an equality of bargaining power?
- If the circumstances that the order was entered into were reasonable, the court must consider whether the order met the objectives for spousal support set out in s. 15.2 of the *Divorce Act* at the time it was made.
- If the order did meet the objectives set out in the *Divorce Act*, does the order still reflect the original intention of the parties and does it continue to meet the objectives for spousal support set out in the *Divorce Act*?

In other words, a court asked to change a consent order for spousal support should first look at the circumstances under which the order was made. Was a party at an unfair advantage? Was a party pressured into agreeing to the order? Secondly, the court should consider whether the order met the criteria for spousal support set out in the *Divorce Act*. Thirdly, if the order passes the first two parts of the test, the court should look at whether the order continues to reflect the parties' intentions at the time the order was made, and whether the order continues to meet the criteria set out in the act.

Orders made outside of British Columbia

It is not always very easy to change an order that was made outside the province because the courts of our province give a great deal of respect to the judgment of the court that made the original order. There are a bunch of other reasons why it can be hard to change an order made outside of British Columbia, but that's the meat of it.

The process that will apply depends entirely on whether the original order was made under the federal *Divorce Act* or under the family law legislation of the jurisdiction whose court made the original order.

***Divorce Act* Orders**

Orders that were made elsewhere in Canada under the federal *Divorce Act* can be changed here under s. 5 of the act, as long as both parties live in British Columbia. Where one party still lives in the province whose courts made the original order, a party living in BC can apply to change the original order using a process described in ss. 18 and 19 of the act:

1. the person making the application, the *applicant*, applies here for a *provisional* order changing the original order,
2. the court sends the provisional order to the court that made the original order, and
3. on notice to the other party, the original court holds a hearing to *confirm* the provisional order.

This process requires two hearings: one here in British Columbia for a provisional order, and a second in the original court to confirm that order. The court in the other province may or may not confirm the provisional order, and may choose to send the order back to BC for more information. Until the provisional order is confirmed, it has no effect and the original order will continue to be the operative order.

Other orders

Orders that were made elsewhere in Canada under provincial family law legislation, or were made in certain countries other than Canada, can be changed by someone living in British Columbia using the provincial *Interjurisdictional Support Orders Act* ^[5]. Governments that have agreed to follow this process under the *Interjurisdictional Support Orders Act* are called *reciprocating jurisdictions*.

The countries that will cooperate with a proceeding under the *Interjurisdictional Support Orders Act* include: South Africa, Zimbabwe, Austria, the Czech Republic, Germany, Gibraltar, Norway, the Slovak Republic, the United Kingdom, the United States of America, the Special Administrative Region of Hong Kong, Singapore, Australia, Fiji, Papua New Guinea, New Zealand and Barbados. The official list of jurisdictions is contained in the *Interjurisdictional Support Orders Regulation* ^[6].

The process under this act is as follows:

1. the applicant completes a bunch of forms provided by the provincial reciprocals office,
2. our reciprocals office sends the forms to the court that made the original order, and
3. on notice of the other party, the original court holds a hearing on the applicant's application and may make an order varying the original order.

Under this process, there is only one hearing, and that hearing is held by the court that made the original order. The court in the reciprocating jurisdiction may or may not make the order that the applicant wants, and may send the application back to British Columbia for more information. The original order will continue in effect until the court in the reciprocating jurisdiction varies it.

This new process is intended to simplify things, by having just the one hearing. To do that, however, the process relies very heavily on paperwork and the officials of our government and those of the reciprocating jurisdiction. As a result, applications under the *Interjurisdictional Support Orders Act* can take a long time to process.

Contact details for the British Columbia Reciprocals Office, along with the forms required by the *Interjurisdictional Support Orders Act*, can be found at www.isoforms.bc.ca^[7].

To vary an order of a country that does not participate in *Interjurisdictional Support Orders Act* applications, you will have to apply to vary the order in that country.

Changing agreements for spousal support

People can reach an agreement that spousal support will or will not be paid, without having to go to court. Usually a deal on spousal support is worked out in a separation agreement, but marriage agreements and cohabitation agreements can also talk about whether support will be payable when a relationship ends. Family law agreements are discussed in more detail in the Family Law Agreements chapter.

Family law agreements and contract law

Family law agreements are private contracts reached between two people. While family law agreements can be attacked and enforced on the principles of contract law, the support provisions of an agreement can also be argued under the *Divorce Act*. This is because a couple's private agreement on spousal support doesn't oust the authority of the court to make an order for support under the *Divorce Act*.

However, the court will usually give considerable weight to family law agreements and will prefer to make an order that reflects the terms of an agreement. Without proof of something like duress or coercion, or some other problem, the court will treat the agreement as representing the honest and informed intentions of the parties to settle their dispute.

Because of the importance the court will usually give to an agreement, it can sometimes be necessary to attack the agreement itself under the law that applies to contracts. An agreement might be found to be invalid for one or more of the following reasons:

- one of the parties was forced to enter into the agreement,
- one party was too much under the influence or control of the other party in consenting to the terms of the agreement,
- the agreement is fundamentally unfair, or
- one party lied to the other party or hid information from that party, and these misleading representations were the basis on which the agreement was executed.

All of these arguments are based on the law of contracts, not on a particular piece of legislation.

If the court sets aside an agreement for spousal support, the person asking for support must convince the court that it should make an order for spousal support, under s. 15.2 of the *Divorce Act* or s. 165 of the *Family Law Act*. This

application will be treated in the same way that all other applications for support are treated.

Agreements for spousal support and the *Family Law Act*

The *Family Law Act* provides some important rules about agreements dealing with spousal support. First, under s. 165(3), the court cannot make an order for spousal support if there is an agreement on spousal support, including an agreement that support not be paid, until the agreement is set aside. Second, under s. 164, two tests are set out to help the court decide when an agreement on spousal support should be set aside.

Under the first test, at s. 164(3), the court must look at the situation of the parties when they were negotiating and executing the agreement. Like in the *Miglin* case, discussed above, the court is required to consider whether these circumstances existed when the parties were making their agreement:

- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would under the common law cause all or part of a contract to be voidable.

The last part of this test, at subsection (d), is about whether there is a defect under the law of contracts that might make the agreement void or voidable. The other parts of the test are all about the fairness of the parties' negotiations.

Now, even if there are no issues with an agreement under s. 164(3), the second test, at s. 164(5), allows the court to set aside agreements that are "significantly unfair" taking into account:

- (a) the length of time that has passed since the agreement was made;
- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- (c) the intention of the spouses, in making the agreement, to achieve certainty;
- (d) the degree to which the spouses relied on the terms of the agreement;
- (e) the degree to which the agreement meets the objectives set out in section 161.

Section 161, mentioned in subsection (e), is the part of the act that sets out the objectives of spousal support.

If the court sets aside an agreement for spousal support, the person asking for support must convince the court that it should make an order for spousal support, under s. 165 of the *Family Law Act*. This application will be treated in the same way that all other applications for support are treated.

Amending the agreement

It may be possible to avoid court altogether if the spouses can agree about the new arrangements and are willing to change the part of the agreement that deals with spousal support. All things considered, this is a much cheaper and much less confrontational way of dealing with the problem. It may well be that the payor is willing to agree to continue or start paying support, or that the recipient is willing to agree to a reduction in the amount of support paid.

Family law agreements are changed by executing another written agreement that updates the original agreement. Changing an agreement is called *amending* the agreement. The agreements are usually called *amending agreements*, *amendment agreements*, *addendum agreements* or something else to that effect and only deal with the part of the original agreement that needs to be changed. They are much shorter than the agreements that they amend, and the text of the agreement usually says something like this:

Frank and Anne agree that their separation agreement, executed on 1 January 2012, shall be amended by cancelling Paragraph 12 of that agreement and replacing it with the following:

Neither party shall be entitled to receive spousal support from the other.

An amending agreement can also:

- reduce the amount someone must pay as spousal support,
- increase the amount payable as spousal support, or
- impose a new obligation to pay support.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Interjurisdictional Support Orders Act* ^[5]
- Interjurisdictional Support Orders Regulation ^[6]

Links

- The British Columbia Reciprocity Office ^[7]
- Legal Services Society Family Law in BC Website: How to change a family law order (Supreme Court and Provincial Court) ^[8]
- Legal Services Society Family Law in BC Website: Fact sheet on when you can change a final order ^[9]
- Legal Services Society Family Law in BC Website: All about court orders ^[10]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Spousal Support Arrears

When a person who is obliged to pay spousal support fails to meet some or all of that obligation, a debt begins to accumulate and the amount owing is called the payor's *arrears* of support.

People generally have two different goals when arrears begin to mount up: the person responsible for paying support likely wants the court to reduce or cancel the arrears, while the person receiving the support will want the court to force the payor to pay what's owing.

This section provides an introduction to the problem of arrears. It discusses the reduction and cancellation of arrears of spousal support and the collection of arrears.

Introduction

If spousal support is owed under a court order or an agreement, a failure to pay the support owing is a breach of that order or agreement, and, in the case of orders, it's contempt of court as well. The court places a high value on the financial support of spouses and will usually take an extremely dim view of anyone who defaults on such an obligation in the absence of a very good excuse or some very compelling circumstances.

A person who owes arrears of spousal support, a *payor*, will likely be interested in the ways that the outstanding amount can be reduced, while a person to whom support is owing, a *recipient*, will be interested in collecting on the arrears. A person who owes arrears will generally have a difficult time convincing the court to forgive all or some of his or her debt. On the other hand, collecting arrears can be difficult as well, if for no other reason than the fact that you can't get blood from a stone. Unless the payor has another source of funds to draw upon, a recipient may discover that the outstanding support will never be recovered.

Despite these barriers and obstacles, it is possible for a payor to have his or her arrears reduced and, sometimes, cancelled altogether. At the same time, recipients have access to some very powerful and effective enforcement tools to collect outstanding arrears of support.

Orders for support

Orders for the payment of spousal support are enforceable like any other order of the court. Someone who breaches a Supreme Court order can be punished for contempt of court. As well, under the *Family Law Act*, the Supreme Court and the Provincial Court can:

1. require the payor to provide security for his or her compliance with the court order,
2. pay any expenses incurred by the recipient as a result of the payor's actions,
3. pay up to \$5,000 for the benefit of another party or a child whose interests were affected by the payor's actions,
4. pay up to \$5,000 as a fine, or
5. if nothing else will ensure the payor's compliance with the order, jail the payor for up to 30 days.

Unfortunately for people who would rather be jailed than pay, s. 231(3)(c) says that:

imprisonment of a person under this section does not discharge any duties of the person owing under an order

Since orders for support require the payment of money, arrears can also be enforced as a judgment debt under the provincial *Court Order Enforcement Act* ^[1] for up to 10 years after the obligation to pay support has ended.

Payors can apply for an order reducing arrears that have accumulated under a court order under both the *Divorce Act* and the *Family Law Act*. Such applications must be made using the act under which the support order was made.

Agreements for support

Arrears that have accumulated under a separation agreement are owed as a result of a contractual obligation to provide support. A separation agreement is a contract that can be enforced in the courts just like any other contract.

Agreements for support are most easily enforced by filing them in court, after which they can be enforced as if they were court orders. Although agreements can still be enforced under the law of contracts, it's a lot simpler to file them in court.

Section 163(3) of the *Family Law Act* says:

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

As a result, the Supreme Court and the Provincial Court can:

1. require the payor to provide security for his or her compliance with the agreement,
2. pay any expenses incurred by the recipient as a result of the payor's actions,
3. pay up to \$5,000 for the benefit of another party or a child whose interests were affected by the payor's actions,
4. pay up to \$5,000 as a fine, or
5. if nothing else will ensure the payor's compliance with the agreement, jail the payor for up to 30 days.

Payors can apply under s. 174 of the *Family Law Act* for an order reducing arrears that have accumulated under an agreement that has been filed in court just like they can for arrears accumulating under an order.

The Family Maintenance Enforcement Program

Although recipients can enforce orders and agreements for spousal support on their own, most of the time recipients will give that job to the Family Maintenance Enforcement Program ^[2], a provincial government program under the provincial *Family Maintenance Enforcement Act* ^[3] which has been contracted out to an American company, Maximus — not that you'd know this from the government website.

FMEP is a free service for recipients that is largely funded by late fees and penalties charged to delinquent payors.

FMEP has no discretion to change the orders and agreements that are filed with it for enforcement. FMEP cannot increase or decrease the amount of a spousal support obligation and it cannot reduce or cancel arrears of spousal support.

The reduction and cancellation of arrears

Payors may apply to court to have their arrears cancelled or reduced. Technically, this is in some ways an application to vary the order or agreement for spousal support under which the arrears accumulated rather than an independent order about the arrears.

Arrears under the *Divorce Act*

Section 17 of the *Divorce Act* says this about varying orders for spousal support:

(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

The *Divorce Act* does not deal expressly with arrears; applications under the act to reduce arrears are simply variation applications. The test the court will apply is similar to the test it applies for orders made under the *Family Law Act*.

Arrears under the *Family Law Act*

Unlike the *Divorce Act*, the *Family Law Act* deals with the question of arrears directly. Section 174(1) of the act says this:

(1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

(2) For the purposes of this section, the court may consider

(a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,

(b) the reasons why the person responsible for paying support cannot pay the arrears owing, and

(c) any circumstances that the court considers relevant.

(3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

(4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the *Family Maintenance Enforcement Act*, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

A similar section of the old *Family Relations Act* was described as a "complete code" regarding the reduction or cancellation of arrears under that act, meaning that the only ground on which a court can reduce or cancel arrears was "gross unfairness," as set out in s. 96(2). I expect the courts will take the same approach to s. 174 of the *Family Law Act*.

The courts have interpreted "gross unfairness" under the *Family Relations Act* to mean that the payor is not only incapable of repaying the arrears but is also unlikely to be able to repay them in the foreseeable future without suffering severe financial hardship.

If you are asking the court to make an order of reducing arrears, you must be prepared to prove that it would be not just unfair but grossly unfair for you to have to pay off the arrears, and you must be prepared to address the criteria set out in s. 174(2).

- What efforts have you made to pay the spousal support you were required to pay?
- Why did you wait until arrears had accumulated before you tried to vary the spousal support order?
- Why can you not pay your arrears now?
- Are there any other circumstances, such as catastrophic business losses or the unintended loss of your employment, or new financial obligations in relation to your family that the court should take into account?

Be prepared to provide to the court a Financial Statement (Form F8 in the Supreme Court and Form 4 in the Provincial Court) summarizing all of your assets and income, liabilities and expenses, if you intend to show the court that you

cannot pay your arrears. Complete financial disclosure is absolutely essential.

Collecting arrears of support

The collection of debts and enforcement of judgments occupies a whole course at law school and is not a simple matter. The provincial government has, however, established an agency responsible for enforcing support obligations, the Family Maintenance Enforcement Program. Someone entitled to receive support under an order or agreement can sign up with this program and the program will tend to the enforcement support without a great deal of further involvement on the part of the recipient.

FMEP is free for recipients. All you have to do is file your order or filed separation agreement with the program and fill out an application form. FMEP will take the matter from there, and the program is authorized by the *Family Maintenance Enforcement Act* to take whatever legal steps are required to enforce an ongoing support obligation, and track and collect on any outstanding arrears, plus interest accumulating on those arrears.

Under the *Family Maintenance Enforcement Act* ^[3], FMEP has the authority to commence and conduct any court proceedings that can be undertaken by a private creditor, as well as some unique actions that the program alone can take. Among FMEP's collection powers are:

1. garnishing the payor's wages,
2. collecting from a corporation wholly owned by the payor,
3. redirecting federal and provincial payments owed to the payor, like GST or income tax rebates, to the recipient,
4. prohibiting a payor from renewing his or her driver's licence,
5. directing the RCMP to seize a payor's passport,
6. registering a lien against personal property and real property owned by the payor, and
7. obtaining an order for the payor's arrest.

While it is possible to undertake collection or enforcement proceedings on your own, this will cost money and time and possibly require you to hire a lawyer and bear that expense as well. Since any private collection efforts you might take may interfere with efforts being made on your behalf by FMEP, recipients enrolled with FMEP are required to obtain the permission of the program's director before they can take independent enforcement actions.

You can find more information about enforcing orders in the chapter Resolving Family Law Problems in Court within the section Enforcing Orders in Family Matters. You can also find more information at the website of the Department of Justice ^[4], which includes a helpful overview of support enforcement mechanisms in Canada.

Separation agreements

Section 163(3) of the *Family Law Act* allows a party to an agreement, usually a separation agreement, to file the agreement in the Provincial Court or in the Supreme Court. An agreement that is filed in court can be enforced as if it were an order of the court. It is not necessary for a court proceeding to have been started before an agreement can be filed in court.

FMEP will enforce agreements for support, however they require that an original copy of the agreement be filed in court and sent to them with the court's stamp before they can enforce the agreement.

You can find more information about enforcing agreements in the chapter Family Law Agreements within the section Enforcing Family Law Agreements.

Orders made outside British Columbia

Section 20 of the *Divorce Act* says that an order made in a divorce action has legal effect throughout Canada. It also provides that such an order may be filed in the courts of any province and be enforced as if it were an order of the courts of that province. In other words, if your divorce order was made in Alberta and contains a term requiring spousal support to be paid, you can register that order in the Supreme Court of British Columbia and it will have the same effect and be enforceable here as if it were an order of the courts of British Columbia.

The provincial *Interjurisdictional Support Orders Act* ^[5] allows orders for spousal support made under provincial laws elsewhere in Canada, and in certain foreign states, to be filed in our courts and enforced as if they were British Columbia orders. The reciprocating states under the *Interjurisdictional Support Orders Act* are South Africa, Zimbabwe, Austria, the Czech Republic, Germany, Gibraltar, Norway, the Slovak Republic, the United Kingdom, the United States of America and its protectorates, the Special Administrative Region of Hong Kong, Singapore, Australia, Fiji, Papua New Guinea, New Zealand, and Barbados and its dependencies.

Foreign orders that are filed in this province may be enforced by FMEP as if they were orders made by the courts of British Columbia. You can find more information in the chapter Resolving Family Law Problems in Court, and in particular in the section Enforcing Orders in Family Matters.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Family Maintenance Enforcement Act* ^[3]
- *Court Order Enforcement Act* ^[1]
- *Interjurisdictional Support Orders Act* ^[5]

Links

- Family Maintenance Enforcement Program Website ^[2]
- Department of Justice: Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement ^[4]
- Clicklaw: Spousal support help from BC Ministry of Justice ^[6]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [4] http://www.justice.gc.ca/eng/pi/fcy-fea/sup-pen/enf-exe/info_cont.html
- [5] <http://canlii.ca/t/8413>
- [6] <http://clicklaw.bc.ca/global/search?k=spousal%20support%20ministry>

Property & Debt

Property & Debt in Family Law Matters

This chapter focuses on the division of property and debt between married spouses and unmarried spouses. Under the provincial *Family Law Act*, spouses are presumed to keep the property that each of them brought into their relationship and to share in the things they acquired during their relationship. The same rules apply about debt. Spouses are presumed to share responsibility for the debts that accumulated during their relationship. The federal *Divorce Act* doesn't talk about the division of property or debt.

This introductory section provides basic information about property and debt. It also looks at the rules about property that apply to couples who are not spouses, and reviews some of the income tax issues that can come up when dividing property. The sections that follow will go into the rules about the division of property and debt in a lot more detail, the steps that you can take to protect family property, and how property and debt are divided by the court through court orders and by spouses through separation agreements.

Dividing property and debt under the *Family Law Act*

The parts of the *Family Law Act* that talk about the division of property and debt apply to people who are *spouses*. The definition of spouse for these parts of the act are a bit different from the rest of the act. For the division of property and debt, a spouse is:

1. someone who is married or was married to someone else, or
2. someone who is or was living in a "marriage-like relationship" with someone else for at least two years.

People who lived together for less than two years are *not* spouses for these parts of the *Family Law Act*, whether they've had a child together or not.

Property and debt can be divided under the terms of a cohabitation agreement or a marriage agreement that the spouses made around the time they began to live together, or under the terms of a separation agreement that they made around the time they separated. If the spouses can't reach an agreement, a court can make an order about the division of property and debt.

Court proceedings for the division of property and debt must be started within two years of:

1. the date of *divorce* or *annulment* for married spouses, or
2. the date of *separation* for unmarried spouses.

Family property, excluded property and family debt

The *Family Law Act* talks about three things when it comes to dividing property and debt: *family property*, *excluded property*, and *family debt*.

All property owned by either or both spouses at the date of separation is *family property*. This includes things like real property, bank accounts, pensions, business, debts owing to a spouse, and so forth. Family property is presumed to be shared equally between spouses, regardless of their use of or contribution to that property.

Excluded property is any property that is excluded from the pool of family property to be split between spouses. This includes the property a spouse owned before the date of marriage or the date the spouses began living together, whichever is earlier, plus certain kinds of property acquired during the spouses' relationship, including:

- property that was bought with the property brought into the relationship,
- inheritances and gifts, and
- certain kinds of insurance proceeds and court awards.

Excluded property is presumed to remain the property of the spouse who owns it.

All debt incurred by either or both spouses from the date of marriage or the date the spouses began living together, whichever is earlier, to the date of separation is *family debt*. Responsibility for family debt is presumed to be shared equally between spouses, regardless of their use of or contribution to that debt.

Beginning and ending a spousal relationship

As you can see, certain dates in a couple's relationship are really important. The date a relationship begins — the earlier of the date the spouses begin to live together or marry — is the date that separates the excluded property brought into the relationship from the family property acquired during their relationship and is the date when spouses begin to share responsibility for new debts. The date the spouses separate, generally speaking, marks the end of the accumulation of shared property and shared debt.

Living together and marrying

Under s. 3(3) of the *Family Law Act*, 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.

Since the definition of *spouse* at s. 3(1)(b)(i) includes people who have lived together "for a continuous period of at least 2 years," once you have reached the two-year mark:

1. you and your partner are spouses, and
2. your relationship as spouses began two years earlier, on the date you began to live together.

Separating

Although a married couple are married until they get a divorce, the key date for the division of property and debt under the *Family Law Act* is the date of separation. This date is important for both married spouses and unmarried spouses.

Although many people move out when they separate, other couples separate and remain living under the same roof. A physical separation is not necessary to separate; there must simply be an intention to end both the relationship and the intimacies that go along with it. Often the decision to separate is made by both spouses, but it only takes one spouse decide to end a relationship, and one spouse's decision to separate doesn't require the consent of the other spouse.

Section 3(4) of the act says this:

- (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.

In other words, to separate, one spouse must announce the end of the relationship and then take steps that would demonstrate an intention to end the relationship. Separation is discussed in more detail in the chapter Separation & Divorce, in the section Separation.

Property brought into the relationship

Under s. 85(1)(a), property that was brought into a relationship is excluded from the pool of family property that is supposed to be divided equally between spouses. Under s. 96, the court "must not" order a division of excluded property, except in limited circumstances. A spouse is therefore normally entitled to keep the excluded property he or she owned when the relationship began. Under s. 85(2), however, it is up to the person who's saying that property is excluded property to prove that the property is excluded property.

For most couples, property brought into a relationship will form the largest component of a spouse's excluded property. However, when most people marry or move in together, counting up their assets is not the foremost thing on their mind. This means that you may wind up having to do some historical accounting to figure out what you had one, two or more years ago. Whether you're just starting a relationship or are trying to figure out what you once had, these are the documents you need to look for:

- bank statements for the period that includes the date you began to live together or got married, whichever came first,
- RRSP, RIF, LIRA and other retirement savings account statements for the same period,
- any employee pension statements that cover the date you began to live together or got married,
- mutual fund and other investment account statements for that period,
- any BC Assessment statements for the year in which you began to live together or got married,
- mortgage and line of credit statements for the period that includes the date you began to live together or got married, and
- credit card and loan statements for that period.

It will be a harder to look back in time to figure out the value of things like cars, motorcycles, trailers, boats, snowmobiles and so on. If you're entering a relationship now, it will be helpful to look up the Canadian Black Book ^[1] or Kelley Blue Book ^[2] estimated values for vehicles. Boats and trailers may need to be specially valued by a dealer.

Property and debt acquired during the relationship

In most circumstances, the property either or both spouses acquire during their relationship will be family property, but there are some important exceptions.

Family property

Under s. 84(1) of the *Family Law Act*, family property is the property owned by one or both spouses on the date of their separation, including any property bought after separation with family property. Section 84(2) give some examples of specific assets that are family property, including:

- interests in companies, businesses, partnerships and ventures,
- money owed to a spouse, and
- bank accounts, savings, pensions and RRSPs.

Family property also includes the amount that any excluded property grows in value after the date the spouses' relationship began or after the excluded property was acquired, whichever is later.

Under s. 81, family property is presumed to be shared between the spouses equally, regardless of their use or contribution to that property.

For information on how to share CPP credits see *How Do I Divide Our CPP Pensions after We're Divorced?* It's located in the *How Do I?* part of this resource in the *Miscellaneous* section.

Excluded property

The sort of excluded property that can be acquired during a relationship is described in s. 85(1), and includes:

- gifts,
- inheritances,
- certain court awards and settlements,
- certain insurance payments, and
- property held in trust, providing that the spouse didn't put the property into the trust.

Excluded property that is acquired during a relationship is presumed to remain the property of the spouse who owns it. However, under s. 85(2), it is up to the person who's saying that property is excluded property to prove that the property is excluded property.

Family debt

Under s. 86, family debt is all debt incurred by either or both spouses during their relationship up to the date of their separation, but can include debt incurred after separation if the debt was incurred to maintain family property, like a loan taken out to pay the property taxes.

This definition means that debt incurred by a spouse before the spouses married or began to live together is that spouse's personal debt; it's only the new debt that they share. Under s. 81, responsibility for family debt is presumed to be shared between the spouses equally, regardless of their use or contribution to that debt.

Dividing property and debt: an example

Let's look at an example to make things a bit easier to understand.

Harkamal moved in to live with Baljinder in his home in 2009, when Baljinder's home was worth \$300,000; Baljinder has no mortgage.

Harkamal starts going to college in 2010 and because she's not working, she takes a personal loan to help pay for her tuition fees, lab fees and textbook costs. Baljinder keeps working while Harkamal is at school, and with his income, he pays for the property taxes, car insurance, utilities and groceries and so forth. He's also able to put some money away into RRSPs.

Harkamal and Baljinder separate in 2013. When they separate, Harkamal owes \$12,000 for her personal loan, Baljinder's house is worth \$400,000 and Baljinder has saved \$30,000 in RRSPs.

In this example, Baljinder's house is his *excluded property*. It was worth \$300,000 when Harkamal began living with him, and it has increased in value by \$100,000. The *family property* is the RRSPs that Baljinder saved, plus the increase in value of Baljinder's house during the relationship. The *family debt* is Harkamal's loan which was incurred entirely during the parties' relationship and is now up to \$12,000.

Boiling this all down, Baljinder would get:

- \$300,000 as the value of the home he brought into the relationship,
- \$50,000 for one-half of the growth in the value of his house to the date of separation,
- RRSPs worth \$15,000, and
- responsibility for \$6,000 of Harkamal's loan.

Harkamal would get:

- \$50,000 for one-half of the growth in the value of Baljinder's house,
- RRSPs worth \$15,000, and
- responsibility for the remaining \$6,000 of her loan.

Property claims and people who aren't spouses

People are not spouses within the *Family Law Act* definition at s. 3, described above, cannot make a claim for the division of property or debt through that act. When people who aren't spouses own an asset jointly, like a house or a car, they are presumed to each be entitled to half of the value of that property. Where a person claims a share of property owned only by the other person, he or she will have to prove an entitlement to that asset through the principles of the common law.

Jointly-owned assets

Where a couple are both on the title of an asset, whether the family home, a car or a bank account, they are each assumed to have an equal interest in the asset. When one party refuses to give the other his or her share of that asset, it is open to that person to start a court proceeding for either:

1. an order for the sale of the asset and the division of the proceeds of the sale, or
2. an order for payment in compensation for his or her interest in the asset.

Where real property is jointly owned, it is possible to make a claim under the provincial *Partition of Property Act* ^[3]. Section 2 of this act says that:

(1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

(2) Subsection (1) applies whether the estate is legal or equitable or equitable only. This act allows a co-owner, including someone with only an equitable interest in the property, potentially including an interest under the law of trusts as discussed below, to apply for an order that the property be sold and the proceeds of the sale divided.

In other words, if you jointly own real property with your partner, you can apply to court for an order that the property be sold and the proceeds of the sale be split between you.

Individually-owned assets

Where a person believes that he or she should have an interest in property owned only by the other person, a claim against that property can only be made under the common law, specifically the law of equity and the law of trusts.

The essential point of this sort of claim is that the non-owning party has, or should be considered to have, a stake in property owned by the other party. The non-owning party's interest in that property is said to be held *in trust* for the non-owning party by the person who owns the property on paper. The non-owning party is the beneficiary of that trust and should be entitled to receive compensation for his or her interest in the property under the trust.

There are three kinds of trust claim that may be made:

- a constructive trust,
- an express trust, and
- a resulting trust.

A *resulting trust* happens when the behaviour of the parties will let the court infer the existence of a trust relationship; an *express trust* is a trust relationship that people intentionally enter into; and, a *constructive trust* is imposed in order to compensate someone for their interest in property when the interest can't be paid out immediately. Resulting and constructive trusts are the most common kind of trusts involved in family law disputes about property.

Needless to say, this area of the law can be complex. If you find yourself in a situation where your only claim to an asset or a share of an asset is through trust law, it is recommended that you hire a lawyer to handle your claim.

Resulting trusts

A resulting trust can be created in the following circumstances:

- one party loans or gives money to the other party to allow him or her to buy an asset, and the person buying the asset owns the asset in his or her name alone, or
- one party transfers property to another without payment.

In each case, the person who transfers the money or asset to the other party is said to retain an interest, called a *beneficial interest*, in the property even though the property is held by the other party in his or her name alone. In a court proceeding based on a resulting trust, the person making the claim, the *claimant*, is asking for compensation for his or her beneficial interest in the property owned by the *respondent*, the person against whom the claim is brought.

Unjust enrichment and constructive trusts

A constructive trust is called *constructive* because the claimant is asking the court to create or impose a trust on the respondent where there wasn't one before. According to the Supreme Court of Canada's decision in the 1980 case of *Pettkus v. Becker* ^[4], [1980] 2 S.C.R. 834, one of the most important cases on constructive trusts, the court will impose a trust on a respondent where the claimant is able to show that the respondent has been *unjustly enriched* as a result of the claimant's labour or other services. Unjust enrichment is shown by proving that:

1. the respondent was enriched as a result of the claimant's contributions,
2. the claimant was correspondingly deprived, and
3. there is no legal reason for the respondent's enrichment.

Enrichment means to have received a benefit or advantage, such as money or the benefit of unpaid labour or other services. *Deprivation* means to have lost the value that might have been otherwise received for the claimant's benefit or advantage, such as the loss of the money or the wages that might have been paid for labour or other services. The deprivation must *correspond* to the enrichment, in the sense that the claimant was deprived of exactly the thing from which the respondent benefited. If the claimant can show these things, he or she will have established that the respondent

was *unjustly enriched* by his or her contributions, and the court may impose a constructive trust to fix the situation.

(There are two other case from the Supreme Court of Canada that are critical in understanding constructive trusts, a 1993 case called *Peter v. Beblow* ^[5], [1993] 1 S.C.R. 980, and a 2011 case called *Kerr v. Baranow* ^[6], [2011] 1 S.C.R. 269 . To get a proper understanding of the law relating to constructive trusts, you should read all of *Pettkus v. Becker*, *Peter v. Beblow*, and *Kerr v. Baranow*.)

Here's an example:

Frank moves into a home owned by Lois. Frank's role in the relationship is that of a homemaker while Lois works outside the home and brings home the bacon. Frank also, out of the kindness of his heart, helps Lois with her web design company, doing her books because he used to be a bookkeeper.

Lois doesn't pay Frank for his labour; perhaps it's understood that Frank is helping out with a common cause, since Lois' company is what provides the family with its income, or perhaps Frank's help is just one of the things he does because he loves Lois. Either way, payment isn't offered and it's not asked for, as is often the case when people are in a relationship.

Frank's labour in the home, cooking, cleaning and tidying, allows Lois to devote her time to the web design company, and saves her from having to hire a housekeeper and a cook, not to mention having to hire an office manager for the company.

Frank, on the other hand, is losing something. Frank could have sold his services as a housekeeper, a launderer and a cook. Frank could certainly have worked as an office manager or bookkeeper for some other company. Furthermore, Frank has made a positive contribution to Lois' company and helped it thrive and prosper.

The months pass. Lois' company has grown in value, and the relationship comes to a tragic end when Frank discovers that Lois' trips to visit the handsome internet service provider in Alberta were for both business and pleasure.

In this example, Lois was unjustly enriched by Frank's labour in the home and his contribution to the web design company, as she didn't have to hire an office administrator or a housekeeper. Frank, on the other hand, lost out on months of wages as an office administrator, and months of wages as a housekeeper. Lois was enriched by exactly the thing Frank was deprived of: his labour, and the financial value and benefit of his labour.

Once an unjust enrichment has been found, the court must determine what the appropriate remedy would be to compensate the applicant for his or her interest in the property. The court will often determine the value of the trust based on the value of the contribution made by the applicant to the property or the purchase of the property.

In the example above, a concrete value can be attached to Frank's contributions to the company and to his labour in the home: what would it have cost to hire a housekeeper and a bookkeeper during that period? Or, how much did Lois' company grow in value as a result of Frank's efforts? This is the beginning of fixing a dollar value on Frank's interest in the company and in Lois' house.

Again, trust claims are complex and the case law supporting and opposing such claims is massive. If you are not a spouse and wish to make claim against property owned only by your partner, I recommended that you hire a lawyer to help.

Tax issues

For many people, there will be no tax impact from the division of their assets. There will, however, be a tax impact if the division creates what the Canada Revenue Agency ^[7] deems to be *income*.

The most common kind of taxable income people have is employment income. Some other kinds of taxable income include:

- the money you get when you cash in an RRSP,
- money received by a shareholder from a company as a dividend or from the sale of his or her shares,
- the interest you get from a loan you've made to someone else, and
- the profit realized from the sale or transfer of real property that isn't the family's principle residence.

When you report this sort of income in your tax return, the CRA considers it to be taxable income, income that may be taxable at different rates.

The purpose of this part of this section is to alert you in a general way to the possibility that there may be tax implications as a result of family property being divided, and that there are sometimes ways to avoid this sort of unfairness. This is, however, a complex area of family law, and if you have a problem of this nature, you really should get the advice of a lawyer who specializes in tax issues; store-bought or online tax software will not identify these issues. You probably don't want to pay any more tax than is absolutely necessary!

Avoiding unfairness

The tax consequences of a particular arrangement in a court order or separation agreement can be taken into account when property is being divided, since the payment of tax by one party may fundamentally change the fairness of the agreement or order. Consider this example:

Say Eli receives \$100,000 in cash and George receives a rental house worth \$100,000, and the cash and the rental house are all part of the family property. At first glance, this seems like a fair, equal split of the family property, which together comes to a total of \$200,000. In fact, it isn't.

No tax will be payable by Eli as a result of receiving the cash. Tax will be payable by George if the rental house has to be sold, since it wasn't the family's primary residence. If the tax payable on the income George earns from the sale is \$20,000, really, Eli has received \$100,000 and George has received \$80,000. If you count the tax that George has to pay, the division of the family property wasn't equal at all.

To make the split equal, Eli should pay George an extra \$10,000 so that each spouse will have \$90,000 once the rental house is sold.

The same problem can arise if one spouse has to sell an asset in order to satisfy an order or agreement for the division of property and debt, such as making a lump-sum payment to equalize the value of the assets held by each party. This may result in the CRA assessing an extra amount of taxable income to the party who had to sell the asset, with the consequence of an additional tax debt owed by that party to the CRA.

There is an easy way to avoid unfair tax consequences and preserve the intention of the agreement or court order: the agreement or order can recognize the negative tax consequences of a particular term and compensate the affected spouse, as in the example involving the rental house above. If you need to convince a court to take tax considerations into account in dividing assets, there are three general rules you should keep in mind:

- each case will depend on the particular circumstances of the parties,
- you should be able to provide an estimate of the tax which will be payable, and

- you must be able to show that the sale or transaction that will result in tax being payable is likely to occur in the reasonably near future.

Dividing RRSPs

Normally, if you wish to cash out an RRSP, you have to pay tax on the RRSP as if the RRSP was taxable income, like employment income. Under the federal *Income Tax Act* ^[8], transfers of RRSPs between spouses are tax neutral, under what are called the *tax-free spousal rollover* provisions of the act.

When RRSPs are to be transferred between spouses according to a separation agreement or court order, the RRSPs are simply transferred between the spouses' RRSP accounts without having to cash them out, and no tax is payable.

Real property

When a piece of property is to be transferred between spouses according to a separation agreement or court order, the parties should use the province's Special Property Transfer Tax Form ^[9], to take advantage of the tax-free status of transfers between spouses made pursuant to family agreements and court orders. This form is normally completed during the process of transferring title to the property at the Land Title and Survey Authority, and no tax will be payable on the transfer.

Resources and links

Legislation

- *Family Law Act*
- *Partition of Property Act* ^[3]
- *Income Tax Act* ^[8]

Links

- Canadian Bar Association BC Branch: Dividing property and debts ^[10]
- Justice Education Society: Workbook for parents separated with children on dealing with finances ^[11]
- Legal Services Society's Family Law Website: How to divide property and debts ^[12]
- Special Property Transfer Tax Return ^[9]

✓ The above was last reviewed for legal accuracy by JP Boyd, April 19, 2013.

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[12] <http://www.clicklaw.bc.ca/resource/1639>

Basic Principles of Property & Debt in Family Law

Under the *Family Law Act*, spouses who are married or who lived together in a marriage-like relationship for at least two years are entitled to share in the property they acquired during their relationship, and to keep any property they each brought into the relationship. The same thing goes for debt. Spouses are equally responsible for the debt they accumulated during the relationship, but they are separately responsible for any debt that they had going into the relationship.

This all sounds pretty straightforward, but there are lots of details that can make the division of property and debt complicated.

This section talks about how property and debt are divided between spouses under the *Family Law Act* and how they used to be divided under the *Family Relations Act*, what property is shareable family property, and what property is excluded from division. It also looks at the role marriage agreements and cohabitation agreements can play in controlling the impact of the *Family Law Act*.

Introduction

The basic plan for the division of property and debt under the provincial *Family Law Act* is pretty straightforward. *You keep what you bring into the relationship, and you split what you get during the relationship.* Of course it's a lot more complicated than this, but that's the basic concept the act is built on.

Part 5 of the *Family Law Act* deals with the division of property and debt, and provides the definitions of *family property* and *family debt*, the things that are presumed to be shared between spouses, and *excluded property*, which is presumed to remain the property of the spouse who owns it. Part 6 of the *Family Law Act* talks about the division of pensions between spouses and says which portion of a pension is supposed to be shared and which parts remain the property of the pension member.

This section looks into the nooks and crannies of Part 5 of the act in some detail, but it doesn't say much about pensions because the division of pensions can be extremely complicated. For information about that, you should speak to a family law lawyer.

Standing

The people who are entitled to ask to divide property and debt are *spouses*, but not all spouses, just spouses who are married to each other or who have lived together in a marriage-like relationship for at least two years. Section 3 says this:

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

Unmarried spouses who have lived together for less than two years are not eligible to ask for orders about the division of property or debt under the *Family Law Act*. The rules about property that apply to these spouses and other people who aren't spouses are discussed in the first section in this chapter, under the heading "property claims and people who aren't spouses," and in the chapter Family Relationships in the section Other Unmarried Relationships.

Period of entitlement

Under s. 81(a) of the *Family Law Act*, spouses are presumed to each be entitled to an equal share in *family property*. Family property is defined at s. 84(1) as:

- (a) on the date the spouses separate, property
- (i) that is owned by at least one spouse, or
- (ii) in which at least one spouse has a beneficial interest

The *end date* for the accumulation of family property, then, is presumed to be the date of separation. The *start date* is the date the spouses' relationship begins, and is found in the definition of *excluded property* at s. 85:

- (1) The following is excluded from family property:
 - (a) property acquired by a spouse before the relationship between the spouses began

The start date and the end date with respect to the accumulation of *family debt* is stated more simply in s. 86:

- Family debt includes all financial obligations incurred by a spouse
- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate

As you can see, the date when "the relationship between the spouses began" and the date "the spouses separate" are very important. These are the dates that mark the end of acquiring excluded property and personal debt, the start of acquiring shareable family property and family debt, and the end of acquiring family property and family debt.

Date of cohabitation and the date of marriage

Section 3(3) says when a relationship between spouses begins:

- (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.

For married spouses, their relationship starts on the earlier of the date they began to live together in a marriage-like relationship or got married. For unmarried spouses, once the parties have lived together for two years, their relationship as spouses is considered to have started on the date they began to live together.

The date of a couple's marriage is pretty obvious. It isn't always so obvious when a couple "begins" to live together in a marriage-like relationship. The judge in a 2003 case from the Saskatchewan Court of Queen's Bench, *Yakiwchuk v. Oaks* ^[1], 2003 SKQB 124, expressed the problem this way:

"With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of 'public' declaration of intent. Often people begin cohabiting with little forethought or

planning. Their motivation is often nothing more than wanting to 'be together'. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people 'ease into' situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist."

Hands up, anyone who has ever begun to "cohabit with little forethought or planning?"

The date of separation

Separation usually happens when one spouse decides that the relationship cannot continue, says so, and then takes steps to end the partnership-like qualities of the relationship, usually by stopping sleeping together, stopping doing chores for the other person, stopping going out together as a couple, and so on. Section 3(4) offers some guidance on when a spousal relationship ends.

(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.

It's easy to imagine that the date of separation could be argued about, especially if the spouses reconciled for a bit or if a spouse's commitment to ending the partnership-like aspect of a relationship wavered from time to time. In order to avoid spending money on lawyers arguing about this issue, you might consider documenting the date of separation in some way, perhaps by sending a letter or an email to your spouse stating your intention to separate. Do remember to keep a copy.

Time limits

Section 198(2) of the *Family Law Act* sets out some important time limits on when claims for the division of property and debt can be brought:

1. married spouses must bring their claim within two years of the date of their *divorce* or a declaration *annulling* their marriage, and
2. unmarried spouses must bring their claim within two years of the date of *separation*.

Under s. 198(5), however, the running of this time limit is considered to be suspended while the parties are engaged in *family dispute resolution* with a *family dispute resolution professional*. Both of these terms are defined in s. 1, and the running of the time limit will not stop if their dispute resolution process doesn't fall within the definition of "family dispute resolution" or if the spouses are not using the services of someone who falls within the definition of "family dispute resolution professional."

A partnership of acquests

The scheme for the division of property under the *Family Law Act* is technically described as a *deferred partnership of acquests* regime. Under the old *Family Relations Act*, property was divided under a *deferred community of property* regime. A "partnership of acquests" scheme for family property means that the spouses both own all of the property acquired during their relationship, whether the property is owned by one spouse or by both spouses jointly; our model is "deferred" because the right to an equal share in this property doesn't arise until the spouses have separated.

The *Family Relations Act* and the *Family Law Act*

Under the *Family Relations Act*, married spouses shared in all property that was "ordinarily used for a family purpose." This meant that you didn't need to look at who owned something on paper, how something was acquired, or whether property was acquired before or during the relationship; what mattered was how the property was *used*. For most couples *everything* they had wound up being ordinarily used for a family purpose in one way or another.

Under the *Family Law Act*, use is irrelevant. In fact that's exactly what s. 81(a) says:

spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution

What matters now is *when* property was acquired and *how* property was acquired. Property bought before the spouses' relationship began is presumed to be excluded property; property bought during the spouses' relationship with excluded property is also presumed to be excluded property. Under a *deferred community of property* regime, both spouses are presumed to have an interest in all assets on the date of separation. Under a *deferred partnership of acquests* regime, the spouses are presumed to have an interest in only the assets they accumulated during their relationship on the date of separation, except for any assets brought with excluded property.

Transition provisions

The *Family Law Act* became law in British Columbia on 18 March 2013. All of the parts of the act about children and support applied to everyone right away, including people who were in the middle of a court proceeding. However, under s. 252(2) married spouses who had started a court proceeding about the division of property or had an agreement about the division of property must continue under the old *Family Relations Act* as if it hadn't been cancelled, unless the spouses agree otherwise:

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

This rule only applies to married spouses because only married spouses could make property claims under the *Family Relations Act*; it is not possible for unmarried spouses to "start or continue" a claim under that act.

The division of family property under the *Family Relations Act* is discussed later on in this section.

Who gets what under the *Family Law Act*

The general rule about how property and debt are divided under the *Family Law Act* is found in s. 81:

Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

The rest of Part 5 concerns:

- the definitions of "family property" and "family debt," and what is excluded from family property,
- the rules for how the division of property and debt are to be accomplished, and the exceptions to those rules,
- orders for the division of property and debt, and the circumstances when the court can divide family property unequally or divide excluded property, and
- agreements for the division of property when the court may set those agreements aside.

Family property and family debt

Family property is defined at s. 84(1) as all of the property owned by either or both spouses *on the date of their separation*. Family property includes property that is bought *after separation* with family property, for example when a spouse trades in the old family Ford Windstar as the down payment for shiny new Porsche Boxster. The Windstar was family property that both spouses have an interest in; since the Boxster was bought with the family property, it too is family property that both spouses have an interest in.

Section 84(2) gets into the specifics of the sorts of things that might be family property:

(2) Without limiting subsection (1), family property includes the following:

(a) a share or an interest in a corporation;

(b) an interest in a partnership, an association, an organization, a business or a venture;

(c) property owing to a spouse

(i) as a refund, including an income tax refund, or

(ii) in return for the provision of a good or service;

(d) money of a spouse in an account with a financial institution;

(e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;

(f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

(3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which

(a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,

(b) the spouse has a power to transfer to himself or herself that part of the trust property, or

(c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

Boiling this all down somewhat, family property includes:

- a spouse's business, regardless of the nature of the business interest,
- money owed to a spouse,
- bank accounts, savings accounts, investment accounts and pension accounts,
- family property that a spouse transferred after separation but can get back, and
- property in a trust that the spouse created and can get back.

Perhaps most importantly, under s. 84(2)(g), family property includes the increase in value of a spouse's *excluded property* after it was received or brought into the relationship.

The definition of family debt is at s. 86 and is much shorter:

Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

In other words, all of the debt accumulating from the date the spouses began to live together or got married, whichever is earlier, to the *date of separation* is family debt. Family debt includes debt that is incurred *after separation* if the debt was incurred for family property, for example if a spouse takes out a loan to make the mortgage payments on the family home. Since the family home is family property, the loan is a family debt that both spouses are responsible for.

The triggering event

When a *triggering event* happens, all of the family property owned by either or both spouses becomes equally owned by both spouses as *tenants in common*. If only one spouse owns an asset, both of the spouses become equal owners of the asset as tenants in common. If both spouses own an asset as joint tenants, the joint tenancy is severed and both of the spouses become equal owners of the asset as tenants in common. This is all a bit complicated to explain, so please bear with me.

How property is owned

There are two ways that more than one person can own the same property in British Columbia: they can own the property as "joint tenants" or as "tenants in common."

When two or more people own a thing as *joint tenants*, they are each owners of the whole thing. This is a fuzzy kind of shared ownership because the interests of one owner can't be separated out from the interests of the other because they each own the whole thing. To put it another way, a joint tenant doesn't own a particular slice of the pie, a joint tenant owns the whole pie.

When a joint tenant dies, his or her interest in the asset disappears, and the surviving joint tenants continue to own the whole asset as they always had. As a result, joint tenancies are extremely handy estate planning tools.

When people own a thing as *tenants in common*, each owner's interest in a property is separate and distinct. The tenants in common of a property each own their particular slice of the pie; collectively, they all own the whole pie, but individually they just own their personal share.

Because each owner's interest is separate from the other owners, a tenant in common can sell his or her share in the asset to someone else, put a mortgage on his or her interest or use it as collateral, or give it to someone else as a gift. If a tenant in common dies, his or her interest in the thing becomes a part of his or her estate to be distributed according to his or her will.

The effect of the triggering event

From a family law perspective, the most important thing about owning an asset as tenants in common, which is how assets are owned after there's a triggering event, is this idea of two separate interests in an asset. Say the family home is registered in only one spouse's name and that spouse goes bankrupt. If there's a triggering event and each spouse takes a one-half interest as a tenant in common, the only part of the house that can be taken by the bankrupt's trustee is the bankrupt's one-half interest; the other spouse's interest in that asset will be preserved from the bankrupt's creditors, and it doesn't matter who owns the asset on paper. This can be hugely important.

Family law lawyers describe the effect of a triggering event as "crystallizing" the spouses' interests in the family property because the triggering event makes each spouse the legal owner of one-half of the family assets in a way that is also binding on people outside the relationship, like creditors, trustees in bankruptcy, potential purchasers and so forth. After a triggering event happens, all a creditor can lien or seize to secure or pay a debt is the debtor's half-share of an asset, regardless of whether the debtor was the sole owner or the joint owner of the asset before the triggering event.

The date of separation

Under s. 81(b), the one triggering event under the *Family Law Act* is the *date of separation*:

on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

If this sounds odd to you, it's probably because the old *Family Relations Act* had four triggering events, each of which required a spouse to have taken some sort of legal step following separation. The triggering events under the old act were:

1. the annulment of the spouses' marriage,
2. the spouses' divorce,
3. the court making a declaration that the spouses are unable to reconcile and resume married life, and
4. the signing of a separation agreement.

Under the *Family Law Act* there is just one triggering event, and it does not require the parties to start a court proceeding or to sign an agreement.

The valuation of property and valuation date

Although the pool of family property to be shared between spouses is crystallized when the triggering event happens, under s. 87(b), the *value* of the family property is not fixed until the date of the trial or agreement that divides the property. This makes sense, because it can take two or three years for the division of property to wrap up at a trial, and it can take four or five months to finish an agreement for the division of property.

Under s. 87(a), the value of property is its *fair market value*, the amount a reasonable buyer would pay for the property *in its current condition*, not the purchase price of the property, the insured value of the property, or the replacement cost of the property. In other words, value of the reconstituted leather living room suite you got from the Brick for \$999 five years ago isn't what *you* paid for it, it's the \$100 that someone would likely give you for it at the date of the trial or agreement.

Excluded property

The definition of *family property* at s. 84 starts from the assumption that *all property* either or both spouses own on the date of separation is shareable family property. Under s. 85(2), the spouse who claims that an asset should be excluded from the pool of family property is responsible for proving that the asset is *excluded property*.

Excluded property is defined at s. 85(1):

(1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) gifts or inheritances to a spouse;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;

- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) property held in a discretionary trust
 - (i) to which the spouse did not contribute,
 - (ii) of which the spouse is a beneficiary, and
 - (iii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

To boil all this down, a spouse's excluded property is all the property that the spouse owns on the date of cohabitation or the date of marriage, whichever is earlier. Other property acquired during the relationship can also be a spouse's excluded property, including:

- gifts,
- inheritances,
- court awards,
- insurance payments, and
- property held in a trust that was contributed by someone else.

Perhaps most importantly, under s. 85(1)(g), excluded property includes property bought during the relationship with excluded property. Say, for example, that a spouse receives an inheritance of \$10,000 and buys a collection of vintage Pyrex. The Pyrex collection would be that spouse's excluded property because it was bought with excluded property, even if the Pyrex collection was used in the day-to-day course of the couple's life together. Remember, whether something was "ordinarily used for a family purpose" is not a consideration under the *Family Law Act*.

Taking stock at the beginning of a relationship

As you can see, it's rather important to know what you owned when you and your spouse began to live together. If you are just starting a relationship, here's what you do.

First, gather the documents listed below for the period that spans the date on which you and your spouse began to live together or got married, whichever is earlier:

- statements for all financial accounts, including savings accounts, investment accounts, RRSP accounts and other retirement savings accounts,
- statements for any workplace pension plans,
- statements for all credit accounts, including credit cards, loans, mortgages and lines of credit,
- your personal income tax return, complete with all of the schedules and attachments,
- your BC Assessments for all real property, or, if you want to be more accurate than that, proper appraisals,
- black book values or dealer quotes for any vehicles you own,
- appraisals for works of art and collections, and
- anything else that helps to establish the value of something you brought into the relationship in a credible way.

Next, once you've gathered these documents, staple them together and keep them together in some place that you're not likely to lose them, like a safety deposit box.

You should still be able to gather much the same collection of documents even if you've already been married or living together for some time. Banks and other financial institutions will give you copies of old statements, but there will be a charge; pension plan administrators should be able to provide old values; and, BC Assessments for past years are available online. You may, however, have a problem valuing old vehicles.

Keeping track during a relationship

It's also important that you keep track of new excluded property acquired during your relationship, and what's going on with the excluded property you brought into the relationship. It may be easiest to keep a journal that:

- shows the dates and amounts of any inheritances, gifts, court awards and insurance proceeds received during the relationship,
- tracks money received from the sale of excluded property, and what you did with the money, particularly if the money was pooled with your spouse's money to buy something,
- tracks property bought in exchange for excluded property, and
- records any changes in the value of excluded property during the relationship.

Remember, under s. 85(2) it's up to the person claiming the property is excluded property to prove it.

Who got what under the *Family Relations Act*

Because of the transition provisions of s. 252 of the *Family Law Act*, the old *Family Relations Act*, even though it's been cancelled, will still apply to determine the division of property between married spouses if:

- they started a court proceeding to divide property before 18 March 2013, the date when the *Family Law Act* came into effect,
- a spouse wants to start a court proceeding to enforce or set aside an agreement about property that was signed before 18 March 2013.

As a result, it's going to be important to know how family property is divided under the *Family Relations Act* for a while longer.

The division and distribution of property between married spouses was governed by Parts 5 and 6 of the *Family Relations Act*. Part 5 of the act dealt with the division of property, including personal property, financial assets, and real estate. Part 6 dealt with the division of pensions. Unmarried couples, including couples who qualify as unmarried spouses, were expressly excluded from the parts of the act that deal with property.

The presumption of equal sharing

When a marriage breaks down, each spouse was presumed to have a one-half interest in all assets that qualify as *family assets*. Section 56 of the *Family Relations Act* said that:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset ...
- (2) ... as a tenant in common.

As long as an asset qualified under the act as a *family asset*, each spouse was presumed to have a one-half interest in that asset. Family assets were defined in s. 58(2) of the act, and the focus under the act was on how an asset was *used during the relationship* rather than on who bought it, when it was bought, or how it was bought:

Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

This section cast a very broad net: as long as an asset was owned by a spouse and was ordinarily used for a family purpose, the asset would be a "family asset" for the purposes of the *Family Relations Act*, and it didn't matter whether the asset was brought into the marriage by one spouse, or bought during the marriage.

To summarize, when a marriage breaks down, the spouses are presumed to own all family assets equally, no matter whose name the asset is in or whether the asset was brought into the marriage by one spouse or bought during the marriage. This presumption, however, only applies between spouses. As far as the rest of the world was concerned, the only owner of an asset is the person with legal title to the asset, which might be:

- one of the spouses,
- both spouses as joint tenants,
- both spouses as tenants in common, or
- one or both spouses, along one or more other people, either as joint tenants or as tenants in common.

The triggering events

When a *triggering event* happened, all of the property owned by either or both spouses became equally owned by both spouses as tenants in common. If only one spouse owned an asset, both of the spouses became equal owners of that asset as tenants in common. If both spouses owned an asset as joint tenants, the joint tenancy was severed and both of the spouses became equal owners of the asset as tenants in common.

Family law lawyers described the effect of a triggering event as "crystallizing" the interests of the spouses in the family assets because the triggering event made each spouse a legal owner of one-half of the family assets in a way that was also binding on people outside the marriage, like creditors, trustees in bankruptcy, potential purchasers and so forth. After a triggering event happened, all a creditor could lien or seize was the debtor's half-share of an asset, regardless of whether the debtor was the sole owner or the joint owner of the asset before the triggering event.

Section 56(1) of the *Family Relations Act* described four triggering events:

1. when the parties made and signed a separation agreement,
2. when the court made a declaration that the spouses had no reasonable prospect of getting back together and resuming married life,
3. when the court made an order for divorce, and
4. when the marriage was annulled.

Once any one of these triggering events happened, each spouse took a one-half legal interest in all of the family assets as a tenant in common, regardless of who bought the asset, who used to own the asset, or when the asset was bought. This new situation lasted until the division of the assets was finally determined by a court order of the court or the parties' agreement.

The equal and unequal division of family assets

Under s. 56 of the *Family Relations Act*, each spouse was presumed to have a one-half interest in all family assets. This was, however, only a presumption, a presumption that could be challenged. When assets were divided more in one spouse's favour than the other, the assets were said to have been *reapportioned*.

The court could order, or the spouses could agree, that all of the family assets would be reapportioned or that just a few assets would be reapportioned. This might have happened to allow one party to keep more of a pension or more of an inheritance, for example, even though all the other family assets might have been divided equally.

Section 65(1) of the *Family Relations Act* described the factors the court could take into account in deciding whether an equal division of the family assets would have been unfair:

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

Family assets were most commonly reapportioned when:

- the marriage was short, say less than six or seven years, and one of the spouses brought the majority of the assets into the relationship,
- one of the spouses was responsible for racking up a lot of debts not related to spending for family purposes,
- some of the assets were located outside of British Columbia,
- one of the spouses required more than half of the family assets to become financially independent,
- one of the spouses had wrongfully disposed of family assets or negligently allowed them to decrease in value, especially if this happened after separation, or
- some of the assets had been bought with a spouse's inheritance.

Defining "family assets"

Not all assets were shareable family assets. The sections of the *Family Relations Act* quoted above only provided for the division of assets that qualified as *family assets*; other sorts of assets might have been exempt from division, so that the spouse who owned the asset would be allowed to keep that asset, without necessarily having to compensate the other spouse for its value.

Family assets were defined in s. 58 of the *Family Relations Act* as:

- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:

- (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
- (i) a share in the corporation, or
- (ii) an interest in the trust owned by the spouse;
- (b) if property would be a family asset if owned by a spouse, property
- (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or
- (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
- (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

If an asset did not fall into these categories, it may not have been something that the spouses were both entitled to share. The basic rule of thumb was this: an asset was a family asset if it was ordinarily used or was intended to be ordinarily used for a family purpose.

Cohabitation agreements and marriage agreements

Cohabitation agreements are agreements signed by people who will be or are living together, who may or may not wind up getting married later on down the road. Marriage agreements are signed by people who will be getting or are married. Although there's no reason why these agreements can't be signed well into a relationship, they're usually signed at or shortly after the date the parties begin to live together or marry.

These agreements are often used to say how property and debt will be handled during a relationship and in the event the parties separate and, under s. 93(1) of the *Family Law Act*, they must be in writing and be signed by each spouse in the presence of at least one other person as witness.

However, since many people are content with the basic plan for the division of property set out in the *Family Law Act*, the question is often about what a cohabitation agreement or a marriage agreement can do that would be better than the division the act expects. Here are some ideas. An agreement could:

- clarify which property is excluded property and what its value was when the relationship began,
- allow a spouse to keep not just his or her excluded property but the growth in value of his or her excluded property,
- say that there will be no shared family property, except for property that is registered in both spouses' names or that the parties agree in writing will be shared family property,
- give a share of a spouse's excluded property to the other spouse, including a share which increases over time,
- make all excluded property shareable family property,
- say how property bought during the relationship will be owned if it's bought with both spouse's excluded property, or
- say what will happen if a spouse's excluded property decreases in value during the relationship.

I'm sure there are other options as well.

Resources and links

Legislation

- *Family Law Act*
- *Family Relations Act*

Links

- Canadian Bar Association BC Branch: Dividing property and debts ^[2]
- Justice Education Society: Workbook for parents separated with children on dealing with finances ^[3]
- Legal Services Society's Family Law Website: How to divide property and debts ^[4]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/5bpc>

[2] <http://www.clicklaw.bc.ca/resource/1240>

[3] <http://www.clicklaw.bc.ca/resource/1529>

[4] <http://www.clicklaw.bc.ca/resource/1639>

Protecting Property & Debt in Family Law Matters

It's sometimes necessary to take steps to protect family property, family debt, and excluded property until a final agreement or order dividing assets is made. Failing to take these steps can sometimes result in property being sold, diminished in value, used as collateral for a loan, moved out of province, or being seized by a trustee in bankruptcy or by a creditor. Most of the time it only becomes important to protect property after a couple has separated.

This section reviews some important initial steps that you can take to secure family property and family debt. It also looks at the restraining orders that can stop family property from being disposed of, the problems posed by third-party claims such as debts and bankruptcy, and how assets located outside British Columbia can be protected.

Initial steps

It may seem a bit neurotic to be worrying about assets when your relationship is falling apart, but this is precisely the time to be concerned. It certainly isn't the case that every spouse is busy squirrelling money away in Switzerland or Antigua, or hatching plans to transfer the title of the family home to a loan shark from Las Vegas, but there are certain steps you should take regardless of how well you think you know your spouse.

There is, as they say, no sense in bolting the barn door after the horses have gone. It's fairly reasonable to take steps to protect your own interests, and in most cases you probably should.

Take stock of property and debt

Firstly, you might want to take a careful, but not too obvious, tally of what each of you owns and owes. This might be difficult if you and your spouse keep separate bank accounts and maintain your own investments, but make your best efforts. A list of the bank accounts, RRSP and investment accounts, cars, properties, loans, lines of credit and credit cards you have may prove to be extremely useful. Even if you can't get all the account details, a record of the names of the financial institutions that are sending your spouse mail can be extremely useful.

Make it clear that you've separated

Once you've decided that your relationship can't continue, and you're sure that it can't continue, you need to separate. This doesn't mean that you and your spouse need to move into separate homes, but you need to announce your decision and you should probably do it in writing so that you have a record of the date of separation.

Under s. 81(b) of the provincial *Family Law Act*, when separation happens each spouse takes a one-half in all family property as tenants in common, regardless of how the property was owned before separation, and becomes responsible for one-half of all family debt. This can be critical to protect your share of the family property from creditors, your spouse's bankruptcy, or court orders made in other court proceedings.

While it's always a good idea to consult with a lawyer if you have a family law problem, be especially sure to do so if you're not certain whether separating would be helpful or harmful.

There are only a few times when a separation is a bad idea, usually when the effect of separation will limit a claim to one-half of the family property when there's a good chance that it might be more. Say, for example, that a spouse is in poor health and dying when the parties separate. The effect of separation may mean that a surviving spouse will get no more than half of the deceased spouse's estate when the spouse might have received more than half as a surviving spouse or a surviving joint tenant.

Register your interest in property

Registering an interest in real property will stop the property from being sold and may prevent the property from being borrowed against. The two most common ways to do this are by filing an entry under the *Land (Spouse Protection) Act* ^[1] with the Land Title and Survey Authority, or by filing a Certificate of Pending Litigation under the *Land Title Act* ^[2] with the Land Title and Survey Authority.

Entries under the *Land (Spouse Protection) Act*

Married spouses and unmarried spouses may file an *entry* on the title of the family home under the provincial *Land (Spouse Protection) Act*. The entry will prevent a spouse from transferring, selling, leasing, or making a gift of the family home without the knowledge and approval of the spouse filing the entry.

The great thing about these entries is that you can get one whether court proceedings have started or not. This is an ideal way to protect yourself if you only have a slight concern about your relationship or the trustworthiness of your spouse, but don't have the need to begin a proceeding just yet. The downside, of course, is that entries under this act only protect the single property that is or was used as the family home.

Certificates of pending litigation under the *Land Title Act*

Where a court proceeding has started in the Supreme Court, a *Certificate of Pending Litigation* (CPL), formerly called a *lis pendens*, can be registered against the title of any property owned by you and your spouse at the Land Title and Survey Authority. As long as you have asked for a CPL in your Notice of Family Claim or Counterclaim and made a claim for the division of family property, you will be entitled to register a CPL.

The effect of a CPL is to announce to anyone interested in the property, such as a mortgagee or a creditor or a potential buyer, that ownership of the property may change as a result of the litigation. This discourages and usually prevents the sale of the property or its use as collateral.

You can file your CPL at the same time as you file your Notice of Family Claim or Counterclaim. The registry will stamp your CPL, and you must take the stamped CPL and file it in the Land Title and Survey Authority together with a copy of your Notice of Family Claim or Counterclaim.

Notices and financing statements under the *Family Law Act*

Spouses who have made a cohabitation agreement, a marriage agreement, or a separation agreement dealing with real property can file a *notice* of the agreement against the title of the property with the Land Title and Survey Authority under s. 99 of the *Family Law Act*. A notice can be filed whether court proceedings have started or not, and will prevent the other spouse from transferring, selling, leasing, or otherwise dealing with the property without the voluntary cancellation of the notice or a court order.

A *financing statement* can be filed in the Personal Property Registry ^[3] against a manufactured home under s. 100. This will stop the manufactured home from being transferred, and any new debts registered against the manufactured home will come in second to the spouse's interest under the financing statement.

Make sure the rent gets paid and the lights stay on

Section 226 of the *Family Law Act* allows the Provincial Court and the Supreme Court to make a conduct order that can require a party to keep paying the household bills and prevent a party from terminating services to the family home:

A court may make an order to do one or more of the following:

- (a) require a party to make payments respecting rent, mortgage, specified utilities, taxes, insurance and other expenses related to a residence;
- (b) prohibit a party from terminating specified utilities for a residence;

Most of the time, people don't stop paying the mortgage or cut off the electricity to the former family home when they move out. However, it can be very tempting to do this when emotions are running high, when there's not enough money to pay rent at the new place plus rent for the old place, or when the BC Hydro account at the former family home is in the name of the person who needs to arrange for the electricity to be hooked up at his or her new place. The court is not likely to make orders under s. 226 when there's not enough money to pay for everything, but it will step in where someone is acting out of spite or malice.

Financial restraining orders

A *restraining order* is an order of the Supreme Court requiring someone to do something or to not do something. A typical restraining order relating to family assets reads something like this:

The Respondent shall be and is hereby restrained from disposing or encumbering, or attempting to dispose of or encumber, the family property and other property at issue without the express written agreement of the Claimant or the further order of this Honourable Court.

In other words, unless the respondent comes to an agreement with the claimant or the court makes another order, under a restraining order like this the respondent is not allowed to sell any real property or personal property, or use that property as collateral for a loan or a mortgage. An order on terms like these is usually all that will be necessary for most couples in most circumstances and will cover real and personal property in British Columbia and personal property outside of British Columbia.

Remember that the Provincial Court does not have the power to make orders affecting property, including restraining orders about property.

The Family Law Act

The easiest way for married and unmarried spouses to obtain a financial restraining order is to apply for an order under s. 91(1) of the *Family Law Act*. This section says that:

(1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

A couple of important points about this section deserve mention:

- The order *must* be granted on a party's application, unless the other party can show that there are enough assets that the applicant's claim to the property won't be frustrated if he or she happens to sell some of the assets.
- The order can be made without the other party being given notice of the application.
- The order includes not just family property but all "property at issue," which might include excluded property.

This is an important order and should probably be applied for whenever a claim is being made for the division of property. Again, this is a matter of simply being prudent. You may have no cause to believe that your spouse would do something that would jeopardize your interests, but it almost always pays to be cautious.

The Rules of Court

Rule 12-4 of the Supreme Court Family Rules^[4] gives the court the authority to make a general restraining order, also called an *injunction*, to make someone to do something or not do something. The potential scope of these restraining orders is very broad, and can include, for example, a restraining order identical to that provided for in s. 91 of the *Family Law Act* as well as an order stopping someone from racking up debt by drawing on credit cards and lines of credit.

Rule 12-4 says little more than "the court can issue an injunction." A 1986 case of the British Columbia Court of Appeal, *British Columbia v. Wale*^[5], 1986 CanLII 171 (BCCA) offers some guidance. In that case, the court held that someone applying for an injunction had to prove three things. In a family law context involving unmarried parties, these are that:

1. you have a reasonable claim against assets owned by your spouse,

2. your spouse has disposed of or encumbered his or her assets or is likely do so, and
3. the inconvenience that will be suffered by your spouse as a result of the injunction is less severe than the inconvenience you will suffer if the injunction isn't granted.

The Law and Equity Act

Section 39 of the provincial *Law and Equity Act* ^[6] does pretty much the same thing as Rule 12-4 of the Supreme Court Family Rules. Section 39 says this:

(1) An injunction ... may be granted ... in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

(3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

This section gives the court a fairly broad authority to make an injunction where the injunction is justified. Much like injunctions under Rule 12-4, you will have to show that:

1. you have a reasonable claim against assets owned by your spouse,
2. your spouse has disposed of or encumbered his or her assets or is likely do so, and
3. the inconvenience that will be suffered by your spouse as a result of the injunction is less severe than the inconvenience you will suffer if the injunction isn't granted.

Applying for restraining orders without notice

The court can only make orders, including restraining orders, when a court proceeding has been started. When there is an urgent problem, as might be the case if a spouse is threatening to sell or move an asset, applications for injunctions and restraining orders can be made with little or no notice to the spouse and sometimes before the spouse has even been notified of the court proceeding.

It's important to know that if you are applying for an injunction or restraining order without notice to the other spouse, the court will require that you make full and complete disclosure of all of the relevant facts, even of those facts that aren't in your favour. If it is discovered that you haven't made full disclosure, the court can set aside the injunction, make an award of costs against you, or make an award of damages to compensate the other party for any inconvenience caused by the injunction. In a 1986 Supreme Court case called *Morin v. Morin* ^[7], 1986 CanLII 896 (BCSC), this resulted in a spouse having the injunction cancelled and getting awarded special court costs of the application.

Debts, bankruptcies and third-party claims

Apart from the possibility that your spouse will be less than forthcoming in dealing with the family property and family debt, you may also need to protect your interest in those assets from claims made by creditors and third parties, and against the possibility of your spouse's bankruptcy or your spouse racking up further debt. These issues can be dealt with, for the most part, by ensuring that you:

1. separate from your spouse, to convert the ownership of all property to a shared ownership between you and your spouse as tenants in common,
2. register a CPL against all real property in which your spouse has an interest, and
3. obtain a financial restraining order under one or more of s. 91 of the *Family Law Act*, s. 39 of the *Law and Equity Act* or Rule 12-4 of the Supreme Court Family Rules.

The problem here is that property that is owned only by your spouse, or by both of you as joint tenants, may be vulnerable to your spouse's creditors and in the event of his or her bankruptcy. Say, for example, your spouse has put up his or her car as collateral for a loan. You would normally be entitled to one-half the car's value as a family property, assuming the car was bought during your relationship. If your spouse defaults on the loan, the car can be seized and you could find, especially where there are few other assets, that you can get no compensation for your interest in the car's value once the lender's default fees and legal fees are added on.

Your spouse's creditors or trustee in bankruptcy will not usually be able to seize assets held only in your name or your interest in property as a tenant in common unless you are responsible for your spouse's debts for some reason, like co-signing or guaranteeing a loan, or using a secondary credit card on your spouse's account. Although, under the *Family Law Act* both spouses are responsible for the debts incurred during their relationship, this obligation is only between spouses and doesn't give any extra rights to creditors.

Creditors

Creditors have a wide range of remedies available to them when a debtor fails to live up to the conditions of a loan, a line of credit or a credit card. Among other things, a creditor can:

- seize any asset put up as collateral on the loan,
- sue the debtor for the amount owing,
- put a lien on property owned by the debtor,
- garnish the debtor's wages,
- force the sale of the debtor's property to meet the debt, or
- register a judgment against the debtor's property.

Any one of these remedies can harm the interest the other spouse has in what would otherwise be family property, even if the other spouse had nothing to do with how or why the debt was incurred. The effect of separation can help to shield the other spouse's presumptive one-half interest in the family property from creditors and limit their ability to recover to the half of the property owed by the debtor spouse.

Third-party claims

Your spouse might be liable for damages or debt to someone in a court proceeding unrelated to your relationship. Your spouse may also have made a deal with someone outside the family that concerns the family property. These people may have a legitimate claim against the family property. The problem is that even though their claim or entitlement may be restricted to property owned by your spouse in his or her name alone, your interest in that property may be lost if a third party gets there first.

As we've discussed, both spouses have a presumptive interest in the family property, including property owned only by the other spouse, as long as it qualifies as family property. A third-party claim or entitlement can result in the loss of an asset or in the loss of the value of the property. By the time the family property is divided, without separation or a restraining order, the assets might very well be in the hands of someone else and no longer be available for division.

Bankruptcy

When someone declares bankruptcy, the ownership of his or her property is transferred to a trustee in bankruptcy. The trustee's job is to tally up the list of the bankrupt's debts and then sell as much of the bankrupt's property as is necessary to satisfy his or her creditors. This may include almost all property registered in the bankrupt's name, but will exclude a few specific assets like pensions, clothing, and work tools.

If an asset is family property, the transfer of the asset to the trustee may deprive the other spouse of any interest he or she might have in that asset and, since the owning spouse is bankrupt, he or she may not have any other financial resources from which to compensate the non-bankrupt spouse for the lost interest.

A trustee in bankruptcy cannot take property that doesn't belong to the bankrupt. If the spouses separate before the bankruptcy, only the bankrupt's one-half interest in the family as a tenant in common will go to the trustee.

Protecting property outside British Columbia

This is a little complicated, so please be patient. The law that deals with the division of property between spouses in this province is the *Family Law Act*. Because the jurisdiction of the government of British Columbia is generally limited to the province of British Columbia, the government cannot usually make laws that affect people and things located outside of British Columbia. For the same reason, the courts of British Columbia usually only have the jurisdiction to deal with things located inside the province of British Columbia.

There are some exceptions to these general rules.

- The Supreme Court of British Columbia can make an order requiring a person to do or not do something when that person accepts the authority of the court, even where that person lives outside the province.
- A person is considered to have accepted the authority of the court by responding to a court proceeding. Once an out-of-province respondent files a Response to Family Claim in reply to the claimant's Notice of Family Claim, he or she has accepted the jurisdiction of the court to deal with the litigation. This is called *attorning to the jurisdiction*.
- When someone attorns to the jurisdiction of the courts of British Columbia, they submit to the court's authority. The court still may not have the authority to make orders about things located outside the province, but it does have the authority to make orders about the person located outside the province. This is called "*in personam* jurisdiction."
- A court with *in personam* jurisdiction over a person can make orders requiring the person to do or not do things involving certain kinds of things located outside the province, such as assets like bank accounts, stocks, investment accounts, and similar assets that aren't real estate. These assets are called *movable assets*.
- Whether a court has *in personam* jurisdiction or not, it usually won't have jurisdiction over real property located outside the province. This kind of jurisdiction is called "*in rem* jurisdiction." Real property and things attached to real property like buildings are called *immovable assets*.

The upshot of all of this is the following general rules:

- the courts of British Columbia generally cannot deal with real property located in other provinces or outside of Canada,
- the Supreme Court of British Columbia can deal with out-of-province assets that are movable, like RRSPs, stocks, bank accounts, chattels and what not, as long as the owner has attorned to the court's jurisdiction, and

- the Provincial Court cannot deal with out-of-province issues at all.

However, the *Family Law Act* contains some provisions that are meant to give the court *in rem* jurisdiction out of province under certain circumstances and, if those circumstances are met, to allow the court to make an order restraining a person from disposing of property located outside the province. Although it remains to be seen how effective this legislation will be in imposing on the authority of another jurisdiction, the act's out-of-province restraining orders are discussed below.

This area of the law is extremely complex, and you really should consider hiring a lawyer to help you whenever you have an interest in assets located outside the province.

Immovable assets

Real property and things attached to real property, like buildings, are called immovable assets. The courts of British Columbia generally do not have jurisdiction over immovable assets located outside of the province.

The general rule

Generally speaking, subject to the exception in the *Family Law Act* discussed below, there is nothing that can be done to stop someone from selling or otherwise dealing with real property located outside of British Columbia, even property that would normally qualify as family property. Usually, the only way to effectively protect such assets from sale or being used as collateral is to start a court proceeding in the jurisdiction in which the property is located.

The courts of this province will, however, usually compensate a spouse for an interest in out-of-province property by reapportioning the property that the court can deal with, property located inside British Columbia, to compensate for the property that it can't deal with. Here's an example:

Zygmunt has a farm in Flin Flon, Manitoba worth \$50,000. Zygmunt and Ivan both own the family home in Vernon, British Columbia worth \$100,000. Assuming both properties were bought after the relationship began and that both are family property, under an equal division each of the spouses would be entitled to \$25,000 for the farm in Manitoba and \$50,000 for the family home in British Columbia.

Since the court can't normally make an order requiring the sale or transfer of the property in Flin Flon, an equal division of the assets in this jurisdiction would give each spouse \$50,000, half the value of the family home, but this would short Ivan of his interest in the farm. To avoid this unfairness, the court could simply divide the family home in Vernon in favour of Ivan, and give him a \$75,000 share rather than an equal share.

This would reapportion the value of the property the court can deal with (the family home) to compensate Ivan for the interest he ought to have in the property the court can't deal with (the farm). Zygmunt is still left with half of the family property, as he remains the sole owner of the farm, \$50,000, and gets a \$25,000 share of the family home, for a total property interest of \$75,000.

In truly exceptional circumstances, it is possible to get an order stopping someone from disposing of real property located outside the province with something called a "*Mareva* injunction." A *Mareva* injunction will stop someone from selling or encumbering assets outside of British Columbia, providing that certain conditions are met. (The name of this order comes from an old English case in which the relief was first granted, *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1980] 1 All E.R. 213) To qualify for this order, you must:

1. show a strong case for your entitlement to a share of those assets,
2. show that there is a real risk that the other party will dispose of those assets before a final order is made, and
3. guarantee that you will make good any harm the other party might suffer if the order is made.

The *Family Law Act*

Under Division 6 of Part 5 of the *Family Law Act*, the Supreme Court of British Columbia may, in certain circumstances, make orders about the ownership and division of property located outside British Columbia. If the court has the ability to make orders dividing property located outside the province, it may also make an order to preserve the property from being disposed of. Section 109(2)(b) says this:

- (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
 - (i) preserve the extraprovincial property ...
 - (iv) provide for any other matter in connection with the extraprovincial property;

The first stumbling block is to figure out whether the court can divide the out-of-province property, and that requires a difficult analysis under ss. 106, 107 and 108 of the act. Assuming the court can make such orders, the next step is to find out whether the order would "enforceable against a spouse" in the place where the property is located. If the answer to both questions is yes, then the court may make an order for the preservation of the foreign property.

This part of the act is extremely complicated and you should get advice from a lawyer whenever you may need to deal with movable and immovable property located outside of British Columbia.

Movable assets

Bank accounts, stocks, investment accounts, and similar assets that aren't real estate are called movable assets. The courts of British Columbia usually have jurisdiction over immovable assets located outside of the province where the owner has attorned to the jurisdiction and accepted the court's authority.

Where a spouse has attorned, the court can make a restraining order stopping the spouse from disposing of movable property located outside of British Columbia under s. 91 of the *Family Law Act*. Inside British Columbia, a s. 91 order will stop a spouse from dealing with everything that is family property or other "property at issue," including real property. Outside British Columbia, a s. 91 restraining order will only stop a spouse from dealing with movable assets.

The court can be reluctant to issue a s. 91 order that is intended to deal with assets located outside the province, since in most cases the courts of British Columbia cannot make orders about things located outside the province. In a 2002 case called *Boyd v. Boyd*^[8], 2001 BCCA 535, the Court of Appeal confirmed that the court can make *in personam* restraining orders that are effective against movable assets located outside the province.

If a s. 91 order is not available for some reason, a *Mareva* injunction will have the same effect. However, *Mareva* injunctions are not granted automatically and you must satisfy the test described just above.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Constitution Acts, 1867 to 1982* ^[9]
- *Land (Spouse Protection) Act* ^[1]

Links

- BC Personal Property Registry Website ^[3]
- Canadian Bar Association BC Branch: Dividing property and debts ^[10]
- Justice Education Society: Workbook for parents separated with children on dealing with finances ^[11]
- Legal Services Society's Family Law Website: How to divide property and debts ^[12]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Dividing Property & Debt in Family Law Matters

If a couple are able to agree on how their property and debts will be divided, they can make a separation agreement summarizing the terms of their settlement. However, if they can't agree, court proceedings will likely start and the court will make an order dividing their property and debt for them.

This section talks about how property and debt are divided between spouses by the court through court orders made under the *Family Law Act*, and by spouses through separation agreements. It also discusses when excluded property can be shared between spouses, when family property can be divided unequally, and when the court can make orders about property located outside British Columbia.

Introduction

Whether you're able to settle how property and debt are going to be shared by agreement or if you're going to need a court order, it's important to understand how the *Family Law Act* works. If you're going to start a court proceeding, the court will be required to divide property using the rules set out in the act; if you're going to be able to settle your property issues, the act will be used to measure the fairness of your agreement if either of you ever tries to get out of the agreement in the future.

How the *Family Law Act* divides property and debt

Part 5 of the *Family Law Act* talks about the division of family property and family debt between spouses. It says what counts as shared family property and shared family debt, and which property is excluded from family property and is supposed to remain the separate property of the owner. It talks about when family property and family debt can be divided unequally, and the circumstances in which excluded property may be shared between spouses. Part 6 talks about how pensions, which count as family property under Part 5, get divided between spouses.

This is how Part 5 works:

- **Section 97(2)(a):** This section says that the court can make declarations concerning the possession and ownership of property and can make orders that may be necessary to give effect to such declarations.
- **Section 106:** This section says when the courts of British Columbia have the authority to divide property and debt if there is another court that can also make orders dividing property and debt between the same spouses.
- **Section 81:** This section states the basic principle that when spouses separate, each spouse takes a one-half interest in family property as a tenant in common, and each becomes responsible for one-half of the family debt.
- **Sections 84 and 85:** These sections tell you how to figure out which property is family property and which property is excluded property.
- **Section 94(1):** This section gives the court the authority to make orders for the division of property and debt between spouses.
- **Sections 95 and 95:** These sections say when the court may divide excluded property between spouses and when it may divide family property unequally.
- **Section 109(1):** This section allows the court to make orders for the ownership and division of property outside of British Columbia.

Interestingly, there isn't a section that explicitly says "the court should make orders dividing family property and family debt equally"; you have to figure this out from s. 81, which says that each spouse should have half of the family property and family debt, and from s. 94, which says that the court can make orders dividing family property and family debt.

Dividing property and debt under the *Family Law Act*

Here's a step-by-step guide to Part 5. The discussions that follow will go into things in more detail.

Step One

To divide property and debt under the *Family Law Act*, you first have to figure out whether you're a "spouse" as defined by s. 3(1)(a) or 3(1)(b)(i). You must either be married or have lived with your partner in a marriage-like relationship for at least two years.

If you're not a spouse, *stop* and read the discussion in the introductory section of this chapter, Property & Debt, about the property rights of people who aren't spouses. People who don't qualify as spouses are entitled to share in property that they both own and may have an interest in property only one of them owns under the common law relating to trusts and equity.

Step Two

Next you need to look at any *cohabitation agreement* or *marriage agreement* that you may have signed earlier in your relationship to see whether it talks about property or debt.

If you have an agreement about property, *stop*. Section 94(2) says that you cannot apply for a division of property if there's a written agreement about property or debt until that agreement is set aside.

Step Three

Next you have to check that you're making your claim within the *time limits* set out in s. 198(2). Married spouses must bring their claims for the division of property and debt within two years of the date of their divorce or a declaration that their marriage is a nullity; unmarried spouses must bring their claims within two years of the date of their separation.

If you're outside the time limits, *stop*. Talk to a lawyer to confirm that you're out of time and ask about whether you're within the limitation period to ask for an interest in property under the common law relating to trusts and equity.

Step Four

Now you have to figure out whether there's *another court* somewhere outside of British Columbia that has the authority to make an order affecting you, your spouse, and your property. Most of the time the answer to this question will be no.

However, if:

- you and your spouse lived somewhere else for a long time,
- you have property outside of the province, or
- you have a cohabitation agreement or a marriage agreement that requires the laws and courts of another place to be used,

there may be a problem. If another court can make an order, you then have to figure out under s. 106 whether the courts of British Columbia should be dealing with your proceeding at all.

If your case is better dealt with by another court, *stop* because you'll need to start a court proceeding there. If not, you can continue here.

Step Five

Now you have to start sorting what you have into *family property* and *family debt*, and *excluded property* and *personal debt*. Start from the assumption that everything you have is family property and family debt and then work backwards.

Property and debt that you got *after you separated* is generally the separate property of each spouse, with two main exceptions:

- property bought after separation with family property is also family property, and
- debt incurred after separation to maintain family property is family debt.

Property you got *during your relationship* is generally family property, except for certain kinds of property that are excluded from family property. These include:

- inheritances,
- gifts,
- certain court awards, and
- certain insurance payments.

Property and debt that you got *before your relationship* is generally excluded property that only you will keep and personal debt that only you will be responsible for.

Step Six

Next you need to figure out what everything is worth and where it is. This will be the hard part.

For *excluded property* and *personal debt*, what you need to know is:

- What was the value of each asset on the date you began to live together or got married, whichever came first?
- For property acquired during the relationship, when did you acquire each asset and what was it worth when you received it?
- What did you do with your property during your relationship? Is it still around? Did you sell it and buy something else?
- Do you still have any debts from before your relationship started? If so, how much did you owe on the date you began to live together or got married, whichever was first?
- Have you incurred any new debt after the date of your separation? Did you add to any debts incurred during your relationship after separation? If so, how much new debt have you racked up?

For *family property* and *family debt*, you need to know:

- What is the value of each asset now?
- Did you buy any family property using the proceeds of sale of excluded property? If so, how much did you put toward the purchase of the family property?
- Is there any property that was bought after separation with family property? If so, what is the value of those assets?
- What are the debts owed by you, by your spouse, or by both of you, and how much is owing now?
- If new debt was incurred after the date of separation, was any of it incurred to pay for family property? If so, how much new debt was spent on family property?

Step Seven

Now that you've got the numbers worked out, you may want to think about whether an *equal division* of family property and family debt would be "significantly unfair," bearing in mind the factors listed in s. 95(2). If it wouldn't be significantly unfair, then split the family property and family debt equally and go on with your life. If it would be significantly unfair, then you've got to figure out what a fair split looks like and I wish you the best of luck sorting this out in a speedy manner.

Finally, you may also want to think about whether there's a reason to share in some or all of the *excluded property*. Excluded property can be divided if there's property outside of British Columbia that ought to be

family property but can't easily be divided, or if it would be "significantly unfair" not to share excluded property, bearing in mind the factors listed in s. 96(b). If there's no reason to share excluded property, carry on. If there is a reason to share that property, then you've got to figure out what a fair division looks like.

Orders for the division of property and debt

Under the *Family Law Act*, a person who is a "spouse" under s. 3 may apply, within the two-year time limit in s. 198, for a division of property under s. 94(1). Where another court may also make an order for the division of property, the court here must first determine whether it should go ahead under s. 106 and, if so, it must next determine what law it should apply under s. 108. However, where no other court may make an order respecting property, the court here may make orders dividing property and debt under Part 5 of the act without any more complications.

The usual order under Part 5 is an order that decides which property is family property and which debt is family debt, and then divides them both equally. However, in some circumstances the court can divide family property and family debt unequally; in others the court can even divide excluded property between spouses.

Determining jurisdiction

A person who qualifies as a spouse under s. 3 of the *Family Law Act* can start a court proceeding in British Columbia and ask for orders about the division of property and debt. There's no rule that says that a person who starts a court proceeding in British Columbia must live in British Columbia, but there must be some sort of connection with this province and the court proceeding. Maybe the other spouse lives here. Maybe the property or debt is here. Maybe British Columbia is where the spouses lived for most of their relationship. Either way, there must be some connection between the court proceeding and British Columbia.

However, where another court might be able to make orders about the same people and the same property, the court here must decide:

1. if it should make orders dividing property and debt or leave those issues for the other court, and
2. if it should make orders, the law it should apply in dividing the property and debt.

Determining whether the court should make orders

You should skip this discussion if no court other than the court of British Columbia can make orders about you, your spouse, and your property.

When another court might be able to make orders about the same people and the same property, s. 106(2) provides the rules to help the court here determine when it may make orders dividing that property between those people under Part 5:

(2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

(a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;

(b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;

(c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;

(d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

In other words, the court here can make an order if:

1. the claim about property was made by a counterclaim in the court proceeding,
2. both spouses agree that the court should make orders about property and debt,
3. either spouse normally lived here when the proceeding started, or
4. there is a "real and substantial connection" between this province and the proceeding.

Section 106(3) helps to explain what "real and substantial connection" means:

(3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:

(a) property that is the subject of the proceeding is located in British Columbia;

(b) the most recent common habitual residence of the spouses was in British Columbia;

(c) a notice of family claim with respect to the spouses has been issued under the *Divorce Act* (Canada) in British Columbia.

In other words, there is a "real and substantial connection" between this province and a court proceeding, which may let the court here make orders about the division of property and debt, if:

1. the property is here,
2. the spouses last lived together here, or
3. the court proceeding includes a claim under the *Divorce Act* (the reason for this factor is that the *Divorce Act* requires a spouse to have lived in the province where he or she makes a claim under the act for at least one year before the court proceeding is started).

As if this wasn't complicated enough, even if the court can make an order because one of the s. 106(2) conditions are met, under s. 106(4) the court can refuse to make orders for the division of property and debt. Section 106(5) says what the court must take into account in deciding to refuse to make orders:

(5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:

(a) the interests of the spouses;

(b) the relative convenience and expense for the spouses and their witnesses;

(c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;

(d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;

(e) the extent to which an order respecting property or debt

(i) made in another jurisdiction would be enforceable in British Columbia, and

(ii) made in British Columbia would be enforceable in another jurisdiction;

(f) the fair and efficient working of the Canadian legal system as a whole;

(g) any other circumstances the court considers relevant.

This is a little harder to boil down, but these factors essentially ask the court to think about what is cheapest, fastest and fairest for the spouses and will require the least number of court proceedings.

Determining the law to apply when the court may make orders

You should skip this discussion if no court other than the court of British Columbia can make orders about you, your spouse, and your property.

Assuming, then, that the court here has decided that it has the authority to make orders for the division of property and debt because one of the s. 106(2) factors is met, and that it hasn't decided to refuse to make orders anyway under s. 106(4), the next thing to figure out is the law that the court should use in deciding how the property and debt should be divided under ss. 107 and 108. That law could be the law of British Columbia, namely Part 5 of the *Family Law Act*, or it could be the law of another place.

Section 108 is just as complicated as s. 106, but what it all comes down to is this:

1. under s. 108(3), if the spouses have an agreement that says the law of a particular place must be used, the law the court must use is the law of that particular place,
2. under s. 108(4), if the spouses first together lived in a place that divides property like the *Family Law Act* divides property, the law the court must use is the law of the place where the spouses first lived together,
3. under s. 108(5), if neither of the first two circumstances apply, the law the court must use is the "applicable internal law."

Section 107 says how you figure out what the "applicable internal law" is:

The applicable internal law for the purposes of section 108 [choice of law rules] is

(a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,

(b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or

(c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

In other words, the "applicable internal law" that should be used to divide property and debt between spouses is:

1. the law of the place where the spouses most recently lived together,
2. the law of the place where the spouses lived together the longest, or
3. if the spouses never lived together, the law of the place where the spouse making the claim for the division of property normally lives.

In the right circumstances, the "applicable internal law" could be the *Family Law Act*!

Property and debt inside British Columbia

Section 97 is the key to Part 5 of the *Family Law Act* and gives the court its general power to make orders about the division of property and debt. Under this section, the court may:

1. make decisions about any issue concerning the ownership, possession, or division of property or debt,
2. make any order necessary to divide property or debt,
3. declare who should own or possess property,
4. make a spouse pay compensation if or she has sold or transferred property that should have been shared,
5. require the sale of a property and payment to the spouses from the proceeds of the sale,
6. make one spouse be responsible for debt,
7. require the sale of property to pay debt, and
8. make orders transferring property to a spouse.

Under s. 97, the court can make whatever orders are needed to equally divide family property and family debt between spouses, whatever extra orders are needed to divide family property and family debt unequally under s. 95, and whatever extra orders are needed to divide excluded property under s. 96.

Interim orders

An *interim order* is a temporary order made after a court proceeding has started and before it has wrapped up with a trial or a settlement. Under s. 88, a spouse can apply to court for an interim order about property at any time until a final order or a final agreement has been made about the division of property and debt.

Paying for dispute resolution processes

Under s. 89, the court can make an order for the interim distribution of some of the family property to pay for:

1. the cost of the court proceeding,
2. the cost of another dispute resolution process, like mediation, arbitration, and collaborative settlement processes, and
3. the cost of expert's reports, like needs of the child assessments under s. 211, property assessments, or business valuation.

Use of property

Under s. 90, the court can make an interim order that one spouse have the exclusive right to live in the family home and use the property kept at the family home. The court will make these orders if it's no longer possible for the spouses to share the home and if the convenience to the spouse who's staying in the home outweighs the inconvenience to the spouse who's being made to leave.

Under s. 91(2)(a), the court can make other interim orders "for the possession, delivery, safekeeping and preservation of property." This might include orders that a spouse must return personal property to the other spouse or that a spouse will have the sole use of personal property, like a car that's necessary to go to work or take the kids to school.

Financial restraining orders

Under s. 91(1) and (2), the court can make some really important interim orders that are intended to freeze any property that is at issue in the court proceeding, including family property and property that might be excluded property, until the property is finally divided by an order or an agreement.

(1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

(2) The Supreme Court may make one or more of the following orders:

(b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,

(i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or

(ii) vesting all or a portion of property in, or in trust for, the applicant.

A couple of important points about this section deserve mention:

- the order *must* be made when a spouse asks for it, unless the other spouse can show that there are sufficient assets so that the claim to the property won't be frustrated if he or she happens to sell some of the assets,
- the order can be made without giving the other spouse notice of the application, and
- the order includes not just "family property" but all property in dispute, including property that might be excluded property.

This is a powerful interim order and you should probably think about asking for this order if you are asking for a share of property. This is just a matter of being prudent. You may have no cause to believe that your spouse would do something that would jeopardize your interests, but it almost always pays to be cautious.

Rule 12-4 of the Supreme Court Family Rules gives the court the authority to make a general restraining order, called an *injunction*, to require someone to do something or not do something. The same authority is given to the court by s. 39 of the provincial *Law and Equity Act*^[1]. See this chapter's section on Protecting Property & Debt for more information.

Dividing property and debt equally

Under s. 81(a) of the *Family Law Act*, "spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution." Under s. 81(b), each spouse's share of the family property is presumed to be an "undivided half interest" and each spouse is "equally responsible for family debt." Section 97 gives the court the ability to make whatever orders are necessary to divide family property and family debt between spouses.

Section 84 says what family property is:

(1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

(a) on the date the spouses separate, property

(i) that is owned by at least one spouse, or

(ii) in which at least one spouse has a beneficial interest;

(b) after separation, property

(i) acquired by at least one spouse, or

(ii) in which at least one spouse acquires a beneficial interest,

that is derived from the property referred to in paragraph (a) or from the disposition of that property.

(2) Without limiting subsection (1), family property includes the following:

(a) a share or an interest in a corporation;

(b) an interest in a partnership, an association, an organization, a business or a venture;

(c) property owing to a spouse

(i) as a refund, including an income tax refund, or

(ii) in return for the provision of a good or service;

(d) money of a spouse in an account with a financial institution;

(e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;

(f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

Section 86 says what family debt is:

Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

Dividing property and debt unequally

Under s. 95(1) of the *Family Law Act*, the court may divide family property or family debt unequally, but only if an equal division would be "significantly unfair." It's hard to say what "significantly unfair" means, because the *Divorce Act* doesn't use this phrase and the old *Family Relations Act* only talked about things that are just *unfair* and things that are *grossly unfair*. It seems reasonable to assume that under the new *Family Law Act*, something that is "significantly unfair" is *more unfair* than something which is just "unfair" yet is *less unfair* than something that is "grossly unfair."

Section 95(2) provides a list of factors that the court may take into account in deciding whether an equal division of property and debt would be significantly unfair:

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

Under s. 95(3), the court can also take into account issues relating to spousal support in deciding whether to divide family property and family debt unequally:

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

This provision will apply when there is an obvious need for spousal support to be paid, but the potential payor doesn't have the surplus income from which to pay. In this situation, the spouse in need of support might get more of the family property to make up for the support that can't be paid. See the chapter on Spousal Support for more information about when spousal support might be payable.

Dividing excluded property

Under s. 96 of the *Family Law Act*, the court may not make an order dividing excluded property between spouses except in two situations: if there's property outside the province that can't be divided under s. 109, discussed below; or, if it would be "significantly unfair" not to divide the excluded property in light of the length of the spouses' relationship or one spouse's contributions to the excluded property owned by the other spouse. Section 96 says this:

The Supreme Court must not order a division of excluded property unless

(a) family property or family debt located outside British Columbia cannot practically be divided, or

(b) it would be significantly unfair not to divide excluded property on consideration of

(i) the duration of the relationship between the spouses, and

(ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

As we saw in the discussion about s. 95, it's hard to say what "significantly unfair" means. I expect that something that is "significantly unfair" is more unfair than something which is just "unfair," yet is less unfair than something that is "grossly unfair."

Property and debt outside British Columbia

Division 6 of Part 5 of the *Family Law Act* has a complicated test that the court must apply to determine whether it can and should make orders dividing property and debt between spouses when another court could also make orders about the same people and the same property. This was discussed earlier in this section under the heading "Determining jurisdiction."

If the court decides that it can make orders, it can, in certain circumstances, also make orders about property located outside the province under s 109(2):

(2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:

(a) instead of dividing the extraprovincial property,

(i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or

(ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;

(b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,

(i) preserve the extraprovincial property,

(ii) provide for the possession of the extraprovincial property,

(iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or

(iv) provide for any other matter in connection with the extraprovincial property;

(c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

To put this another way:

1. under s. 109(2)(a), the court can divide family property here unequally to compensate for property outside the province, just like how the court can divide excluded property for the same reason under s. 96(a),
2. under s. 109(2)(b)(i), the court can make a kind of restraining order to stop the property outside the province from being sold, just like how the court can make restraining orders about property inside the province under s. 91(1), and
3. under s. 109(2)(b)(ii) and (iii) and s. 109(3), the court can make orders about which spouse should be able to possess or own property outside the province and orders transferring property outside the province between spouses.

Separation agreements for the division of property and debt

A separation agreement is a contract that records a settlement of the issues that arise when a relationship ends. Separation agreements can be an effective and inexpensive way of settling things. However, the terms of the agreement must be reasonable, and the parties must be able to get along well enough to negotiate the deal and then put it into action it when it's done.

The ways that a separation agreement can deal with the division of family property and family debt are virtually unlimited. Under the *Family Law Act*, each spouse is presumed to keep the property he or she brought into the relationship and share in the property bought during the relationship. Although spouses are presumed to be each half responsible for any debt incurred during the relationship, you can make whatever other arrangements you want, as long as both spouses agree to those arrangements and they're reasonably fair. In fact, s. 92 says this:

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

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

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

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

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

In other words, in making an agreement about the division of property and debt, spouses can divide unequally the things they're supposed to divide equally, divide things they're not supposed to divide, and not divide things that are supposed to be divided. As long as you both agree, you can do pretty much whatever you want in a separation agreement.

The effect of a valid agreement

When spouses have an agreement about the division of property and debt, s. 94(2) of the *Family Law Act* says that the court cannot make an order about the division of family property, excluded property, or family debt, unless the parts of the agreement that deal with property and debt are set aside by a court order. This gives agreements on the division of property and debt a lot more protection against later court challenges than was provided to agreements under the old *Family Relations Act*.

Making a valid agreement

Under s. 93 of the *Family Law Act*, an agreement about the division of property and debt must be:

1. in writing, and
2. signed by each spouse in the presence of someone else as a witness.

There are other requirements about the validity of agreements that are part of the common law of contracts. These are discussed in a little more detail further on in this section, but for a more thorough discussion you should look at the Family Law Agreements chapter.

Asking the court to set aside an agreement

Section 94(2) says that the court cannot make an order dividing property or debt in the face of an agreement on property and debt until it has set aside those parts of the agreement. As a result, if a spouse is unhappy with the terms of a separation agreement on property or debt, the spouse must first ask the court to set aside the agreement and second ask for an order about the division of property and debt.

Family law agreements and contract law

Family law agreements are private contracts reached between two people. While family law agreements can be attacked and enforced on the principles of contract law, the court will usually give considerable weight to family law agreements. Without proof of some serious problem like duress or coercion, or some other issue, the court will treat the agreement as representing the honest and informed intentions of the parties to settle their dispute.

Because of the importance the court will usually give to an agreement, it can sometimes be necessary to attack the agreement itself under the law that applies to contracts. An agreement might be found to be invalid for one or more of the following reasons:

- one of the parties was forced to enter into the agreement,
- one party was too much under the influence or control of the other party in consenting to the terms of the agreement,
- the agreement is fundamentally unfair, or
- one party lied to the other party or hid information from that party, and these misleading representations were the basis on which the other party signed the agreement.

All of these arguments are based on the law of contracts, not on a particular piece of legislation.

Agreements on property and debt and the *Family Law Act*

The *Family Law Act* provides two tests to help the court decide when an agreement on property and debt should be set aside. Under the first test, at s. 93(3), the court must look at the situation of the parties when they were negotiating and executing the agreement. The court is required to consider whether these circumstances existed when the parties were making their agreement:

- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would under the common law cause all or part of a contract to be voidable.

The last part of this test, at subsection (d), is about whether there is a defect under the law of contracts that might make the agreement void or voidable. The other parts of the test are all about the fairness of the parties' negotiations.

Now, even if there are problems with an agreement under s. 93(3), the court can still decide not to set aside the agreement if "it would not replace the agreement with an order that is substantially different from the terms set out in the agreement" under s. 93(4). In other words, if the court wouldn't make a different order than the arrangements the parties agreed to, it might just leave the agreement alone.

If there are no problems under s. 93(3), the second test, at s. 93(5), allows the court to set aside agreements that are "significantly unfair" taking into account:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement;

If the court sets aside an agreement under s. 93(3) or (5), the court will then make an order dividing property and debt between the spouses in place of the agreement.

Resources and links

Legislation

- *Family Law Act*
- *Law and Equity Act* ^[1]
- *Family Relations Act*

Links

- Canadian Bar Association BC Branch: Dividing property and debts ^[2]
- Justice Education Society: Workbook for parents separated with children on dealing with finances ^[3]
- Legal Services Society's Family Law Website: How to divide property and debts ^[4]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/8459>
- [2] <http://www.clicklaw.bc.ca/resource/1240>
- [3] <http://www.clicklaw.bc.ca/resource/1529>
- [4] <http://www.clicklaw.bc.ca/resource/1639>

Family Relationships

Family Relationships

People in virtually any kind of relationship can find themselves having a problem involving family law. Some people are married, others have lived together long enough to qualify as spouses without being married, while others are in shorter relationships, perhaps lasting for only one night, which produce children.

Family law isn't just about relationships between spouses or parents. It also concerns the relationships between grandchildren and grandparents, between nieces and nephews and aunts and uncles, and between children and other adults with significant roles in their lives

This chapter focuses on the different kinds of family relationships recognized by the *Family Law Act*.

In this first section we take a look at the range of family relationships, and examine how the law impacts on people in these relationships. We also discuss some urban myths about married and unmarried relationships. The other sections in this chapter go into more detail about the legal rights and duties involved in married relationships, unmarried spousal relationships, and relationships involving unmarried people who have had a child but never lived together. The final section talks about the claims a child's caregivers and extended family members can make.

Everything in this chapter applies just as much to same-sex couples as it does to opposite-sex couples.

Introduction

Being in a family relationship can create legal obligations in addition to the moral and social obligations that we usually associate with a family relationship. Under the old common law, for example, a husband had the legal duty to provide his wife and children with shelter, food, and the other basic necessities of life. Although this obligation still exists under the federal *Criminal Code* ^[1], it has not been a part of the legislation on family law since the English *Divorce and Matrimonial Causes Act* was passed in 1857. As society has evolved, so have the obligations triggered by different kinds of family relationships.

Family law in British Columbia deals with four kinds of family relationships:

- **Married spouses:** People who are married spouses have been wed at a ceremony conducted by someone licensed by the province to perform marriages. Married relationships end when a court makes an order for the spouses' divorce.
- **Unmarried spouses:** People who are unmarried spouses have lived with each other in a "marriage-like relationship" for a certain minimum amount of time; this is the sort of relationship people mean when they talk about "common-law spouses." The relationships of unmarried spouses end when they separate. Unmarried spouses do not need to get a divorce.
- **Unmarried parents:** Unmarried parents are people who have had a child together but never lived together. Unmarried parents might include people who have helped someone have a child through assisted reproduction, like being an egg donor, a sperm donor, or a surrogate mother, depending on what an assisted reproduction agreement might say about who's a parent and who's not. Unmarried parents also include people who were in a dating or casual relationship and have had a child.

- **Children's caregivers and extended family:** Extended family members and other adults may have a parent-like relationship with a child who is not their biological child. This might include grandparents, aunts and uncles, and other people who have had a significant role in raising a child.

Married spouses

To be able to marry, the parties must be, among other things, unmarried, sane, relatively sober, and over a certain age. They must also be married by a person properly licensed to conduct marriages, who is either a civil marriage commissioner or an authorized religious official. The process for getting married in British Columbia is described in detail in the Marriage & Married Spouses section of this chapter, which has more information about the law relating to marriage.

Living together

Many, if not most, people who marry live together before they tie the knot. It is important to know that a lot of the rules about property and debt under the provincial *Family Law Act* are based on when a married couple began to live together, if that date is earlier than the date of marriage.

Marriage

The law about marriage has changed enormously over the last three centuries; marriage once had a much more important legal significance than it does today. Before about 1890, a married couple was legally considered to be one person. A husband took ownership of all of his wife's property on marriage and could use his wife's assets as collateral for loans. His wife, on the other hand, lost the ability to hold a bank account in her own name, sell her property without her husband's consent, or start a law suit or run a business in her own name. In contrast, women who hadn't married could own property in their own names, have bank accounts, sue and be sued, and run a business.

The institution of marriage was once of such social significance that people could be sued for attempting to interfere with a married couple's relationship. Until 1972, it was a civil offence to falsely boast that you were married to someone (called *jactitation of marriage*) or to lure a spouse away from a married relationship (called *criminal conversation*), and a court proceeding could be brought against someone for loss of the benefits of marriage (called *loss of consortium*).

All of these old rules are now extinguished in British Columbia and married couples are no longer considered to be a single legal person, with the husband having sovereign rights over his wife and her property. Since 1978, married women have had exactly the same property rights that single women have, which also happen to be the same property rights that their husbands have. A husband can no longer apply for credit in his wife's name or use her property as collateral for a loan without her express permission. On top of this, the old rules restricting marriage to opposite-sex couples have now been abolished, first by the courts and then as a result of the federal *Civil Marriage Act* ^[2].

If there's a difference between married and unmarried spousal relationships (apart from the religious dimensions), it's probably that marriage often implies a greater sense of personal commitment to the relationship and a willingness to treat the relationship as a true partnership. Marriage suggests something more permanent than an unmarried relationship. It may signal a personal dedication to nurturing the relationship and a willingness to stick it out through the good times and the bad.

Under the law of British Columbia, however, the most significant difference between married and unmarried spousal relationships is that only married spouses need a divorce or an annulment to end their relationship.

Annulment

If one or more of the requirements of a valid marriage are lacking, a marriage may be cancelled, or *annulled*. To obtain an annulment, one of the parties must begin a court proceeding asking for a declaration that the marriage is void. A marriage may be annulled if:

- a female spouse was under the age of 12 or a male spouse was under the age of 14 (the common law ages of puberty),
- one or both of the spouses did not consent to the marriage,
- a male spouse is impotent or a female spouse is sterile going into the marriage,
- the marriage cannot be consummated,
- the marriage was a sham, or
- one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

You can find more information about void marriages, voidable marriages, and annulment in this chapter's section on Marriage & Married Spouses.

Separation

Separation is simple: the parties must simply start living "separate and apart" from each other, whether under the same roof or in separate homes. Contrary to popular opinion, you do not need to see a lawyer, sign something, or file some sort of document in court to obtain a separation. You just need to call it quits and tell your spouse that it's over.

For married spouses, separation may signal the breakdown of their emotional relationship but it doesn't end their legal relationship. To do this, one or both spouses must apply to court for a divorce.

Divorce

Divorce is the legal termination of a valid marriage. To obtain a divorce, one or both spouses must begin a court proceeding asking for a divorce order, and at least one of the spouses must have been *ordinarily resident* in British Columbia for the year before starting the court proceedings.

The court will make a divorce order if the married relationship has broken down. Under the federal *Divorce Act*, there are three ways to prove marriage breakdown:

1. the spouses have been separated for at least one year,
2. one of the spouses committed adultery, or
3. one of the spouses treated the other spouse with such mental or physical cruelty that the relationship cannot continue.

It is possible to oppose an application for a divorce order, although this rarely happens. In general, once one of the grounds for marriage breakdown has been established, the courts will allow the divorce application, regardless of any objections raised by the other spouse.

Unmarried spouses

Section 3(1) of the provincial *Family Law Act* defines *spouse* as including married spouses as well as:

1. people who have lived in a marriage-like relationship for at least two years, and
2. people who have lived in a marriage-like relationship for less than two years and have had a child together.

Unmarried spouses who have lived together for at least two years have all of the same rights and obligations under the *Family Law Act* as married spouses.

Unmarried spouses who have lived together for less than two years don't qualify as spouses for the parts of the act that talk about dividing property and debt, but they are spouses for the parts about spousal support and the child support obligations of stepparents.

The federal *Divorce Act* doesn't apply to unmarried relationships, whether the parties are spouses under provincial law or not.

Living together

The relationship between unmarried spouses begins on the date they begin to live together in a "marriage-like relationship." This might be the date that a couple who are dating moves in together, or it might be the date that a relationship between housemates becomes a romantic, committed relationship.

This chapter's section on Unmarried Spouses talks about when a relationship becomes "marriage-like" in nature.

Separation

Unmarried spouses are separated when they begin to live "separate and apart" from each other, whether under the same roof or in separate homes. Contrary to popular opinion, you do not need to see a lawyer, sign something, or file some sort of document in court to obtain a separation. You just need to call it quits and tell your spouse that it's over, and then start acting like it's over.

For unmarried spouses, separation is the end of their emotional and legal relationship with each other. Unmarried spouses do not need to get divorced.

Other unmarried relationships

The other group of people the *Family Law Act* talks about is *parents*, and this group is broader than a lot of people might think. Family law doesn't have much to do with people who are just dating and don't have a child together.

Parents through natural reproduction

Under s. 26, a child's parents are presumed to be the child's *birth mother* and *biological father*. This includes *everyone* who is a mother or a father, regardless of the nature of the parents' relationship with each other. They could be married spouses or unmarried spouses, dating each other or not dating at all.

Parents through assisted reproduction

When one or two people need the help of others to have a child, some additional rules apply:

- the one or two people who want to have the child, the *intended parents*, are parents,
- the donor of sperm or an egg *is not a parent*, unless everyone has signed an assisted reproduction that makes the donor a parent, and
- a surrogate mother *is a parent*, unless everyone has signed an assisted reproduction that makes her not a parent.

If you do the math, you'll see that under the *Family Law Act* a child can have up to five parents. The act doesn't discriminate between parents who are intended parents and parents who are donors or surrogate mothers. In for a penny, in for a pound, as the saying goes: a parent under an assisted reproduction agreement is liable to pay child support just like every other parent, but is also presumed to be the guardian of a child under s. 39(3).

Caregivers and extended family relationships

Other people can have a legal interest in a child in addition to people who are parents. Most of the time these people are extended family members who have had a parent-like relationship with a child, such as a grandparent, an aunt or an uncle, or even a much older sibling, but any adult who has had a parenting role in a child's life may have an interest in a child.

This kind of legal interest plays out in one of two ways. Where a child's parents are doing a good enough job, an extended family member might want *contact* with the child, if time with the child is being withheld. Section 59(2) of the *Family Law Act* says this:

A court may grant contact to any person who is not a guardian, including, without limiting the meaning of "person" in any other provision of this Act or a regulation made under it, to a parent or grandparent.

Where a child's guardians are no longer in the picture or if there's a concern about the child's welfare with his or her guardians, an extended family member might also apply for *guardianship* of the child. Section 51(1)(a) merely says that the court may appoint "a person" as a child's guardian, and an extended family member is certainly a person.

Different rights and responsibilities

Married spouses and unmarried spouses

Married spouses and unmarried spouses who have lived together for at least two years have exactly the same rights in British Columbia under the provincial *Family Law Act*. Both may:

- be the *guardians* of any children they happen to have, and as guardians have parental responsibilities and parenting time with respect to those children,
- have *contact* with a child if they happen not to be guardians,
- ask for or be responsible to pay *child support*,
- ask for or be responsible to pay *spousal support*,
- share in *family property* and any *family debt*, and
- apply for *protection orders* if they feel they are at risk of family violence.

The only legal differences between married spouses and unmarried spouses who have lived together for at least two years are that only married spouses must get a *divorce* to end their relationship with one another, and only married spouses can ask the court for orders under the federal *Divorce Act*. That's it.

The only legal difference between unmarried spouses who have lived together for at least two years and unmarried spouses who have lived together for less than two years is that couples who have lived together for less than two years aren't able to share in family property and family debt under the *Family Law Act*. They may:

- be the *guardians* of their children, and as guardians have parental responsibilities and parenting time with respect to those children,
- have *contact* with a child if they happen not to be guardians,
- ask for or be responsible to pay *child support*,
- ask for or be responsible to pay *spousal support*, and
- apply for *protection orders* if they feel they are at risk of family violence.

Although unmarried spouses who have lived together for less than two years are cut out of the part of the act that deals with property and debt, they still share in property they jointly own and they can make claims to property owned only by

one spouse under the law of trusts and the law of equity. These claims are discussed in the introductory section of the Property & Debt chapter.

Other unmarried relationships

Although people who are not spouses can have all sorts of legal relationships with each other, from co-owning land or running a business together, from a family law perspective, in general their most important relationship is as parents.

Parents may:

- be the *guardians* of their children, and as guardians have parental responsibilities and parenting time with respect to those children,
- have *contact* with a child,
- ask for or be responsible to pay *child support*, and
- apply for *protection orders* if they feel they are at risk of family violence.

Like unmarried spouses who have lived together for less than two years, couples who are not spouses still share in property they jointly own, and they can make claims to property owned only by one spouse under the law of trusts and the law of equity. These claims are discussed in the introductory section of the Property & Debt chapter.

Couples who are not spouses, not parents, and do not live together cannot apply for protection orders under the *Family Law Act*.

Children's caregivers and extended family

Adults with an interest in a child who is not theirs may:

- ask to be appointed as the *guardian* of a child, and as a guardian have parental responsibilities and parenting time with respect to that child,
- have *contact* with a child, and
- ask for *child support*.

A few surprisingly common misunderstandings

Certain misconceptions about what marriage, unmarried relationships, separation and divorce involve are fairly common. Part of these misunderstandings, I'm sure, come from television and movies. Others are just urban myths.

Married relationships

Marriage and getting married

It is not true that an unmarried couple is automatically "married" once they've lived together for a certain amount of time. A unmarried couple is never legally married unless they have actually had a marriage ceremony. There is no such thing as a "common-law marriage."

You are not legally married unless you have a marriage ceremony and the ceremony is conducted by someone authorized by the provincial government to perform marriages. Your car mechanic can marry you, if your car mechanic is a marriage commissioner, but your Wiccan high priestess cannot legally marry you unless she also happens to be a licensed marriage commissioner.

Las Vegas marriages and other sorts of quickie marriages are valid and binding marriages, as long as the marriages meet the criteria for valid marriages, discussed in the next section. If you want to undo the marriage, you'll have to get divorced just like every other person in a valid marriage, and that will usually mean waiting until one year has passed

since your separation. An alcohol-induced Las Vegas marriage was upheld in the very funny 2005 Supreme Court case of *Davison v. Sweeney* ^[3], 2005 BCSC 757, simply because the spouses knew what they were doing when they married, despite the fact that they had never had sex and separated two days after the marriage, when their respective holidays ended.

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia, nor is it possible to be "legally separated." Whether you're in an unmarried relationship or a marriage, you are separated the moment you decide that the relationship is over. That's it, there's no magic to it. When you or your partner announces that the relationship is over and there's no chance of getting back together, boom, you're separated. Congratulations.

To be crystal clear:

- you do not need to "file for separation" to be separated, in fact, there's no such thing in British Columbia as "filing for separation," despite what you might see on the websites of the people who sell do-it-yourself legal kits,
- there are no court documents or other papers you have to sign to be separated, and
- you don't need to appear before a judge, lawyer, shaman or anyone else to be separated.

To be separated, you just need to decide that your relationship is over and say so.

The fact that a married couple is separated isn't enough to let a separated spouse remarry. You must be formally divorced by an order of the court in order to remarry. If you remarry without being divorced from the first marriage, the new marriage will be invalid.

On the other hand, the fact that you're separated won't stop you from having a new relationship, including a new relationship that would qualify as a spousal relationship. Technically, this is adultery, but no one except the Pope or your in-laws is likely to care. There's a lot more information about new relationships after separation in this chapter's section on Separation.

Divorce and getting divorced

As far as divorce is concerned, a court must make an order for your divorce or you'll never be divorced. You can have been separated from your spouse for twenty years, but unless a court has actually made an order for your divorce, you'll still be married. It'd be nice (and cheaper) if the passage of time gave rise to an automatic divorce, but it doesn't work that way.

It is not true that you need to have a separation agreement to get a divorce. Separation agreements are helpful to record a settlement of the issues arising when a couple separates, like the division of property or the payment of support and so forth, but they're not a requirement of the divorce process. You especially don't need a separation agreement if the only issue is whether you'll get a divorce order or not.

It is not true that you remain married if your spouse dies. Once that happens, your marriage is at an end. You don't need to get divorced, the sands of time have done that for you.

It is also not true that a lack of sex in your relationship automatically ends your marriage, allows the marriage to be declared void, or is otherwise a ground of divorce. Sex has very little to do with divorce, just as it often has little to do with marriage. A lack of sex may spell the end of a relationship and spur a couple's separation, but at law whether you and your spouse are having sex or not is irrelevant.

The one exception to this last rule has to do with the "consummation" of the marriage, and this exception doesn't mean what most people think it means. A marriage does not need to be consummated to be a valid, binding marriage. In order to escape a marriage on this ground, you or your partner must, I kid you not, have an "invincible repugnance" to the act

of sexual intercourse or some physical condition that makes sex impossible.

Unmarried spousal relationships

The automatic marriage

It is not true that a unmarried couple are automatically married once they've lived together for a certain amount of time, nor is there any such thing as a "common-law marriage." You can have lived together for twenty years and still not be legally married; an unmarried couple is never married unless there is an actual marriage ceremony performed by someone licensed to perform marriages.

Applying for spousal status

A couple become spouses when they qualify as a "spouse" under whatever law applies; for most federal laws the couple must have lived together for at least one year, and for most provincial laws the couple must have lived together for at least two years. There's no application to make and no one to apply to. It's all about meeting the definition of "spouse."

The accidental spouse

It is not true that you become unmarried spouses simply by living with someone for long enough. You must be living together in a "marriage-like relationship" to become unmarried spouses; mere roommates will not become spouses by accident. There wouldn't be any frat houses if this wasn't the case.

Likewise, a dating couple won't become spouses if they have a child. They must also be living together in a "marriage-like relationship."

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia, nor is it possible to be "legally separated." Whether you're in a unmarried relationship, a marriage, or you're just dating, you are separated the moment you decide that the relationship is over. That's it, there's no magic to it. When you or your partner leaves, boom, you're separated.

Getting divorced

Unmarried spouses do not need to be divorced. Once you've decided to separate, the relationship is over, regardless of how long the relationship may have been. There is no need to get a divorce because there's no marriage to terminate.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Civil Marriage Act* ^[4]
- *Marriage Act* ^[5]

Links

- Canada child benefits calculator ^[6]
- Legal Services Society's Family Law Website: FAQs about marriage, divorce and annulments ^[7]
- Canadian Bar Association BC Branch: Script on getting married ^[8]

- Legal Services Society's "Living Together or Living Apart", Chapter 1, Types of Relationships ^[9]
- Canadian Bar Association BC Branch: Introduction to family law ^[10]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/7vf2>
- [2] <http://laws-lois.justice.gc.ca/eng/acts/C-31.5/index.html>
- [3] <http://canlii.ca/t/1q471>
- [4] <http://canlii.ca/t/7w02>
- [5] <http://canlii.ca/t/846b>
- [6] http://www.cra-arc.gc.ca/bnfts/clcltr/cctb_clcltr-eng.html
- [7] <http://clicklaw.bc.ca/resource/2289>
- [8] <http://clicklaw.bc.ca/resource/1257>
- [9] <http://www.clicklaw.bc.ca/resource/1058>
- [10] <http://clicklaw.bc.ca/resource/2376>

Marriage & Married Spouses

Marriage creates a legal relationship between two people, a relationship that gives each spouse legal rights and obligations towards each other on top of whatever promises they may have made during their marriage ceremony. A proper marriage must comply with certain legal requirements, however, and as a result not all marriages must be ended by divorce. Some marriages are invalid from the start and can be annulled.

This section discusses the legal requirements of a valid marriage. It looks at void marriages and voidable marriages (there is a difference), and at marriages that are invalid. It also discusses the legal rights resulting from marriage.

Legal requirements of marriage

The legal requirements of a valid, legal marriage are governed by the common law, the federal *Marriage (Prohibited Degrees) Act* ^[1], the federal *Civil Marriage Act* ^[2] and the provincial *Marriage Act* ^[3]. The difference between the first two pieces of legislation and the last is that under our Constitution, only the federal government has the authority to pass laws dealing with marriage and divorce, while only the provincial governments have the authority to pass laws dealing with the mechanics of how marriages are performed.

The requirements of a valid British Columbia marriage are these:

- **Relatedness:** the spouses cannot be within the prohibited degrees of relatedness set out in the *Marriage (Prohibited Degrees) Act*.
- **Marital status:** both spouses must be unmarried at the time of their marriage.
- **Mental capacity:** both spouses must have the mental capacity, at the time of the ceremony, to understand the nature of the ceremony and the rights and responsibilities marriage involves.
- **Age:** with some exceptions, both spouses must be of the age of majority or older.
- **Solemnization:** the marriage must be performed by a person authorized by the government of British Columbia to perform marriages.

Being of opposite genders used to be one of the requirements for a valid marriage. Gay and lesbian couples have been able to marry in British Columbia since 8 July 2003. On 20 July 2005, with the passage of the *Civil Marriage Act*,

same-sex couples became able to marry throughout Canada.

For a quick summary on getting married in British Columbia, see *How Do I Get Married in British Columbia?* It's located in the section *Marriage, Separation & Divorce* in the *How Do I?* part of this resource.

Relatedness

Section 2(2) of the federal *Marriage (Prohibited Degrees) Act* states that:

No person shall marry another person if they are related

(a) lineally by consanguinity or adoption;

(b) as brother and sister by consanguinity, whether by the whole blood or by the half-blood; or

(c) as brother and sister by adoption.

In other words, adopted siblings as well as birth siblings are within the prohibited degrees of consanguinity and cannot marry, while, on the other hand, first cousins are free to marry if they don't mind banjo music. A marriage that violates this requirement is void *ab initio*, that is, the marriage is void as if it had never occurred.

Age

Both parties must, in general, be over the age of majority. Under the provincial *Marriage Act*, however, a marriage may still be valid as long as both parties were 16 years of age or older and provided that the marriage was necessary and in the best interests of both parties.

Interestingly, the act might be read in such a way that the marriages of girls as young as 12 and boys as young as 14, the old common-law ages of puberty, might still be considered to be valid. Since marriages between people this young are prohibited in Canada without a court order, this rule will only apply to preserve the marriages of young couples wed outside of Canada.

Foreign marriages

Two rules of the common law govern the validity in British Columbia of marriages performed outside the province:

1. the formalities of the marriage (the mechanics of the marriage ceremony) are those of the law in the place where the marriage occurred, and
2. the legal capacity of each party to marry is governed by the law of each party's domicile.

This means that people who live in British Columbia may be married elsewhere by a hairdresser holding a badger, for example, if the laws of that place allow hairdressers holding badgers to marry people (the *formalities of marriage*). On the other hand, if two 10-year-olds who live in British Columbia are married outside of Canada by a priest or marriage commissioner, their marriage will be voidable (the *capacity to marry*), regardless of the local validity of the marriage ceremony.

Invalid foreign marriages may be considered, in exceptional circumstances, to be valid in Canada. A marriage occurring in a place where it is impossible for some reason to comply with the local law governing marriage, because of civil war or religious discrimination, for example, might well be found to be valid in British Columbia.

Void marriages

A marriage that is void *ab initio*, void "from the beginning," is void as if it had never been celebrated. In general, an application to the court is not required to dissolve a marriage that is void *ab initio* since such marriages are void from the get-go. However, you may have to apply for a declaration that your marriage is void if someone is making a claim against you based on the fact that you are supposed to be married.

A marriage will be void *ab initio* if:

1. one or both spouses were seven years old or younger (the absolute minimum age required to consent to marry under the old common law),
2. the spouses were within the prohibited degree of relatedness,
3. one or both of the spouses did not have the mental capacity to marry, or
4. one or both of the spouses were already married at the time of the marriage.

It is important to know that even if a marriage is declared void, the parties may still have certain legal rights and obligations towards each other if they qualify as "spouses" under the provincial *Family Law Act*.

Voidable marriages

A voidable marriage is a marriage that is potentially void but remains valid until an application is made to the court for an annulment, a declaration that the marriage is void. A marriage may be invalid and annulled if:

1. the spouses were over seven years of age, but a female spouse was under the age of 12 or a male spouse was under the age of 14 (the old common-law ages of puberty),
2. one or both of the spouses did not consent to the marriage or were under duress or some other kind of coercion when they married,
3. a male spouse is impotent or a female spouse is sterile going into the marriage,
4. the marriage cannot be consummated,
5. the marriage was a sham, or
6. one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

You must make an application to court for an *annulment*, a judicial declaration that your marriage is void. Without that declaration, your marriage will remain legal and binding. The court may refuse to cancel a marriage that is voidable.

It is important to know that even if a marriage is annulled, the parties may still have certain legal rights and obligations towards each other if they qualify as "spouses" under the provincial *Family Law Act*.

Consent and duress

As with any contract, which is how marriage was historically described, if either party has not properly given his or her consent or was under some sort of duress or coercion in agreeing to the marriage, the marriage may be voidable. Essentially, the argument here is that you didn't go into the marriage of your own free will; you were forced into it.

Sham marriages

Sham marriages are marriages that are entered into without the intention of the spouses to live as husband and wife, but rather for some other purpose, such as tax benefits or immigration status. While these marriages might be voidable for lack of intent, the courts have, in some cases, found them to be binding on the parties nonetheless. If you are thinking of marrying someone to help them get into Canada, think twice: you may not be able to get out of the marriage quickly if something goes wrong.

Misrepresentation and fraud

Fraud and misrepresentation, terms found in the law of contracts, may also make a marriage voidable. If misrepresentation is claimed, the deception must usually be as to identity or some other material fact about the marriage itself, rather than about something like income or social standing. A classic case of fraud and misrepresentation involved the marriage of a woman to the identical twin of the man whom she had been dating and had intended to marry; the marriage was declared void on the wife's application once the deception was discovered.

Capacity to reproduce

A marriage may be voidable if either spouse lacked the personal capacity to have children going into the marriage.

Failure to consummate a marriage

It used to be the case, and many people think this is still true, that if the spouses never had sex the marriage was voidable. The common law has developed in a somewhat different direction. A spouse must have either a complete inability to have sex because of some physical problem, or an "invincible repugnance" to the prospect of sex which is psychological in nature. Be warned that one instance of consummation will defeat either spouse's ability to claim inability to consummate as a ground of voidability.

A 2004 case of the British Columbia Supreme Court, *Grewal v. Sohal* ^[4], 2004 BCSC 1549, reviewed the law on applications to annul a marriage based on non-consummation. The court held that the applicant must prove that:

1. there had been no consummation of the marriage,
2. the refusal to consummate the marriage was persistent and not due to capricious obstinacy,
3. the applicant has an invincible aversion to sex with the other spouse,
4. the aversion was the result of some sort of incapacity, and
5. the incapacity may be based on normal, predictable reactions.

Invalid marriages

An invalid marriage is a marriage that does not comply with the formalities of marriage. These formalities include the authority of the person conducting the marriage to actually perform the marriage, an error in the marriage ceremony, or errors in the parties' marriage license.

There is a common-law presumption that a marriage should not be declared invalid merely because the marriage didn't meet the required formalities, and the court will try to uphold invalid marriages when it can. Section 16 of the provincial *Marriage Act* provides, for example, that irregularities in a marriage license won't invalidate a marriage entered into in good faith; s. 11 similarly provides that a marriage conducted by an unauthorized person won't be declared invalid if the marriage is unchallenged.

Married spouses' rights and responsibilities

While a couple is married, the federal *Criminal Code* ^[5] requires each spouse to provide the other with the "necessities of life," whatever that means. Apart from that, there is no legislation that defines the duties involved in marriage.

When a married couple separates, each of the spouses has certain rights under the federal *Divorce Act* and the provincial *Family Law Act*. Under the *Divorce Act*, a spouse can ask for:

- a divorce, to legally end the marriage,
- custody of and access to any children born of the marriage,
- child support for any children born of the marriage as well as for any stepchildren, and
- spousal support.

Under the *Family Law Act*, a spouse can ask for:

- parental responsibilities for and parenting time with any children,
- child support for any children born of the marriage as well as for any stepchildren,
- spousal support,
- a share of the family property and any family debt,
- an order protecting property, and
- a protection order if he or she feels at risk of family violence.

All these issues except for divorce can be resolved by the spouses' agreement rather than be argued about in court. To get a divorce, the court must make a divorce order.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Civil Marriage Act* ^[2]
- *Marriage (Prohibited Degrees) Act* ^[1]
- *Marriage Act* ^[3]

Links

- Vital Statistics Agency: Search for marriage commissioners ^[6]
- Vital Statistics Agency: Marriage registration and certificates information ^[7]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 19, 2013.

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[1] <http://canlii.ca/t/7vq2>

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[4] <http://canlii.ca/t/1q1m1>

[5] <http://canlii.ca/t/7vf2>

[6] http://www.vs.gov.bc.ca/cgi-bin/search/marriage_commissioners.cgi

[7] <http://www.vs.gov.bc.ca/marriage/>

Unmarried Spouses

The provincial *Family Law Act* defines *spouse* as including married spouses and unmarried couples, provided that the unmarried couple has lived together in a "marriage-like relationship" for at least two years, or lived together for less than two years if they have had a child. Because the federal *Divorce Act* only applies to married spouses, all of the rules that apply when unmarried relationships end are found in the *Family Law Act*.

This section talks about qualifying as unmarried spouses, the consequences of being in a spousal relationship, and unmarried spouses' entitlement to government benefits. This section also talks about the legal issues involved when a relationship breaks down. The next section in this chapter, *Other Unmarried Relationships*, talks about couples in unmarried relationships who don't qualify as spouses.

Introduction

The legal rights and responsibilities people in an unmarried relationship owe to each other, and the government benefits to which they might be entitled, are described in a number of different laws, and these different laws have different definitions of what it means to be a "spouse"; a couple might meet the test under one law but not the test under another.

Although married couples are always married spouses, unmarried couples aren't always unmarried spouses. For example, the federal *Income Tax Act* ^[1] defines "spouse" as including people who have cohabited for one year, while the provincial *Employment and Assistance Act* ^[2] defines "spouse" as including people living together for three months if the welfare caseworker believes that their relationship demonstrates "financial dependence or interdependence, and social and familial interdependence."

Regardless of a couple's federal or provincial status under these rules, it is not true that being an unmarried spouse or common-law partner, the expression used in a number of federal laws, means that you are legally married. Being married involves a formal ceremony and certain other legal requirements like a marriage license. Without that ceremony and that license, unmarried spouses will never be married, no matter how long they've lived together.

Provincial legislation

For most provincial laws, the question is whether or not a particular couple are "spouses." Qualifying as a spouse might mean that you are entitled to the family rate for MSP, that you can share in your spouse's estate in the event your spouse dies, or that you are no longer entitled to social assistance.

In general, for most but not all provincial laws, you must have lived with your partner for at least two years to qualify as a spouse. (The laws about sharing in a spouse's property after his or her death also require you to have been living together at the time of your spouse's death.) Here's the definition from the *Wills Variation Act* ^[3]:

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

Here's the definition from s. 3 of the *Family Law Act*:

- (1) A person is a spouse for the purposes of this Act if the person
 - (a) is married to another person, or

- (b) has lived with another person in a marriage-like relationship, and
- (i) has done so for a continuous period of at least 2 years, or
- (ii) except in Parts 5 and 6, has a child with the other person.

(2) A spouse includes a former spouse.

And here's the definition from the *Adult Guardianship Act* ^[4]:

"spouse" means a person who

(a) is married to another person, and is not living separate and apart, within the meaning of the *Divorce Act*, from the other person, or

(b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

As you can see, there are lots of subtle differences between these definitions, and it can be very important to find out just how a particular law defines spouse.

Federal legislation

Most federal laws distinguish between "spouses," people who are legally married, and "common-law partners," who aren't. Qualifying as a common-law partner might mean that you are entitled to a share of your partner's CPP credits, receive the Old Age Security spouse allowance or survivor's benefits, or the spouse amount for the GST Credit.

In general, you must have lived with your partner for at least one year to qualify as a common-law partner under federal legislation. Here's the definition from the *Old Age Security Act* ^[5]:

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited with the individual for a continuous period of at least one year.

Here's the definition from the *Income Tax Act*:

"common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(a) has so cohabited throughout the 12-month period that ends at that time, or

(b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (3) and subparagraph 252(2)(a)(iii),

and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

"Conjugal relationship" is the federal equivalent of British Columbia's "marriage-like relationship."

"Common-law spouses"

Family law in British Columbia doesn't talk about people who are "common-law spouses" and never has. Once upon a time, people could marry each other and create a legal relationship simply by agreeing to marry, without getting a licence from the government or having a particular kind of ceremony. Because the rights between the spouses came from principles established by the common law, these were known as common-law marriages. Common-law marriages were valid in England until the *Marriage Act* of 1753, better known by its full flowery name, *An Act for the Better Preventing of Clandestine Marriage*.

Normally I wouldn't make a fuss about terminology like this, except that the phrase "common-law spouses" kind of suggests that there are certain rights and entitlements that a couple get from the operation of the common law, and this really isn't the case and it hasn't been the case for two-and-a-half centuries. What's really important is whether a couple are "spouses" under the particular law that they're looking at; all of their rights and entitlements come from the operation of a statute.

There is no such thing as a "common-law spouse" or a "common-law marriage" in British Columbia. If you're not married but you're a "spouse," it's because of s. 3 of the *Family Law Act*.

Qualifying as an unmarried spouse

It's usually pretty hard to argue that you're not married if you're a married spouse. It's a lot easier for unmarried couples to argue about the status of their relationship, and the stakes can be quite high. If a couple were just roommates, for example, neither of them will be able to ask for a share of the family property or for a contribution to the family debt, and neither will be able to ask the other to pay spousal support.

Living together...

This requirement of an unmarried spousal relationship is fairly self-explanatory. An unmarried couple who have lived together and had a child together are spouses who are eligible to ask for spousal support, regardless of how long or how short a period of time they lived together. An unmarried couple who have lived together for at least two years are spouses who are eligible to ask for spousal support and orders about the division of property and debt.

The only thing that needs to be pointed out is that the two-year period doesn't need to be continuous. On the other hand, if a claim is based on the parties being unmarried spouses, the court will probably look at the nature of the relationship in more detail. A gap of three months in the middle of the two years a couple are supposed to have lived together might prevent someone from claiming that a couple are spouses; on the other hand, if the three months' absence was because someone was working out of town, the three months may not matter very much.

...In a "marriage-like relationship"

This is more complex than the calculation of the duration of a relationship, partly because it calls for the court to make a decision about the nature of the parties' private, personal relationship with one another. In a 1998 case called *Takacs v. Gallo* ^[6], 1998 CanLII 6428 (BCCA) our Court of Appeal endorsed these considerations:

- **Shelter:**

Did the parties live under the same roof? What were the sleeping arrangements? Did anyone else occupy or share the available accommodation?

- **Sexual and Personal Behaviour:**

Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings towards each other? Did they communicate on a personal level? Did they eat their meals together? What, if anything, did they do to assist each other with problems or during illness? Did they buy gifts for each other on special occasions?

- **Services:**

What was the conduct and habit of the parties in relation to the preparation of meals, washing and mending clothes, shopping, household maintenance, and other domestic services?

- **Social:**

Did they participate together or separately in neighbourhood and community activities? What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties? What was the attitude and conduct of the community toward each of them and as a couple?

- **Economic Support:**

What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life? What were the arrangements concerning the acquisition and ownership of property? Was there any special financial arrangement between them that both agreed would be a determinant of their overall relationship?

- **Children:**

What was the attitude and conduct of the parties concerning children?

In a nutshell, where the "marriage-like" quality of a relationship is disputed, the court will enquire as to how the couple represented themselves to their family and friends, and as to the nature of their financial relationship and household relationship. Did the couple present themselves as a family unit and conduct their personal affairs as a family unit? The judge in a 2003 case from the Saskatchewan Court of Queen's Bench, *Yakiwchuk v. Oaks* ^[7], 2003 SKQB 124, expressed the difficulty of determining what is and what is not a "marriage-like" relationship this way:

"Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property — in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important — for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their 'spouse' by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some 'spouses' do everything together — others do nothing together. Some 'spouses' vacation together and some spend their holidays apart. Some 'spouses' have children — others do not. It is this variation in the way human beings structure their relationships that make the determination of when a 'spousal relationship' exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of 'public' declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to 'be together'. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when

the cohabitation actually began is blurred because people 'ease into' situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist."

To be clear though, mere roommates will never qualify as unmarried spouses. There needs to be some other dimension to the relationship indicative of a commitment between the parties and their shared belief that they are in a special relationship with each other.

Time limits

An unmarried spouse who has a child can face a claim for child support until the child reaches the age of 19, and possibly longer. Child support is mostly about being a parent not being a spouse.

However, there are three important things you need to know about claims for spousal support and claims for child support against stepparents:

- A claim for child support against a spouse who is a stepparent must be brought within *one year* of the stepparent's last contribution to the support of the child, and cannot be brought until *after the spouses have separated*.
- An unmarried spouse must bring a claim for spousal support within *two years* of the date of separation.
- An unmarried spouse must bring a claim for the division of property and debt within *two years* of the date of separation.

Bringing a claim means starting a court proceeding asking for a particular order, not the date when the first application is made in that proceeding.

The date of separation is the date when one or both spouses realize that their relationship is over, says so, and ends the "marriage-like" quality of the relationship. As a result, the "marriage-like" quality of a relationship can terminate before a couple physically separates, and the time limits will usually begin to run from that date rather than the date someone moves out.

Effect of dispute resolution processes

Under s. 198(5) of the *Family Law Act*, the running of the time limits "is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional." The purpose of this provision is to allow people to engage in dispute resolution without having to feel pressured into starting a court proceeding to stop a time limit from running out. However, this provision isn't as straightforward as it looks.

First, the parties have to be engaged in a process of *family dispute resolution*. That term is defined in s. 1 of the act as including:

- the services of a family justice counsellor,
- mediation,
- collaborative settlement processes, and
- arbitration.

You'll notice that negotiation isn't on this list. As well, under the Family Law Act Regulation ^[8], a process of mediation and arbitration requires the execution of a mediation agreement or an arbitration agreement to count as mediation or arbitration under s. 1.

Second, the parties have to be engaged in one of these processes with a *family dispute resolution professional*. This term is defined in s. 1 of the act as including:

- family justice counsellors,
- lawyers,

- mediators who meet the training requirements set out in the Family Law Act Regulation, and
- arbitrators who meet the training requirements set out in the Family Law Act Regulation.

In other words, being engaged in a family dispute resolution process with someone like a community leader, an elder, a senior family member, a priest, an imam or a rabbi won't cut it unless the person also happens to fit into the definition of family dispute resolution professional.

Third, the parties must be *engaged* in the family dispute resolution process. That implies a process that is continuing and underway, rather than one that was started but never followed-through with.

Effect of attempts to reconcile

The *Divorce Act* talks about how the one-year period a married couple must usually wait in order to get divorced is not interrupted if the parties live together in an attempt to reconcile for less than 90 days. Similar language is used in the *Family Law Act* for the purpose of determining the date when a couple stops accumulating family property. Neither of these provisions apply to the two-year time limit for bringing claims under the *Family Law Act*.

Rights and responsibilities of unmarried spouses

Provided a couple qualify as spouses, either one of them is entitled to seek an order for spousal support under the *Family Law Act* or to ask for an order that a stepparent pay child support for the benefit of the child of a spouse. The rules that apply to an unmarried spouse's claim for spousal support or for child support from a stepparent are exactly the same as those that apply to married spouses.

An unmarried couple who have lived together for at least two years can also ask for an order about the division of property and debt. The rules that apply to an unmarried spouse's claim for the division of property and debt are exactly the same as those that apply to married spouses.

If an unmarried couple has had a child together, they are parents who are entitled, just because they are parents, to ask for orders about the care of the child and for child support. The rules that apply to determine guardianship, the distribution of parenting arrangements and contact are exactly the same as they are for any other parents, including parents who are married.

Government benefits

The fact that a couple live together may entitle one or both of them to certain benefits paid by the federal or provincial government if they also qualify as *spouses* or *common-law partners* under the applicable rules and legislation. It can also expose them to the prospect of losing those benefits, most notably social assistance payments.

Social assistance

The ministry that administers the *Employment and Assistance Act* ^[2] and is responsible for social assistance often treats anyone living together as a couple as being in a spousal relationship, whether you are or aren't. This will decrease, and sometimes cancel, your benefit entitlement under what's known as the "spouse in the house" rule. As soon as you and your partner — or the person the ministry claims is your partner — stop living together, the ministry will usually return to treating you as single.

Employment Insurance

EI applies the same standards to unmarried spouses as it does to married spouses.

Canada Pension Plan

Unmarried spouses may share in each other's accumulated CPP credits, however this sharing is not automatic. You must apply to equalize your CPP credits with your spouse's CPP credits.

There may be positive income tax consequences if you elect to share a CPP pension that is being paid out. You will be eligible to share your pension if you have been living together as a couple for at least one year and you are both at least 60 years old.

Old Age Security Pension

The Old Age Security Pension is available to people who are at least 65 years old. You may be entitled to receive the amount for a couple rather than for two single people, as well as other benefits like the spouse allowance and survivor's benefits, if you have been living together as a couple for at least one year.

MSP and medical and dental benefits

The Medical Services Plan will cover your partner on your plan without any minimum limit on the length of time you've been living together, although you must have signed your partner up on the plan and must pay the family rate rather than the single rate.

If you or your partner receive any workplace medical or dental insurance coverage, check with the plan administrator to see if unmarried couples are eligible beneficiaries under your plan.

ICBC death benefits

A surviving unmarried spouse can apply to receive death benefits from ICBC when the other spouse is killed in a car accident, regardless of whose fault the accident was.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Income Tax Act* ^[1]
- *Wills Variation Act* ^[3]
- *Adult Guardianship Act* ^[4]
- *Old Age Security Act* ^[5]
- *Employment and Assistance Act* ^[2]
- *Canada Pension Plan* ^[9]

Links

- Legal Services Society's Family Law Website: Property issues and common-law relationships ^[10]
- Canada Pension Plan Survivor's Pension ^[11]
- Legal Services Society's Family Law Website: Proving you're separated if you and your spouse still live together ^[12]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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[1] <http://canlii.ca/t/7vb7>

[2] <http://canlii.ca/t/84l7>

[3] <http://canlii.ca/t/84g0>

[4] <http://canlii.ca/t/84gj>

[5] <http://canlii.ca/t/7vjx>

[6] <http://canlii.ca/t/1dz3n>

[7] <http://canlii.ca/t/5bpc>

[8] <http://canlii.ca/t/8rdx>

[9] <http://canlii.ca/t/7vfd>

[10] <http://clicklaw.bc.ca/resource/1639>

[11] <http://clicklaw.bc.ca/resource/2204>

[12] <http://clicklaw.bc.ca/resource/2291>

Other Unmarried Relationships

Your relationship may have been brief, but if you and your boyfriend or girlfriend have had a child together, you are both responsible for meeting the child's financial needs and you both may have the right to participate in raising the child. Paying child support is an obligation that comes from being a parent, but actually parenting a child is a privilege not a right.

This section is for unmarried people who have had a child but who never lived together, and, as result, are not spouses. It talks about the legal issues unmarried parents may have to deal with and those they don't, and discusses the two most common issues couples like this have to deal with: child support and the care of children.

Introduction

The provincial *Family Law Act* applies to couples that are or were in long-term cohabiting relationships and to couples who weren't in long relationships but have had a child together. Almost all of the orders the act talks about aren't available to couples who aren't married and who don't qualify as unmarried spouses. As a result, parents who didn't live together aren't entitled to ask for spousal support and are excluded from the parts of the act that talk about sharing family property and family debt. What they can ask for are orders about the care of their children and about child support.

The federal *Divorce Act* only applies to people who are or were married to each other; it doesn't apply to unmarried couples, including couples who qualify as unmarried spouses.

Orders available to unmarried couples

Under the *Family Law Act*, couples who neither married nor lived together have certain rights and obligations toward one another if they have a child. One or both of them will also be entitled to certain government benefits as a result of being parents, but those rights don't come from the *Family Law Act*, they come from legislation like the provincial Income Tax (BC Family Bonus) Regulation ^[1] and the federal *Income Tax Act* ^[2].

Children and child support

There is no minimum length-of-relationship requirement for any claim under the *Family Law Act* involving children. A parent is a parent, regardless of the sort of relationship that produced the child.

A parent may apply for all of the orders available under the *Family Law Act* that concern children, from child support to guardianship to the various restraining orders that are available to protect a child from harm. Issues about children are discussed in a little more detail further on in this section.

Property

In a short relationship, each person will generally be entitled to keep whatever he or she brought into the relationship and anything he or she received as a gift from the other person. If there are any jointly owned assets — property that both people own and that is registered in both names — like a house or a car, there is a legal presumption that each owner is entitled to an equal interest in the asset, whether the couple contributed equally to its purchase or not.

Although unmarried couples who lived together for less than two years, or didn't live together at all, aren't able to make any claims about property owned only by one of them under the *Family Law Act*, they may be able to make a claim under certain common law principles. These are discussed in more detail in the first section of the Property & Debt chapter, under the heading "Property claims and people who aren't spouses".

Orders not available to unmarried couples

A couple who have a child but did not live together, or who lived together for less than two years and did not have a child, cannot ask for orders under the *Family Law Act* about:

- spousal support,
- child support for the benefit of stepchildren, or
- the division of family property and family debt.

Only people who qualify as married or unmarried spouses may ask for orders on these subjects.

Spousal support

Section 3 of the *Family Law Act* defines a *spouse* for the purpose of claims for spousal support as someone who is married, has lived in a marriage-like relationship with someone else for at least two years or for less than two years if the couple has had a child together. Since only spouses are eligible for spousal support, people who do not meet these criteria cannot apply for spousal support.

Child support for stepchildren

Stepparents can be required to pay child support for the benefit of their stepchildren. However, s. 146 of the *Family Law Act* defines a *stepparent* as someone who is "a spouse of the child's parent." As a result, someone in an unmarried relationship that doesn't qualify as a spousal relationship cannot be made to pay child support for the other person's children from a previous relationship.

Family property and family debt

The *Family Law Act* defines a *spouse* for the purposes of claims about property and debt as someone who is married or has lived in a marriage-like relationship with someone else for at least two years. Only people who meet this narrower definition of spouse may ask for orders about the division of property and debt under the act.

Agreements available to unmarried couples

A family law agreement is a contract between two or more people that is enforceable by the courts, just like any other kind of contract. People can make any kind of contract they want, as long as the contract isn't made for an illegal purpose and doesn't require a person to do something illegal. There's no reason, for example, why two people couldn't make a contract requiring one of them to wear purple shirts on Thursdays in exchange for a box of ants. Although it's hard to imagine why anyone would want such a contract, it's still possible and it would be enforceable in court provided that the agreement was properly written out and signed.

This section has just gone through the sorts of orders unmarried couples can ask for under the *Family Law Act*. Essentially, we're talking about orders about the care of children and the payment of child support. If an unmarried couple was going to have an agreement, it would probably talk about these two issues. However, like the contract about shirts and ants, there's no reason why an unmarried couple couldn't make an agreement that also talked about the payment of spousal support and the division of family property and family debt. Although the couple are under no legal obligation to make a contract about these things, they can do so if they want.

Government benefits

The most important thing to know about government benefits is that most federal legislation defines a *spouse* as someone who has been in a cohabiting relationship for at least one year, as opposed to British Columbia's legislation which generally requires a two-year cohabiting relationship to qualify. As a result, someone in a relationship of at least one year may qualify for any federal benefits that depend on a spousal relationship although they probably won't qualify for provincial benefits. People in a relationship of less than one year will not usually qualify for any benefits at all.

Benefits relating to children, like the BC Family Bonus ^[3], the Canada Child Tax Benefit ^[4], the National Child Benefit Supplement ^[5] and the Universal Child Care Benefit ^[6], are available to anyone who is a parent, regardless of the nature of that person's relationship with the other parent. The website of the Canada Revenue Agency ^[7] has a lot of information about federal and provincial benefits.

The federal government has a helpful online child benefits calculator ^[8] that estimates the amount of benefits available from federal and provincial sources based on information you provide.

Rights and responsibilities of unmarried parents

Couples who are not married and have not lived together but have had a child together can ask for orders about the care of their child, and child support for their child under the provincial *Family Law Act*.

Child support

Child support is payable by anyone who is the parent of a child, regardless of the nature or brevity of the relationship that produced the child. The *Family Law Act* says, at s. 147, that "each parent" has a duty to provide support for his or her child.

Under s. 150(1) of the act, child support is to be paid in the amount determined under the Child Support Guidelines. As a result, all of the provisions of the Guidelines apply to unmarried parents, including:

1. the tables that are used to calculate the amount of child support payable,
2. the exceptions that allow child support to be paid in an amount different than the usual table amount, and
3. the rules about the payment of children's special expenses.

Nothing in the *Family Law Act* or the Child Support Guidelines allows a parent to escape paying support through some quirk in the circumstances under which the child was conceived or whether the pregnancy was planned or not. The only question that may be left open is whether or not the person being asked to pay child support is the parent of the child for whose benefit support is sought. If that's an issue, a paternity test can always be taken.

You can find additional information about child support and the Guidelines in the chapter Child Support. You can find additional information about paternity and paternity testing in the chapter Other Family Law Issues, in the section Parentage and Assisted Reproduction.

The care of children

Under s. 40(1) of the *Family Law Act*, only people who are the guardians of a child have *parental responsibilities* and *parenting time* in relation to that child. People who are not the guardians of a child may have *contact* with the child and do not have the right to participate in making decisions about the raising of the child or the right to get information from the important people involved in the child's life, such as doctors, teachers, counsellors, coaches and so on.

Under s. 39, the people who are presumed to be the guardians of a child are:

1. the child's parents, as long as they lived together,
2. a person who is a parent of a child under an assisted reproduction agreement, and
3. a parent who "regularly cares" for the child.

In other words, if a couple has had a child but never lived together, the parent who does not live with the child is not presumed to be a guardian of the child unless he or she "regularly cares" for the child.

A parent who isn't a guardian can become a guardian if the child's other guardians, who may be just the other parent, agree that the parent should be a guardian. If the parents can't agree on this, then the parent who isn't a guardian has three choices. He or she:

1. must settle for having contact with the child and not being able to participate in parenting the child,
2. must prove that he or she "regularly cares" for the child, in order to be recognized as a guardian of the child who is entitled to participate in parenting the child, or
3. must apply to be appointed as the guardian of a child under s. 51 of the *Family Law Act*.

Applications for appointment as guardian are difficult as the person who is making the application must provide a special kind of affidavit that talks about the children who are and have been in the person's care, any civil or criminal court

proceedings that might impact on the safety of a child, and any history of involvement with the Ministry for Children and Family Development. The person must also provide recent MCFD and police records checks. Applications for appointment as a guardian are discussed in more detail in the Guardianship, Parenting Arrangements and Contact section of the Children chapter, under the heading "Being a guardian and becoming a guardian."

Resources and links

Legislation

- *Family Law Act*
- provincial *Income Tax Act* ^[9]
- provincial Income Tax (BC Family Bonus) Regulation ^[1]
- *Universal Child Care Benefit Act* ^[10]
- federal *Income Tax Act* ^[2].

Links

- Canada child benefits calculator ^[8]
- Canada Revenue Agency Website: Child and family benefits ^[11]
- BC Family Bonus ^[3]
- Legal Services Society's "Living Together or Living Apart" booklet, Chapter 1, Types of Relationships ^[12]
- Canadian Bar Association BC Branch: Introduction to family law ^[13]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 20, 2013.

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- [4] <http://www.cra-arc.gc.ca/cctb/>
- [5] <http://www.nationalchildbenefit.ca/eng/home.shtml>
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- [9] <http://canlii.ca/t/843w>
- [10] <http://canlii.ca/t/7w0s>
- [11] <http://www.cra-arc.gc.ca/bnfts/>
- [12] <http://www.clicklaw.bc.ca/resource/1058>
- [13] <http://clicklaw.bc.ca/resource/2376>

Children's Caregivers and Extended Family

People other than a child's parents can also have a legal interest in a child. Typically, these people are a child's blood relatives — grandparents, aunts, uncles and so forth — although there's no reason why someone else, like an unrelated long-term caregiver or a neighbour, couldn't also have an interest in the care and well-being of a child, or in having time with a child on a regular basis.

This section talks about the claims a child's caregivers and extended family members can make to guardianship of a child, contact with a child, and child support.

Introduction

Grandparents and other people who are not parents normally become involved in court proceedings dealing with children in only a few situations:

- where one or both of the guardians of the children are dead,
- where one or both of the guardians have abandoned the children or the care of the children,
- where there are serious concerns about the ability of the guardians to care for the children, or
- where they are being denied time or involvement with the children.

Their concerns are usually about supervising or managing the parenting of the children, or about getting a schedule in place that will let them see the children on a regular basis.

Two laws might apply to caregivers and extended family members who are seeking orders about parenting the children or having time with them. Where the children's parents are already in court about the children, that might be the federal *Divorce Act* if the parents are or were married, or the provincial *Family Law Act* whether they were married or not. If the children's parents are not involved in a court proceeding between each other, it will be the *Family Law Act*.

Each law has different rules about how and when people other than parents can apply for orders about children, and it's important to understand which law might be applicable.

The *Divorce Act*

Under s. 16(1) of the *Divorce Act*, the court can make an order for *custody* or *access* on the application of a spouse or "any other person." Section 16(3), however, says that an "other person" must get the court's permission before bringing on such an application.

Since we're talking about the *Divorce Act*, a court proceeding must have already started between married spouses or formerly married spouses before a child's caregivers and extended family members can step in; there must be an existing proceeding between the spouses in which to bring the application.

The *Family Law Act*

The *Family Law Act* talks about *guardians* who have *parental responsibilities* and *parenting time* with children, and about people who are not guardians who have *contact* with a child.

If the child's guardians are already in court, a child's caregiver or extended family member can start a court proceeding and ask that the new proceeding be *joined* to the court proceeding between the guardians. Once that happens, the caregivers and extended family members can ask to vary any orders that have already been made between the guardians in order to give them contact or other rights with respect to the children.

If the guardians are not in court, a child's caregiver and extended family member can start a court proceeding against the parents or guardians and ask for orders about the children.

Orders and agreements

This section talks about the orders available to children's caregivers and extended family members, and is written on the assumption that someone who is interested in securing a right to involvement in a child's life will be going to court to secure that right. After all, if the child's parents or guardians were okay with the kind of involvement the person is looking for, there'd be no need to secure an order as they'd likely give their permission. In such circumstances, there's no reason at all why the child's parents or guardians and the caregiver or extended family member couldn't make an agreement on the issue instead of going to court.

A family law agreement is a contract between two or more people that is enforceable by the courts, just like any other kind of contract. The sort of agreement a child's caregiver or extended family member would want to sign might:

- authorize the caregiver or extended family member to exercise certain parental responsibilities in relation to the child, under s. 43(2) of the *Family Law Act*,
- provide the caregiver or extended family member with specific rights of contact with the child, under s. 58(1) of the act, or
- if the child is living with the caregiver or extended family member, require one or more parents or guardians to provide child support to the caregiver or extended family member, under s. 147(1) of the act.

It's important to know, as you'll see further on in this section, that a child's guardians cannot make an agreement appointing anyone other than a parent as a guardian. Only the court can make someone other than a parent a guardian, and that requires an application to court and a court order.

Rights and responsibilities of caregivers and extended family members

A child's caregivers and extended family members can ask for orders about the care of a child under the provincial *Family Law Act*. If the child's parents are married and have an order made under the federal *Divorce Act*, the child's caregivers and extended family members *must* make any applications about the child under that act and they must get the court's permission first.

Where a child winds up living mostly with a caregiver or extended family member, the caregiver or extended family member can ask for an order under the *Family Law Act* requiring either or both of the child's parents to pay child support.

A child's caregivers and extended family members cannot ask for orders for spousal support from a parent under the *Divorce Act* or the *Family Law Act* because they're not spouses of the parent. For the same reason, they cannot ask for orders about the division of family property and family debt against a parent under the *Family Law Act*. Only spouses can ask for these orders.

The care of children

The *Divorce Act*

When a child's caregiver or extended family member must apply for orders about the child under the *Divorce Act*, he or she will be asking for orders about *custody* and *access*. These applications will usually be applications to change, or *vary*, an order that has already been made between the child's parents.

To vary an order for custody or access, s. 17(5) of the *Divorce Act* requires proof of a change in circumstances:

Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

Once a change in circumstances has been proven, the child's caregiver or extended family member must then show why it is in the best interests of the child for the court to make the order he or she is asking for, and the court will usually extend a great deal of respect to the wishes of the child's parents. These issues are discussed in more detail in the chapter on Children, in the section Custody and Access.

The *Family Law Act*

Whether a caregiver or extended family member is applying under the *Family Law Act* for guardianship, and the rights that go along with it, or for contact, he or she must show why it is in the best interests of the child for the court to make the order asked for. The court will usually extend a great deal of respect to the wishes of the child's guardians in considering these applications, and often, depending on the child's age and maturity, to the wishes of the child. These issues are discussed in more detail in the section Guardianship, Parenting Arrangements and Contact in the chapter on Children.

Guardianship, parental responsibilities and parenting time

Under s. 40(1) of the *Family Law Act*, only people who are the guardians of a child have *parental responsibilities* and *parenting time* with respect to that child. People who are not the guardians of a child may have *contact* with the child and do not have the right to participate in making decisions about the raising of the child or the right to get information from the important people involved in the child's life, such as doctors, teachers, coaches and so on.

Under s. 39, the people who are presumed to be the guardians of a child are:

1. the child's parents, as long as they lived together after the child was born,
2. a person who is a parent of a child under an assisted reproduction agreement, and
3. a parent who "regularly cares" for the child.

A child's caregiver or extended family member who isn't a parent under an assisted reproduction agreement is not presumed to be a guardian of the child. A caregiver or extended family member may become the guardian of a child by:

1. applying for an order appointing him or her as a guardian of a child under s. 51,
2. being appointed by as the standby guardian of a child under s. 55, or
3. being appointed as the guardian of a child upon the death of a guardian under s. 53.

Since being appointed as a standby guardian or a testamentary guardian can both take some time, a caregiver or extended family member who feels the need to step in sooner rather than later will apply for appointment as the guardian of a child under s. 51.

Applications for appointment as a guardian can be difficult and time-consuming, and the court must be satisfied that the appointment is in the best interests of the child. The person who is applying to become the guardian of a child, the *applicant*, must fill out a special affidavit required by the Provincial Court Family Rules ^[1] and the Supreme Court Family Rules ^[2] that talks about:

- the applicant's relationship to the child,
- the other children currently in the care of the applicant,
- any history of family violence that might affect the child, and
- any previous civil or criminal court proceedings related to the best interests of the child.

Applicants must also get a new criminal records check and a records check from the Ministry of Children and Family Development.

Authorizations to exercise parental responsibilities

Under s. 43(2) of the *Family Law Act*, a guardian who is temporarily unable to exercise certain parental responsibilities may authorize someone to exercise those responsibilities on his or her behalf, including a child's caregiver or a member of the child's extended family. Such authorizations must be made in writing, and should say exactly what it is that the authorized person can do.

The parental responsibilities that someone can exercise under a written authorization are:

- making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child,
- making decisions about whom the child will live with and associate with,
- making decisions about the child's education and participation in extracurricular activities,
- giving, refusing, or withdrawing consent to medical, dental and other health-related treatments for the child,
- applying for a passport, licence or permit for the child,
- giving, refusing, or withdrawing consent for the child, if consent is required,
- receiving and responding to any notice that a parent or guardian is entitled or required by law to receive, and
- requesting and receiving from third parties health, education, or other information respecting the child.

Authorizations like these are mostly used when the child needs to go somewhere else to attend school and the guardian needs to make arrangements for the child to be looked after, when the guardian is seriously ill but going to recover, and when the guardian is going to be out of commission while recovering from a surgery or treatment.

Contact with a child

Any person can apply for contact with a child under s. 59 of the act. The court must be satisfied that the contact asked for is in the best interests of the child. People who are applying for contact don't need to get a criminal records check or an MCFD records check done.

Child Support

The Divorce Act

Under s. 15.1(1) of the *Divorce Act*, only a married spouse may apply for a child support order under the act. As a result, a caregiver or extended family member who has had to apply to vary a *Divorce Act* order for custody must apply for child support under the *Family Law Act* if child support is needed. Both applications can be made in the same document

and at the same time.

The Family Law Act

The *Family Law Act* says, at s. 147(1), that "each parent" has a duty to provide support for his or her child, as long as the child in question is a *child* as defined by s. 146 and hasn't become a spouse or withdrawn from the care of his or her parents under s. 147(1). Under s. 149, the court can make an order requiring a parent to pay child support to "a designated person" on the application of "a person acting on behalf of a child:"

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

(2) An application may be made by

(a) a child's parent or guardian,

(b) the child or a person acting on behalf of the child...

As long as the child lives mostly with a child's caregiver or extended family member, the caregiver or extended family member can ask for an order for child support against some or all of the child's parents and guardians.

According to s. 150(1) of the act, where an order for child support is made, the amount of the support order is to be determined under the Child Support Guidelines. As a result, all of the provisions of the Guidelines apply when a child's caregiver or extended family member is asking for child support, including:

- the tables that are used to calculate the amount of child support payable,
- the exceptions that allow child support to be paid in an amount different than the usual table amount, and
- the rules about the payment of children's special expenses.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines ^[3]

Links

- Grandparents raising grandchildren helpline ^[4] from the Parent Support Services Society of BC
- Benefits for grandparents raising grandchildren ^[5]
- Department of Justice Child Support Calculator ^[6]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/85pb>
- [2] <http://canlii.ca/t/8mcr>
- [3] <http://canlii.ca/t/80mh>
- [4] <http://clicklaw.bc.ca/helpmap/service/1133>
- [5] <http://clicklaw.bc.ca/question/commonquestion/1118>
- [6] <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/apps/look-rech/index.asp>

Separation & Divorce

Separation & Divorce

A couple *separates* when one or both spouses decide that their relationship is over and then take steps to act on that decision. When an unmarried couple separates, their relationship is over. The relationship of married spouses, on the other hand, isn't legally over until they are divorced or their marriage is annulled.

This chapter begins by taking a quick look at separation and divorce, and talks about a few urban myths about separation and divorce. The following sections look in more detail at the legal and practical aspects of separation and the emotional dimensions of separation. The do-it-yourself divorce process is reviewed in a fair amount of detail in the Divorce section at the end of this chapter.

Everything in this chapter applies just as much to same-sex couples as it does to opposite-sex couples.

Introduction

The rules about separation and divorce are fairly straightforward, despite some common misunderstandings.

Separation simply means making the decision that a relationship has broken down. You don't have to move out to separate. You just have to tell your spouse that things have come to an end and that you'd like to end the relationship, and then act on that decision.

Divorce is the legal termination of a married relationship. A divorce requires an order of the court ending the marriage. A couple who have been separated for a dozen years are still married, and they'll remain married until they get a court order for their divorce. Unmarried spouses do not need to get divorced; their relationships are over when they separate.

Separation

Separation is simple: the parties must simply start living "separate and apart" from one another, whether under the same roof or in separate homes. Contrary to popular opinion, you do not need to see a lawyer or file some sort of court document to obtain a separation. You just need to call it quits, tell the other spouse that it's over, and take whatever steps are necessary to put an end to the partnership qualities of your relationship.

For married couples, separation signals the breakdown of their relationship but does not release them from the bonds of their marriage.

For unmarried couples, including unmarried couples who qualify as spouses under the *Family Law Act*, separation is all that's required to end the relationship.

Annulment

If one or more of the requirements of a valid marriage are lacking, the marriage may be annulled or cancelled. To obtain an annulment, one of the parties must make an application for a declaration that the marriage is void. A marriage may be annulled if:

- a female spouse was under the age of 12 or a male spouse was under the age of 14 (the common law ages of puberty),
- one or both of the spouses did not consent to the marriage,
- a male spouse is impotent or a female spouse is sterile going into the marriage,
- the marriage cannot be consummated,
- the marriage was a sham, or
- one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

You can find more information about void marriages, voidable marriages, and annulment in the chapter Family Relationships, in the section Marriage & Married Spouses.

Divorce

Divorce is the legal dissolution of a valid marriage. To obtain a divorce, one spouse must sue the other in the Supreme Court ^[1], and at least one of the spouses must have been "ordinarily resident" in British Columbia for the preceding year. A spouse must prove that the marital relationship has broken down in order to qualify for a divorce order, and a marriage may have broken down for one of three reasons:

1. separation for a period of not less than one year,
2. adultery, or
3. mental or physical cruelty.

It is possible to oppose an application for a divorce order, although this rarely happens. In general, once one of the grounds for divorce has been established, the courts will allow the divorce application, despite the objections of the other spouse.

For various reasons, getting divorced can sometimes be a low priority in some people's lives. Frankly, most people have better things to do with their time than filing the paperwork necessary to get divorced, especially if that's the only legal issue to deal with. With the passage of time, spouses can lose track of each other, and it sometimes happens when one spouse decides to move on the divorce issue the other spouse can't be found, and the divorce order gets made without the other spouse being told about it! If you're not sure if you're divorced, see *How Do I Find Out if I'm Divorced?* It's located in the section *Marriage, Separation & Divorce* in the *How Do I?* part of this resource.

A few surprisingly common misunderstandings

A lot of people seem to labour under certain misconceptions about what marriage, separation and divorce actually involve. Part of these misunderstandings, I'm sure, come from television and movies; others are urban myths that get spread over a few pints at the pub.

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia, nor is it possible to be "legally separated." Whether you're in an unmarried relationship or a formal marriage, you are separated the moment you decide that the relationship is over. That's it, there's no magic to it. When you or your partner announces that the relationship is over and there's no chance of getting back together, boom, you're separated.

To be crystal clear:

- you do not need to "file for separation" to be separated (in fact, there's no such thing in British Columbia as "filing for separation," despite what you might see on the websites of the people who sell do-it-yourself legal kits),
- there are no court documents or other papers you have to sign to be separated, and
- you don't need to appear before a judge, lawyer, shaman or anyone else to be separated.

To be separated, you just need to decide that your relationship is over and say so.

Separation and remarriage

The fact that a married couple are separated isn't enough to let either of the spouses remarry, however. You must be formally divorced by an order of the court in order to remarry. If you do remarry without being divorced from the first marriage, the new marriage will be invalid.

Separation and new spousal relationships

On the other hand, the fact that a married couple has separated won't prevent you from having new relationships, including a new relationship that would qualify as an unmarried spousal relationship. Technically, this is adultery, but no one is likely to care. The Separation section of this chapter has a lot of information about new relationships after separation.

Divorce and the "automatic divorce"

As far as divorce is concerned, a court must make an order for your divorce or you'll never be divorced. You can have been separated from your spouse for twenty years, but unless a court has actually made an order for your divorce, you'll still be married. It'd be nice (and cheaper) if the passage of time gave rise to an automatic divorce, but it doesn't work that way.

Divorce and separation agreements

It is not true that you need to have a separation agreement to get a divorce. Separation agreements are helpful to record a settlement of the issues arising when a couple separates, like the division of assets or the payment of support and so forth, but they're not a requirement of the divorce process. You especially don't need a separation agreement if the only issue is whether you'll get a divorce order or not.

Divorce after death

It is not true that you remain married if your spouse dies. Once that happens, your marriage is at an end. You do not need to obtain a divorce.

Divorce for want of sex

It is also not true that a lack of sex in your relationship automatically ends your marriage, allows the marriage to be declared void, or is otherwise a ground of divorce. Sex has very little to do with divorce, just as it often has little to do with marriage. A lack of sex may spell the end of a relationship and spur a couple's separation, but at law whether you and your spouse are having sex or not is irrelevant.

The one exception to this last rule has to do with the *consummation* of the marriage, and this exception doesn't mean what most people think it means. A marriage does not need to be consummated to be a valid, binding marriage. In order to escape a marriage on this ground, you or your partner must, I kid you not, have an "invincible repugnance" to the act of sexual intercourse or some physical condition that makes sex impossible.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society's Family Law Website: Divorce and separation basics ^[2]
- Legal Services Society's Family Law Website: Proving you're separated if you and your spouse still live together ^[3]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] http://www.courts.gov.bc.ca/supreme_court/

[2] http://www.familylaw.lss.bc.ca/legal_issues/divorceBasics.php

[3] <http://clicklaw.bc.ca/resource/2291>

Separation

Separation usually signals the breakdown of a married or unmarried relationship. It can be one of the most traumatic stages in the conclusion of a relationship, but it can also lead to reconciliation and the resumption of life together as a committed couple. Separation occurs when one or both spouses decide that their relationship is over and say so; there's no need to hire a lawyer or to seek the approval of a judge.

This section discusses the legal aspects of separation, the rules relating to reconciliation, and some of the other issues you may want to consider once you have separated or have decided to separate. The information applies to married spouses and unmarried spouses.

This section will also address some common questions about sex and new relationships after separation. The next section, Separating Emotionally, talks about the emotional dimensions of separation and how those emotional issues can influence the resolution of the legal issues.

Introduction

Although many people move out when they separate, others separate and remain living under the same roof. A physical separation is not necessary to separate; there must simply be an intention to end the relationship and the intimacies and mutual support that a committed relationship usually involves.

Often the decision to separate is made by both spouses, but it only takes one spouse to decide to end a relationship, and a spouse's decision to end a relationship doesn't require the consent of the other spouse.

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

Everyone is entitled to separate if they wish to end a relationship, and you don't need to see a lawyer to do so; the function of the family law lawyer is to assist in the resolution of the issues arising from the breakdown of the relationship.

Now, to be fair, what people often mean by "legal separation" is a *separation agreement*. This is something else altogether. A separation agreement is a contract that a couple use to record their agreement about things like how the children will be cared for, how their property will be shared, and how child support and spousal support will be paid. Separation agreements are not always necessary, and you can't be forced to sign a separation agreement.

You can find more information about separation agreements in the chapter Family Law Agreements within the section Separation Agreements. You can find out more about preparing to separate in How Do I Prepare for Separation?, located in the *How Do I?* section of this resource. Look under *Marriage, Separation & Divorce*.

The date of separation

Under the old *Family Relations Act*, married spouses rarely argued about when they separated. The issue was sometimes important for unmarried spouses because their ability to ask for spousal support depended on whether they started a court proceeding within one year of the date of separation.

Under the new *Family Law Act*, the date of separation has become very important for both married and unmarried spouses. In general, the date of separation is the date that:

- each spouse's one-half interest in the family property crystallizes,
- the spouses stop accumulating family property and begin accumulating their own personal property,
- the spouses stop accruing family debt and begin accruing their own personal debt,
- starts the two-year period within which unmarried spouses must begin a court proceeding for the division of property and debt, if settlement can't be reached (the two-year period for married spouses starts on the date of their divorce),
- begins the two-year period within which unmarried spouses must begin a court proceeding for spousal support, if settlement can't be reached (the two-year period for married spouses starts on the date of their divorce).

The Property & Debt chapter talks about the first four issues in more detail; the Spousal Support chapter talks about the last issue.

Spouses do not need to move out in order to be separated. What's needed is for at least one spouse to reach the conclusion that the relationship is over, to say as much to the other spouse, and then begin behaving as if the relationship is over. That usually means stopping behaving like a couple, stopping sleeping together, stopping doing chores and tasks for each other, and so on. Section 3(4) of the *Family Law Act* talks about separation:

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.

This is helpful, because the old *Family Relations Act* didn't talk about separation in any detail. However, the phrase in s. 3(4)(b), "the court may consider," suggests that this section isn't a comprehensive listing of things the court should consider, and the cases about separation are still very helpful. Here are some of the highlights:

Herman v. Herman, Nova Scotia Supreme Court, 1969:

"[A]s long as the spouses treat the parting or absence, be it long or short, as temporary and not permanent, the couple is not living separately even though physically it is living apart. In order to come within the clear meaning of the words 'separate and apart' in the statute, there must need be not only a physical absence one from the other, but also a destruction of the consortium vitae or as the act terms it, marriage breakdown."

Hills v. Hills, Nova Scotia Supreme Court, 1969:

"[T]he words 'living separate' connote an attitude of mind in the spouses in which they regard themselves as withdrawn from each other."

McDorman v. McDorman, New Brunswick Supreme Court, 1972:

"While the mere living separate and apart of the spouses may not be conclusive of the fact that there has been a permanent breakdown of the marriage, especially in cases where the separation may have been brought about ... by enforced hospitalization ... all of the circumstances accompanying such separation must be considered in determining whether or not it has in fact led to a permanent marriage breakdown."

Lachman v. Lachman, Ontario Court of Appeal, 1970:

"A marital relationship is broken down when one only of the spouses is without the intent for it to subsist."

It's important to know that the Canada Revenue Agency has its own definition of separation, and requires people to have lived separate and apart for 90 days before considering them to actually be separated; once the 90-day period is over, the date of separation is the date the couple began to live separate and apart.

Being separated while living together

It is possible to separate and remain living under the same roof as your spouse. People sometimes do this when they simply cannot afford to make ends meet while maintaining separate homes or when neither spouse wants to leave the home and the children.

In order for the courts to recognize this form of separation as a separation, the spouses must live as if they have completely ended the romantic aspect of their relationship. This usually includes sleeping in separate beds in separate rooms, opening separate bank accounts and closing joint accounts, separately performing household chores like laundry and cooking, not going out as a couple, and so on. Either way, the spouses must stop behaving as if they are a couple.

Because the date of separation can sometimes be hard to pin down when separated spouses continue to live under the same roof, it can be very helpful to make some sort of record of the date that separation occurred. Sending a letter or email to your spouse to confirm separation might be a good idea; make sure you keep a copy.

Desertion

This is an old statutory ground of divorce, established in the 1857 English *Divorce and Matrimonial Causes Act*, which allowed a spouse to claim a divorce after she had been abandoned for at least three years "without just cause."

This ground of divorce has long since been abolished, but a claim for divorce based on simple separation for a period of at least one year may be brought instead.

Separation and children

Under s. 39(1) of the provincial *Family Law Act*, spouses are presumed to be guardians of the children they had during their relationship after they have separated.

Separation can be extraordinarily difficult on children. In most registries of the Provincial Court, couples are required to attend a Parenting After Separation program. This program, which is brief and free, teaches parents how to communicate with one another after separation and how to talk to their children about separation. It is an extremely useful program, and one which I encourage all separating parents to take. You can find more information about this program and other issues relating to children and separation in the Children chapter, in the section Parenting After Separation.

Separation is, of course, also difficult for the adults who are separating. You can find more information about the emotional dimensions of separation in the next section of this chapter, Separating Emotionally.

Reconciliation

For some couples, a period of separation does not sound their relationship's death knell. For some, a period of separation can be a time for rebuilding a relationship and can become a healthy break that rejuvenates and revitalizes a marriage.

Married spouses

The *Divorce Act* contains a number of provisions intended to discourage divorce and encourage spouses to remain together. Section 8(3)(b) of the act provides that:

A period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or

(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

In other words, a married couple may attempt to reconcile and can resume a cohabiting relationship for a maximum of 90 days without stopping the clock on separation as a ground of divorce. If a couple have lived together for more than 90 days since the first separation, the clock will start again at the end of the last period in which they lived together as a married couple.

The 90 days needn't be consecutive in order to stop the clock. If you are claiming separation as the ground of your divorce, you cannot have resumed your relationship with your spouse for a total of 90 days within the one-year period of separation.

Unmarried spouses

Because unmarried couples don't need to get divorced, the *Family Law Act* has no similar provisions about separation and attempts at reconciliation, except in relation to property. Section 83(1) says this:

For the purposes of this Part, spouses are not considered to have separated if, within one year after separation,

(a) they begin to live together again and the primary purpose for doing so is to reconcile, and

(b) they continue to live together for one or more periods, totalling at least 90 days.

These provisions are important because the date of separation is the date when new property and new debt stop being shared family property and family debt and start being each spouse's separate property and debt.

Things to think about after separation

Once you've separated, there a number of things you may want to do, change, or adjust to reflect the new circumstances of your relationship with your spouse.

Bank accounts and credit cards

You should remove your name from any joint bank accounts or credit cards. If your spouse has signing authority or debiting authority on any of your accounts or credit cards, you should consider cancelling his or her authority.

Credit cards, loans and lines of credit can often be capped by telling the bank to make the accounts *deposit only*. This will mean that no more withdrawals can be made and the only transactions that can take place are deposits. You could also tell the bank to reduce the credit limit to the current balance on the account.

Insurance policies, pensions and RRSPs

You may wish to change the beneficiary of your insurance policies, pensions, and RRSP accounts if your spouse is the present beneficiary. If your spouse is the irrevocable beneficiary on such an account, your bank or insurance company may require your spouse's consent to remove his or her name as a beneficiary.

Wills

Separation may stop an unmarried spouse from making claims under the *Estate Administration Act* ^[1] and the *Wills Variation Act* ^[2]. These laws allow an unmarried spouse to claim a share of the estate of his or her deceased spouse, but only if the spouses were living together at the time of the death.

Separation has no effect on the ability of married spouses to make claims under the *Estate Administration Act* and the *Wills Variation Act*. Married spouses can claim a share of the estate of the deceased spouse as long as they are still married, whether they're separated or not.

As a result of these laws, if you don't have a will, you should make one if you don't want your spouse to share in your estate. If you do have a will, you may want to change it. Special wording is normally used when married spouses change a will after separation, usually something along these lines:

"I make this my will following my separation from [name], my [wife/husband], and in contemplation of my divorce from [name], to whom I leave nothing as [she/he] is well provided for."

You should see a wills and estates lawyer for help in making or changing a will.

When married spouses are divorced a former spouse cannot act as executor of the deceased spouse's estate and any specific gifts to the former spouse are cancelled.

Powers of attorney and other authorizations

Spouses often have mutual powers of attorney, that is, each spouse may have a power of attorney that gives him or her authority over the other spouse's affairs should the other spouse become unable to manage them. If your spouse has power of attorney over your affairs, you may want to revoke (cancel) the power of attorney. You do not need your spouse's agreement to cancel a power of attorney.

If you want to revoke a power of attorney or a similar type of authorization, you should contact a lawyer to have the proper documents drawn up.

Medical and dental insurance

Normally, spouses and children are still covered by the other spouse's health insurance for a period of time after separation. Coverage for children usually ends once the children turn 19; coverage for married spouses almost always ends on divorce, but coverage for unmarried spouses may end when the parties stop living together. You should contact the people who administer your insurance plan for more information as different plans have different rules about the eligibility of spouses as beneficiaries following separation.

For most people, maintaining spousal benefits cost little or nothing. If that's the case, consider leaving your spouse's coverage in place for as long as your plan allows; it will appear rather mean-spirited if you cancel your spouse's benefits. Whatever you do, don't cancel the children's benefits!

Finances and assets

When you separate, make sure you take with you or secure the following items:

- your financial information, including your credit card statements, bank statements, RRSP and investment account statements, and so forth,
- your MSP card and your private medical insurance card, if you have one,
- your children's birth certificates,
- your immigration or citizenship documents, if you are new to Canada, and
- your passport and your children's passports.

You may also wish to take a fair share, half or less than half, of the household property such as the children's clothing, the furniture, and your personal effects. However, I would really encourage you to think twice about this and proceed with caution. Yes, the odds are quite good that half the common household property is yours, but the last thing you want to do after separation is to ramp up the tension any further. If you absolutely cannot live without the dish set, then take the dish set, but otherwise it may be best to leave the dish set at home. Nothing looks worse than the spouse who takes half the glasses, half the cutlery, half of a dining room suite and half of the living room furniture.

Now, this may seem a bit pessimistic, but you should also take a list of all of the property your spouse owns in his or her own name and of all the things the two of you own jointly. A detailed list, including balances and account numbers and serial numbers, would be ideal, but even something as simple as a list of the financial and other institutions you and your spouse deal with will do. You can collect that information by writing down the names and addresses of the people who are sending your spouse statements; you don't even have to open the envelopes. This information could prove invaluable if you wind up in an argument about who owns what or the extent of the family property and family debt.

Sex and new relationships after separation

A lot of readers have questions about the consequences of sex after separation. The discussion that follows is about sex with spouses, sex with people other than spouses, new relationships, and how a married spouse can be in a unmarried spousal relationship with someone else while still being married.

Sex with spouses

There are, generally speaking, no legal consequences to having sex with your spouse after you've separated. While it might cause some emotional difficulties — such as prolonging the amount of time it takes to recover from a relationship that's broken down — there is nothing legally wrong with having sex with your spouse. Most people would say that there's nothing morally wrong with it either.

Having sex with your spouse after separation will not have an impact on how the care of the children is managed, the amount of child support to be paid, whether spousal support should be paid, or how your property and debt should be divided. The court does not look into this sort of conduct in determining these issues.

However, two things that married spouses probably need to think about are these:

- **Reconciliation:** While simply having sex with your spouse won't count toward the 90-day period of reconciliation described above, it may if you begin to live with each other while you're doing it.
- **Divorces based on adultery:** If you are making a claim for a divorce based on your spouse's adultery, and you have sex with your spouse after you start the claim, you could be considered to have forgiven your spouse for the adulterous conduct. If you have forgiven your spouse, you will not be able to obtain a divorce based on his or her adultery. The same principle would probably also apply to divorce claims based on cruelty.

Sex with other people

Just like having sex with your spouse after you've separated, there's nothing wrong with having sex with someone else after you've separated. Separation is partly defined as leaving a spouse with the intention of ending the relationship. Once you've separated, the court will consider the romantic, marriage-like aspect of the relationship to have concluded, and your obligation to remain monogamous along with it. Married spouses won't be divorced until they get a court order, of course, but after separation the marital aspects of their relationships, and the attendant expectations of monogamy, will be considered to be at an end.

Having sex with someone else will not have an impact on how the care of the children should be managed, the amount of child support to be paid, whether spousal support should be paid, or how the family property and debt should be divided. The court does not consider this sort of conduct in determining these issues.

Is it adultery?

Adultery is only an issue for married spouses. Technically speaking, it is in fact adultery to have sex with anyone other than your spouse for so long as you are married. You will remain married until you have obtained an order for your divorce.

While having sex with someone else might constitute adultery, the court will not care whether you've committed adultery or not. As far as the courts are concerned, if your relationship is over, go ahead and do what you like. No one apart from your ex and your in-laws is likely to criticize you for it.

Can it be a ground of divorce?

You cannot sue for divorce based on your own adultery. Now, if it's your spouse who has had sex with someone other than you following separation, you can use his or her adultery to get a divorce as long as you haven't already claimed a divorce for another reason like separation.

New relationships

New romantic relationships are treated in exactly the same way as new sexual relationships: the courts will not normally be concerned with a new relationship unless your new partner could somehow be seen as a genuine risk to the children.

Entering into a new relationship will not usually have an impact on how the care of the children should be managed and the amount of child support to be paid, and it will never have an impact on whether spousal support should be paid or how your property and debt should be divided. The court does not look at this sort of conduct in determining these issues. Besides, most separated spouses find themselves in new relationships before they are divorced.

What about the kids?

As a general rule, people should be a bit careful about exposing the children to new relationships. It can be very confusing to deal with the idea of parents separating and then have to cope with the idea of a parent being involved with some stranger who appears to be stepping into the shoes of the other parent.

You should take a lot of care in deciding how and when the children are introduced to new relationships. In general, older children are more likely to understand the new relationship; younger children are more apt to be confused by the new relationship, especially when the new person tries to "parent" the children themselves. Whether we like it or not, society teaches children a very Norman Rockwell/Hallmark Cards view of life: there are two parents, those parents love each other very much, and those parents are supposed to be together always. You should ask any new partner to be sensitive to these issues and to avoid presenting him- or herself to the children as an alternate parent.

What if there are a lot of "new" relationships?

Sometimes a newly separated spouse feels the need to go out and explore his or her options, so to speak, and engages in a series of short-term relationships. This will be very difficult for children of all ages to deal with, if they're aware it's going on. It's one thing to have your parents' relationship break up, which is difficult enough to deal with, but to be introduced to a parade of new people that a parent appears to be romantically involved with can be enormously confusing, and potentially lead to resentment and an alignment with the other parent.

In general, you shouldn't introduce your children to a new partner unless you are sure of the new relationship and expect to be in it for a good long while. If you're not sure about the longevity of the new relationship, be safe rather than sorry and don't introduce your children to your new partner until you're positive the new relationship will last.

If you are the other parent, you may want to ask for an order or an agreement requiring the parent involved in the new relationship to be in that relationship for a certain amount of time — say five or six months at a minimum — before he or she introduces the children to the new person. That being said, while it is entirely reasonable to be concerned about the impact of the new relationship on the children, some caution is suggested. Before you interfere with things, make sure that your concerns about the children are well-founded and based on their interests rather than on your own emotional reaction to your ex's new relationships.

Becoming an unmarried spouse

Someone who is separated but still married can become a spouse in an unmarried relationship. Not everyone is in a rush to get a divorce once a marriage breaks down, and some people don't get around to getting a divorce until many years have passed since they separated.

If you are separated from your married spouse, you are still married and will continued to be married to that person until you get a divorce. If you enter into a new romantic relationship while you are separated, and live with the new person in a "marriage-like relationship" for more than two years or have a child with that person, you will be considered to be in an unmarried spousal relationship; it doesn't matter whether you're divorced or not.

If you find that you're married and also in a new relationship that qualifies as a spousal relationship:

- you may have an obligation to pay child support for your partner's children as a stepparent,
- you will have an obligation to support any children you and your partner have together,
- you may have an obligation to pay spousal support to your partner, and
- there may be family property and family debt that you might be required to share with your partner.

These obligations are in addition to whatever obligations you have to your married spouse and any children from your marriage.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Estate Administration Act* ^[1]
- *Wills Variation Act* ^[2]

Links

- Legal Services Society's Family Law Website: Separation ^[3]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/840g>

[2] <http://canlii.ca/t/84g0>

[3] <http://clicklaw.bc.ca/resource/1640>

Separating Emotionally

The previous section discussed the law about separation. This section talks about the emotional dimensions of separation. The laws and the courts only deal with a narrow slice of all the things that go on when a relationship ends and often ignore, because they must, the larger emotional and psychological issues.

These issues, however, influence a couple's ability to work together after separation and often play a huge role in determining how a separating couple will go about resolving their legal problems. An understanding of the emotions involved in separation can help to reduce conflict and the cost of resolving the legal issues involved in separation.

This section applies to both married and unmarried couples. It provides an introduction to separating emotionally, looks at the grieving process that accompanies the end of a long-term relationship, and discusses how the emotional aspects of separation can impact on the resolution of the legal issues a couple might have to deal with.

Introduction

Ending a long-term relationship, whether married or unmarried, is not just a matter of packing your bags and walking out the front door. Separation stirs up incredibly powerful emotions that can take a surprisingly long time to work through; many counsellors liken these emotions to the grieving process that follows the death of a loved one. Chief among these emotions are love, anger, remorse, and sadness, and separating couples often find themselves experiencing these emotions in a very intense manner and cycling through them over and over.

These emotions often wind up clouding a person's judgment. You can find yourself doing things and saying things you never thought you would, or doing things you promised you'd never do again. You can find yourself looking at your partner and wondering who the hell this person really is, and how can he or she be so different from the person you were together with for so long. Unrecognized and unmanaged emotions can take over the emotional and legal processes of separation like a runaway train and take you down tracks you never anticipated.

The emotions involved in separation are normal. Everyone experiences them, although we each process these emotions in our own way. From a lawyer's perspective, the key problems that must be processed in the midst of these distorted and confused feelings are:

1. settling the legal issues that crop up at the end of a relationship,
2. obtaining reasonable instructions from the client,
3. separating anger from the negotiation process,
4. separating anger from the litigation process, and
5. ensuring that the conflict doesn't spill out onto the children.

The vast majority of couples can resolve their issues through negotiation or mediation, no matter how angry they are with one another. Where a couple simply cannot separate the emotional baggage of separation from the resolution of the legal issues that come at the end of their relationship, litigation may be inevitable.

Many studies have shown that mediation and collaborative settlement processes produce agreements that are better for both parties and better for the children, and that last longer than the results of litigation. Mediation and collaborative processes can help a couple to work through their individual emotional issues and can produce an agreement that isn't so much a legal contract as it is a moral contract. Parents especially tend to deal with each other, and with their children, with a lot less rancour following a mediated or collaborative resolution of their problems.

Litigation is sometimes necessary, even when a couple is capable of a less antagonistic choice: when a party threatens to flee with a child; where there is a history of abuse or where abuse seems imminent; and, where a party is threatening to

do something rash with family property. When litigation is provoked by emotions arising from the end of the relationship and isn't really necessary, then you can run into some serious and expensive problems:

- One or both people will adopt an entrenched and unreasonable position about things like the children and other family issues, sometimes a position that they would never have considered taking. Sometimes positions are adopted out of spite or vindictiveness.
- The emotional tension will worsen, particularly when you see things you thought were long buried in the past put into an affidavit. There will be backstabbing, accusations, and wounded feelings.
- There is an increased risk of the children being used to goad the other parent, although sometimes unintentionally.
- There is an increased risk of the alienation or estrangement of a child from a parent, and the permanent impairment of the child's relationship with that parent.
- There will be many interim applications and the litigation may not be settled even with a trial. In circumstances like these, the litigation may never truly end, especially when there are children involved.
- The litigation will cost an enormous amount of money, and you risk losing the equity in the family assets to court fees and legal fees.
- At the end of the day, you risk being permanently unable to communicate effectively with your former partner. This can be a serious problem when children are involved.

As a result of all of this, it can be critical to get a grip on your emotions right out of the starting gate. While all of these emotions are common, natural, and entirely understandable, failing to recognize and manage them can lead to disastrous short- and long-term consequences to your emotional well-being, your relationship with your children, your children's emotional well-being, and your financial situation. If you are having trouble managing your feelings and you have children, see a counsellor as soon as possible.

Parenting after separation

When a couple have children, they must accept that they will remain a permanent part of each other's lives, whether they like it or not. A couple may no longer be partners, but they will always be parents. The parental relationship does not end with the romantic relationship.

It is impossible to emphasize enough how important it is to always put the children first. This may sound a bit trite, but putting the children ahead of yourself can be an extremely challenging task when you are also trying to cope with the intense emotions involved in separation. It can be tremendously difficult to refrain from badmouthing your former partner to the children, "forgetting" to drop them off on time, and using them as a weapon.

The Parenting After Separation program ^[1] is available throughout British Columbia. In my view, all couples with children can benefit from this program, no matter how well or poorly you think you and your former partner get along.

The Parenting After Separation program can offer important advice about talking to your children about the separation, talking about your former partner with the children, and talking with your former partner in ways that avoid hurting and wounding and are focused on the children.

Information about parenting after separation, including contact information for the different agencies that offer the PAS program, is available in the Children chapter, in the section Parenting After Separation. As well, some very good research papers and literature reviews about parenting after separation, the costs of high-conflict separation, and other topics relating to the child's well-being and outcomes following separation can be found at the website of the Department of Justice ^[2]. These papers are of a uniformly high quality and are well worth the read.

A few notes from JP Boyd

I am not a psychologist, a psychiatrist or a counsellor. As a result, this section should be read with a grain of salt as it is based on my observations of my clients' experiences and a healthy dose of common sense. For the same reason, this section should not be used as an authority for the propositions it sets out.

There are a ton of resources available to help you cope with the separation process and keep the emotionally harmful aspects of the process away from your children. In addition to public programs, many counsellors specialize in helping people work through the emotional turmoil that often follows the end of a long-term relationship. Since counsellors are unregulated, anyone can hang a shingle saying that they offer counselling services. What you should be looking for are people with the designation of Registered Clinical Counsellor (RCC), Certified Canadian Counsellor (CCC) or Registered Psychologist (RPsych).

- The website counsellingbc.com ^[3] offers a list of subscribing counsellors by area of practice.
- The BC Association of Clinical Counsellors ^[4] also maintains a referral list of its members.
- The BC Association for Marriage and Family Therapy ^[5] has a referral list and helpful information about how to choose a counsellor.

The grieving process

Many counsellors liken the process of emotionally separating from a long-term relationship to the grieving process that happens when a loved one dies. In general, this process can be expected to take one to two years to complete. Dr. Elizabeth Kubler-Ross, in her book *On Death and Dying* ^[6], describes a five-stage model of grief, and how grief affects our ability to make decisions in each stage.

- **Shock and denial:** "This isn't happening to me!" An initial paralysis at hearing the bad news; trying to avoid the inevitable. People usually avoid making decisions or taking action at this point.
- **Anger:** "Why is this happening to me?" A frustrated outpouring of bottled-up emotion. Making decisions at this point is difficult because all one's energy gets put into the emotion rather than problem-solving, and the other partner is usually vilified.
- **Dialogue and bargaining:** "I promise I'll be a better person if..." Seeking in vain for a way out; seeking paths that might offer a solution. People generally become more willing to explore alternatives.
- **Depression and detachment:** "I just don't care anymore." A final realization of the inevitable. It is hard to make reasonable decisions at this stage because of the sense of resignation.
- **Acceptance:** "I'm ready for whatever comes." Finally finding the way forward. Decisions are much easier to make because people have found new purpose, having begun to accept the loss.

Dr. Robert Emery agrees that the Kubler-Ross model applies to separating, but he looks at the grief process in a slightly different way. In his book *Renegotiating Family Relationships* ^[7], Dr. Emery describes the grieving process as a cycle of love, anger, and sadness, which gets repeated in varying degrees of intensity as a person works his or her way through the Kubler-Ross stages, from shock and denial through to acceptance of the end of the relationship.

In his excellent book *The Truth about Children and Divorce* ^[8], Dr. Emery says this:

"Over time the intensity of the emotions diminishes and people usually find that the feelings begin to blend. Early on, the grief of divorce is experienced as an intense period of feeling nothing but love, followed by an equally intense period of feeling nothing but anger, followed by an equally intense period of feeling nothing but sadness. ... Over time, however, the intensity of the feelings begins to wane, and the cycles of each emotion begin to blur and run into the other two. This overlapping of emotion results in a realistic, less emotionally painful view of the divorce.

"When the blending does not occur, people get stuck in one emotional cycle or another. Someone who gets stuck on love may deny the reality of the breakup and pine for reconciliation; someone caught up in anger will act out of vindictiveness and a need for revenge; those mired in sadness will assume an exaggerated and unrealistic sense of responsibility for what has occurred."

For most people, the difficult thing is that knowing about the stages of divorce and the grief cycle does precious little to actually solve the problem. You can intellectually know what's going on, but knowing what's going on doesn't mean that the emotions go away; there is no magic light switch that you can flip to turn your emotions off. Knowing about the emotional roller coaster can, however, keep you aware of what is motivating your reactions to your former partner and help you contain your emotions while you are negotiating the fallout from the end of your relationship.

It is important to remember that you and your former partner are probably not going to be at the same stage of the grieving process. One person can come to the conclusion the relationship is over long before separation and reach acceptance, while the other person is still in shock and denial that the relationship has ended. This is another factor that will aggravate feelings between you and your former partner.

Each person's goal at the end of the day is to find acceptance, that moment when you don't recognize your former partner's voice on the telephone right away. As Dr. Emery has observed, the opposite of love isn't hate; it's indifference.

A warning about allies

All of us seek allies as we cope with the end of a relationship. It's human nature. Allies may be found in family members, friends, co-workers, or a new boyfriend or girlfriend. While we all appreciate the support that allies can offer, allies can also polarize your position about your former partner, and sometimes encourage you to take an unreasonable and entrenched position when you need to be more flexible.

Allies take sides. That's just what they do. Imagine going to your mom or dad in tears, complaining about your former partner. Your parent's job isn't to say "Well, really Bob is a fine person and a great father, you really should lighten up a little and remember his good qualities." Their job is to comfort you, and that often means saying "Yeah, you're right, I can't believe what a complete ass Bob is being! Whatever did you see in him anyway?"

You shouldn't stop seeking reassurance and comfort from your allies, but you should try to be alert to the influence allies can have, even though they're not intentionally trying to worsen the issues you and your former partner are dealing with.

A warning about parenting

Some people best manage a breakup by walking out the door and never looking back, and doing their grieving alone. This just isn't possible where there is property to manage and divide, and it's especially not possible when a couple have children. You can't change your phone number, you can't stop answering the phone, and you can't refuse to see your former partner if you have children. You are still mom or dad, and you'll always be mom or dad and have a relationship with the other parent until or unless your children predecease you.

As a result, it is even more critical for you to properly manage the roller-coaster emotions of separation when you have children. You may be caught up in a whirlwind of anger and remorse at the present, but you have to think of the long-term effect of any rash behaviour. Do you want to be able to attend your child's graduation ceremony? Do you want to go to your child's wedding? How do you want your child to think of you in five years?

It is enormously difficult, but you simply must keep a button on your emotions while you grieve. Dr. Emery offers these suggestions in *The Truth about Children and Divorce*:

- First, draw clear boundaries around your relationship with your former partner. Let your partner know what you're prepared to talk to him or her about, what information you're prepared to share, and what if anything you're prepared

to do with the children together.

- Second, use those boundaries to form a more business-like relationship with your former partner. The two of you may not be friends, but together you are engaged in the "business" of parenting your children. Keep your emotional distance from your former partner.
- Third, respect these new rules. Don't intrude past those boundaries and keep your discussions focused on parenting. It may be hard not to react when your former partner pushes your buttons, but you're best off following this old saying: don't say anything if you don't have anything nice to say.

A warning about children

It can be extremely tempting to rely on your children to comfort you as you go through the grieving process. One word: *don't*. Whatever else you do, don't do this.

Children will be well aware when something's wrong. They will know when you're upset, when you're withdrawn, and when you're crying. Younger children will react with confusion and possibly fear. Older children who are more emotionally sophisticated will want to comfort you. There's nothing wrong with this either, but you do need to control your emotions.

When a child becomes too involved in soothing a parent, there are two main risks: you may develop an overly adult relationship with the child and burden the child with too much information about what's going on, information that is usually age-inappropriate; or, the child may turn into a caretaker, handling your emotions, picking up the housework that's falling behind, and assuming a parenting role towards any younger children.

According to Dr. Emery, "extreme emotional care taking is developmentally inappropriate and can have long-term consequences on children's mental health." Children who grow up too soon are robbed of their right to be children. In the long-term they have trouble forming meaningful relationships, they may be emotionally distant, and they may be compulsively over-responsible.

Resolving the issues

There are a variety of ways to resolve the issues that arise when a relationship ends, the most common of which are negotiation, mediation, and litigation. Collaborative law is sort of a cross between negotiation and mediation.

Litigation is a contest between two parties, at the end of which, following trial, there is a winner and a loser. That's a bit of a gloss on things, but litigation really is adversarial in nature, and if the parties can't come to an agreement between themselves, a trial will be held and a judge will impose a resolution on the parties.

With mediation and negotiation, it's the parties themselves who come up with the resolution of their issues. Mediation in particular is cooperative in nature, and requires both parties to commit themselves to a dialogue aimed at finding a solution. There is no winner and no loser, as mediation and negotiation both demand accommodation, and neither party gets exactly what they want; these processes are about compromise.

Unless there is a pressing and manifest urgency, in my view negotiation and mediation are to be preferred over litigation. While it is absolutely true that in some situations court is the only way out, most people can find compromise no matter how wound up their emotional states happen to be.

In *The Truth about Children and Divorce*, Dr. Emery describes three general categories of divorcing couples: the angry divorce, the distant divorce, and the cooperative divorce. While these categories are not exactly exhaustive and are drawn from an American legal construct, they are useful in discussing the impact of emotional separation on negotiation, mediation, and litigation.

The cooperative separation

Couples engaged in a cooperative separation have usually worked out a lot of their emotions and resolved much of their grief. They recognize their emotions for what they are, and avoid acting out of spite or tearfully reminiscing about the lost relationship. These couples attempt to work things out between themselves, with or without help from lawyers and mediators.

Cooperative separations usually result in a separation agreement or an order that they agree the court should make. Often, what little litigation may occur is limited to simply getting the divorce order.

The distant separation

Couples in a distant separation are able to keep their conflict from their children, but are still dealing with feelings of hurt, resentment, anger, and pain. While there is plenty of intense anger, this emotion usually fades to a growing dislike or indifference. These couples have done a lot less emotional work on their feelings, and their recollections of the relationship are characterized by bitterness rather than sadness.

These couples are not friends but know better than to become enemies, perhaps because of the children or past experience with the court system. They deal with each other minimally, without a great deal of warmth or demonstrated anger.

The angry separation

This, of course, is the type of separation to be wary of. These separations are also known as "high-conflict" separations. Couples in an angry separation have trouble letting go of the marriage, and feel intense pain and anger. Their emotions are usually raw and neither party has done a great deal to manage their feelings.

These couples have the hardest time dealing with each other and the legal issues between them, as they focus on "fault" and "blame," and are often unable to stop themselves from lashing out hurtfully. Resolving the issues is the most difficult for these couples, and they are the most prone to protracted, ugly litigation.

Couples in an angry separation, particularly those with children, generally need to get professional help in dealing with the emotional fallout from the end of the relationship if they are to avoid court and learn to cope with each other and their feelings in the months and years to come.

Angry separations are the sort that lawyers most often wind up dealing with. The epic battles couples engaged in an angry separation are capable of can barely be described. The legal issues arising from the breakup are rarely concluded within two years, and, when there are children, can run for six or more years! A trial rarely resolves issues between these couples, as they will often keep fighting long afterward about real or imagined changes in their respective circumstances following judgment. These couples are also living proof that money doesn't buy happiness — it buys you litigation, and lots of it.

Anger

By now, you will have guessed that the irrational thinking anger triggers can be the most important roadblock to resolving family law issues in a cooperative manner. Anger is an incredibly powerful emotion characterized by Dr. Emery as "the toxic residue of unresolved grief."

Anger also does a lot of very odd things that not many people are aware of. Ignorance of these different functions of anger can slow the grieving process, entrench unreasonable positions, and protract the resolution of the issues flowing from the end of a relationship.

Anger avoids other emotions

Anger can be used to divert blame from yourself and avoid feelings of guilt. People experiencing anger as a shield are often avoiding accepting responsibility for, perhaps, an affair or being the one who announced the end of the relationship. It can also stop you from experiencing the other primary emotions in the grieving process, sadness and love.

Anger prolongs the relationship

Intense anger can also signal that you are not yet done with the relationship. Conflict can be a way of drawing a former partner closer by getting their attention and maintaining the emotional relationship. Underneath this kind of anger remains love and a continuing attachment to a former partner, as illogical as this sounds.

Anger hides fear

The process of separation contains a lot of threats, whether real or imagined. Many of these threats are obvious: the risk of losing an asset, the risk of not being able to have another romantic relationship, the risk of losing one's children. Fear triggers the fight-or-flight response; anger can be a manifestation of the fight response.

Anger blinds

Anger can stop you from recognizing positive steps your former partner is taking to resolve issues, and lead you to assume that your partner is acting on false pretenses or on a hidden agenda. This kind of anger breeds suspicion that is often unwarranted.

Anger can also stop you from acknowledging your former partner's good qualities, especially around parenting issues. Avoiding admitting these qualities makes it easier to hold onto an objectively unreasonable position.

Anger is easy

For people who are emotionally bottled up, the emotions wrapped up in the grieving process can be very difficult. Both sadness and love can be difficult to acknowledge and deal with, particularly when feeling those emotions is associated with a loss of face. As a result, anger can be the easiest emotion to deal with and less painful to experience.

The results of anger

Apart from slowing down the grieving process, anger inevitably delays the resolution of the issues that come from the end of a relationship. An enraged person is not going to be able to negotiate since negotiation involves making concessions; an enraged person is mostly going to want to litigate. People in this state of mind make threats like "I'm going to take you for everything you've got," or "you'll never see the children again." They will also tell their lawyers that "it doesn't matter what it costs or whether I'm likely to lose, it's the principle of the thing!"

Sometimes these threats come true, and the consequences to both parties can be enormous.

- Someone who takes an unreasonable position out of anger will lose, but in carrying out their crusade they risk draining all of the family's assets to fund the litigation.
- Rage can permanently impair a couple's relationship with one another. Where there are no children, this may not be a problem, but where there are children this can be disastrous. You may not give a fig about your former partner, but what memories will your children have of the next five years of their lives?
- People can jump to ridiculous conclusions by expecting the worst from their former partner, leading to conflict after conflict — and court application after court application. Redness on the buttocks of a toddler becomes evidence of molestation, rather than simple diaper rash.
- Rage can trigger "affidavit wars," in which each person makes inflated claims about the purported evils of the other. Minor events are exaggerated beyond all proportion. The costly "war" is triggered because the other party is put to the burden of addressing each inflated claim. Very rarely is a party able to refrain from making reciprocal claims about the misconduct of the other: "I drink all the time? Actually, I only drink socially but you smoked pot when you were pregnant." What is a judge to make of claims like these?
- Anger can strip you of your ability to see common sense and lead you to adopt positions that are objectively unreasonable and doomed to fail. In the process of failing, however, you can expect to spend a lot of money and further damage the tensions in your relationship with your former partner.

Rage, as Dr. Emery observes, is a symptom of unresolved grief. Whatever the cause, failing to move beyond anger can be poisonous to you, to your former partner, to your children, and to your relationship with your children. Some counselling, whether by yourself or with your former partner, can be critical in moving forward and out of anger.

Choosing your lawyer

Your choice of lawyer can play a large part in determining how your separation unfolds. Many lawyers are quite open to mediation and collaborative settlement processes, while a few others see litigation as the only means of resolving a dispute, particularly lawyers who have a reputation as being bulldogs. Other lawyers do not take their duty to respond promptly to correspondence particularly seriously, which will delay things and may result in an unnecessarily large number of interim applications. Still other lawyers see their duty as limited to militantly carrying out their clients' instructions, without supplying a great deal of options or cautions as to the likely effect of those instructions.

The best family law lawyers give their clients a common-sense analysis of their situation, based on probable outcomes and their expert knowledge of the law, and encourage their clients to take positions that are objectively reasonable. These lawyers will usually pursue settlement, both before and after litigation has started, and see litigation as a last resort. They are open to negotiation and mediation and other out-of-court processes, although they may prefer a result-oriented mediation process rather than the lengthier traditional mediation process that also tries to address emotional issues.

While some people, particularly those in angry separations, feel an almost irresistible urge to go out and hire the toughest bulldog around to exact revenge against their former partner, bulldogs rarely see any resolutions other than: a settlement on exactly the unreasonable, extortionate terms their clients want; or, a knock-down drag-'em-out trial. These lawyers cost the most, and you can expect the litigation process to drag out for an ungodly amount of time — with absolutely no guarantee of a better result than what you would have had if you'd taken a different, less antagonistic approach.

Even if you are in an angry separation, step back and take a breath. Remember that even though you may hate your former partner at present, you will have to live with the consequences of hasty litigation and your unreasonable positions well into the future. You might also lose your house to pay your lawyer's fees.

How do you find a lawyer? By reputation. Ask around; talk to friends who have had to deal with family lawyers before; ask for referrals from the other professionals in your life. You can also window shop. You don't have to hire the first lawyer you have a consultation with; go ahead and set up meetings with a bunch of different lawyers. You can find

additional information about hiring a lawyer in the chapter about The Legal System, in the section You & Your Lawyer. You should also know that many lawyers who litigate are also accredited family law mediators. If the lawyer you're speaking to is also a family law mediator, you may want to enquire about the possibility of using his or her services to mediate your dispute before you say much more about your case. If you give the lawyer too much information about your situation, he or she may not be able to assume the impartial role demanded of a mediator.

Required reading

- *Renegotiating Family Relationships*^[7], by R.E. Emery
- *The Truth about Children and Divorce*^[8], by R.E. Emery (Read this book!)
- *Rebuilding: When Your Relationship Ends*^[9], by B. Fisher and R.E. Alberti
- *Healing Hearts: Helping Children and Adults Recover from Divorce*^[10], by E. Hickey and E. Dalton
- *Helping your Kids Cope with Divorce the Sandcastles Way*^[11], by M.G. Neuman
- *Joint Custody with a Jerk: Raising your Child with an Uncooperative Ex*^[12], by J.A. Ross

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Services Society's Family Law Website: Separation^[13]
- Department of Justice Website: Supporting families experiencing separation and divorce^[14]
- BC Counsellors by Practice Area^[15]
- BC Association of Clinical Counsellors^[4]
- BC Association for Marriage and Family Therapy^[5]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [2] <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/index.html>
- [3] <http://www.counsellingbc.com/>
- [4] <http://bc-counsellors.org/>
- [5] <http://www.bcamft.bc.ca/ohana/website/index.cfm?p=95575656796>
- [6] <http://www.worldcat.org/title/on-death-and-dying/oclc/4238>
- [7] http://www.worldcat.org/title/renegotiating-family-relationships-divorce-child-custody-and-mediation/oclc/30474579&referer=brief_results
- [8] http://www.worldcat.org/title/truth-about-children-and-divorce-dealing-with-the-emotions-so-you-and-your-children-can-thrive/oclc/53485317&referer=brief_results
- [9] http://www.worldcat.org/title/rebuilding-when-your-relationship-ends/oclc/5707044&referer=brief_results
- [10] http://www.worldcat.org/title/healing-hearts-helping-children-and-adults-recover-from-divorce/oclc/30739454&referer=brief_results
- [11] http://www.worldcat.org/title/helping-your-kids-cope-with-divorce-the-sandcastles-way/oclc/37300625&referer=brief_results
- [12] http://www.worldcat.org/title/joint-custody-with-a-jerk-raising-a-child-with-an-uncooperative-ex-a-hands-on-practical-guide-to-communicating-with-a-difficult-ex-spouse/oclc/682894488&referer=brief_results

[13] <http://clicklaw.bc.ca/resource/1640>

[14] <http://www.justice.gc.ca/eng/pi/fcy-fea/index.html>

[15] <http://www.counsellingbc.com>

Divorce

Divorce is the legal termination of a marriage by an order of the court. Without this order, a couple will remain married to each other no matter how long they've been separated. Although a divorce order represents the formal conclusion of a marriage, where children are involved or one spouse is financially dependent on the other, issues about the payment of support and the care of the children will continue.

This section provides an overview of the grounds for divorce, and discusses the nature of a divorce order and the effect of foreign divorce orders in Canada. It also reviews the do-it-yourself divorce process, and the court forms used in that process, in enough detail that you can get your own divorce without having to hire a lawyer.

The criteria that must be met to obtain an annulment — which is different than a divorce order and isn't nearly as simple and straightforward as most people think — are discussed in the chapter Family Relationships within the section Marriage & Married Spouses.

The grounds for divorce

Under the federal *Divorce Act* there is really only one reason why you can apply for a divorce order, *marriage breakdown*. Under s. 8 of the act, there are three reasons why marriage breakdown may have occurred:

1. the intentional separation of the spouses for at least one year;
2. the adultery of a spouse; and,
3. one spouse's treatment of the other with such mental or physical cruelty that it is impossible to continue the marriage.

In Canada, all divorces proceed on a no-fault basis, regardless of the ground of divorce relied upon. *No-fault*, in this context, means that the reasons for marriage breakdown have nothing at all to do with the court's consideration of issues like custody and support. No matter how upset someone is by a spouse's misbehaviour, it will have no impact on how the legal issues are addressed.

Most divorces are based on separation. The only advantage of seeking a divorce based on cruelty or adultery is that the divorce is available relatively quickly; you needn't wait for a year's worth of separation to pass before you are eligible for the order. However, while you are eligible to begin divorce proceedings as soon as you learn of the adultery or experience the cruelty, you must be able to prove that the other spouse committed the wrongful behaviour you allege.

As you can imagine, few people are prepared to admit that they committed adultery or battered their spouse, and as a result divorces based on these grounds rarely proceed smoothly. In fact, where a court action has dragged on long enough so that more than a year has passed since the parties separated before the matter finally comes to court, some judges will refuse to hear any evidence of the wrongful behaviour and will grant the divorce instead on the basis of the parties' separation.

Separation

To obtain a divorce based on separation for a period of at least one year, you and your spouse must have lived separate and apart for that year. The period of living separate and apart can pass while living under the same roof, however the marital qualities of your relationship with your spouse must have ended.

The *Divorce Act* provides that a couple can attempt to reconcile and resume married life for up to 90 days during this one-year period. If the couple live together for a total period of more than 90 days with the intention of getting back together, the clock resets and a new one-year period will not start running until after the couple separates again.

Adultery

A spouse who is claiming that the other spouse is guilty of adultery must prove this claim in court. Before the court will pronounce the order for divorce, the court must also be satisfied that the party making the claim has not *condoned* the adultery or *connived* to effect the adultery. If the court is not satisfied, it will not grant the divorce.

Proof of adultery normally consists of an affidavit from either your spouse or the person with whom your spouse committed the adulterous act, admitting to the adultery. You cannot seek a divorce based on your own adulterous conduct.

Many people will have seen the movie "Intolerable Cruelty," which lays a great deal of emphasis on the punitive consequences of adultery, and suggests that spouses caught with their pants down are going to lose everything they have. That might be true in the US, but it certainly isn't true in Canada. In Canada, there are no consequences for marital offences of that nature: you won't lose your house, you won't lose the children, and you won't find yourself living in a cardboard box. Adultery, while relevant as a ground of divorce, plays no role in the court's determination of these other issues.

Cruelty

A spouse who claims that the other spouse is guilty of cruelty must prove his or her claim in court. Cruelty can consist of physical abuse or mental abuse, and may also give rise to a claim for an award of damages as a result of the cruelty. Before the court will pronounce the divorce order, it must be satisfied that the party making the claim has not *condoned* the cruelty.

Proof of cruelty normally consists of a medical, psychological or psychiatric report, or, in some circumstances, a simple letter from a treating professional describing the abuse.

Conspiracy, connivance and condonation

If a court finds that there has been conspiracy, connivance, or condonation in the application for the divorce order, the court will not grant the order. The point of this is to ensure that a couple are not attempting to escape the requirements of the *Divorce Act* and cheat the court to get a quick divorce.

If there has been *condonation*, the marital offence used to found the divorce claim, adultery or cruelty, has been forgiven. If the act has been forgiven, the court cannot pronounce a divorce order since the marital relationship hasn't broken down.

Conspiracy and *connivance* are both attempts to cheat the court. A relationship must have legitimately broken down before the court will officially dissolve it; anything else would be a fraud upon the court. *Conspiracy* means that the spouses have worked together to achieve the wrongful act providing the ground for divorce. This could mean, for example, an agreement between the spouses for one of them to have sex with someone else in order to claim adultery as a ground of divorce. *Connivance* means to arrange for the wrongful act to occur. For example, this could include one

spouse arranging for the other to be seduced by someone else in order to claim adultery as a ground of divorce.

Child support

The court is required, under s. 11(1)(b) of the *Divorce Act*, to satisfy itself that "reasonable arrangements" have been made for the support of the children before it can grant an order for divorce. As you might expect, a *reasonable arrangement* usually means that child support is being paid according to the Child Support Guidelines. If you have children, you will have to prove that the children are being provided for as the Guidelines require before you can get a divorce. Remember that under the Guidelines, the table amount of child support payable for incomes of less than \$10,800 per year is zero.

The only possible exception to this rule would be if the parent to whom child support is payable cannot be found, and the child support payments therefore cannot be paid. In such circumstances the court may make a divorce order that doesn't refer to child support, or it may make an order that merely refers to the payor's obligation to pay child support without fixing an amount payable.

The divorce order

In order to get a divorce order, the court must be satisfied that:

- the marriage legally exists,
- at least one of the parties has been ordinarily resident in British Columbia for at least one year before the proceeding began,
- the ground on which marriage breakdown is claimed has been proven, and,
- if there are children, an adequate amount of child support is being paid.

It is possible to oppose an application for a divorce order. Practically speaking, however, by the time the application gets before a judge, the responding party has usually come to realize that a divorce is inevitable. If the court is satisfied that the applicant is entitled to his or her order because the grounds for the divorce have been proven, the divorce is usually granted despite any objections by the other spouse.

Corollary relief

An order for divorce can be made on its own or together with *corollary relief*. Typical orders for corollary relief include orders about the care of children, child support, and spousal support.

Divorce orders are usually made after all of the corollary issues, if any, have been dealt with, either as a result of a trial or a settlement reached following negotiations. The court will be reluctant to make a divorce order until all of the legal issues have been addressed.

The appeal period

Orders for divorce usually contain a term that "this order shall not take effect until the 31st day after its pronouncement." This is to allow the appeal period to expire. Once those 31 days have passed, however, the parties are officially divorced and are free to remarry if they wish.

It is possible to abridge this appeal period, if the divorce must take effect sooner for some urgent reason such as remarriage. If this is the case, you should advise the court of the need for haste, and a waiver of appeal will have to be filed.

Certificate of divorce

Once the appeal period has expired, either party may apply to the court, for a small filing fee, for a Certificate of Divorce. This is, strictly speaking, unnecessary, as the order is itself sufficient proof of divorce. Nevertheless, people often want this certificate to obtain a sense of closure, or because they expect to marry within the next couple of years, or because they may wish to prove they are divorced without having to disclose the other terms of their divorce order. Most family law lawyers take care to prepare Certificates of Divorce nicely in a format suitable for framing.

Foreign divorce orders

Section 22(1) of the *Divorce Act* deals with the effect in Canada of divorces obtained outside Canada. In a nutshell, if a divorce was properly granted by the foreign country the parties will also be considered to be divorced here, without the need to obtain a Canadian divorce order.

Of course, there is a small catch. Either spouse must have been "ordinarily resident" in the country in which the divorce was obtained for at least one year before the divorce proceedings started. In other words, if you've lived in Sri Lanka for less than a year before you started your application for divorce, your divorce may not be recognized in Canada even though it's perfectly good in Sri Lanka. As long as you had lived in Sri Lanka for more than one year before you started your application, your divorce there will be valid in Canada.

Even if a foreign divorce isn't good under Canadian law, everyone will usually accept the fact that the spouse is divorced. Whether the divorce meets Canadian requirements will only ever become an issue if one of the spouses later claims that the divorce is not valid. This can have some fairly serious consequences, mostly involving the division of property and pensions. You can find more information about the property entitlements of married spouses in the chapter Property & Debt, in the section Dividing Property & Debt.

The do-it-yourself divorce

The only way to obtain an order for divorce is by starting a court proceeding; you must sue your spouse if you want to get divorced. The do-it-yourself process, called the *desk order divorce process*, allows you to obtain a final order for divorce without ever having to appear in court, and the order can deal with all of the issues between you and your spouse, from divorce to the division of property to child support.

You can get your divorce yourself using the desk order divorce process, without having to retain a lawyer. While some of the court forms can be a bit daunting, there are plenty of resources, such as this website, that can help you unravel the mysteries and complete the process on your own.

Generally speaking, a desk order divorce is appropriate in two situations:

1. when the only issue between you and your spouse is getting a divorce; or,
2. when you have other issues, but those have been settled, either through a separation agreement or an agreement about the terms of a consent order.

In the first case, a desk order application will be for a divorce alone. In the second case, a desk order application will be an application for a divorce plus *corollary relief*, that is, orders apart from the divorce order itself, such as orders dealing with care of children, support, or the division of assets.

Most court proceedings go like this: the claimant files a Notice of Family Claim and serves it on the respondent; the respondent then files a Response to Family Claim and sometimes a Counterclaim. If the respondent fails to file a Response to Family Claim, the claimant's court proceeding is said to be *uncontested*. This means that the respondent is assumed to either agree with the relief sought by the claimant or to have chosen not to defend the claim. In such

circumstances, the claimant is free to seek a *default judgment* against the respondent.

A desk order divorce application is essentially an application for a default judgment, whether the claimant's court proceeding is for a divorce order alone or for a divorce order with corollary relief, and is governed by Rule 10-10 of the Supreme Court Family Rules ^[1].

For a brief summary of this process, go to the *How Do I?* section of this resource and read How Do I Get Divorced? It's located under *Marriage, Separation & Divorce*.

Choosing between the sole application process and the joint application process

There are two types of desk order divorce actions:

1. the sole application process, in which only one spouse is responsible for ushering the process through; and,
2. the joint application process, in which the spouses work together to get the job done.

There are a few important differences between sole applications and joint applications.

- Joint applications are quicker and cheaper, but the spouses will have to cooperate with each other. In a sole application, no cooperation is required.
- A sole application takes a little longer since the person bringing the action has to serve the other spouse with the Notice of Family Claim and wait 40 days before proceeding. In a joint application, service is not necessary and you can apply for the divorce order right away.
- In a sole application, the spouses are called the claimant and respondent. In a joint application, the spouses are called claimant 1 and claimant 2.
- In a joint application, both spouses must sign the Notice of Family Claim, and both must execute an affidavit for the application for the divorce order.

The sole divorce application

These instructions are for the sole divorce application process:

Step One

Prepare your Notice of Family Claim. Make three copies of the original.

Step Two

Go to your local registry of the British Columbia Supreme Court. Bring the original Notice of Family Claim and the three copies you have made of it. Also bring the original of your government-issued Marriage Certificate. Fill out the Registration of Divorce Proceeding form, which will be available at the courthouse. File all of these materials and pay the \$210 court fee. The court will stamp the action number and the court seal on all copies of your Notice of Family Claim, keep the original, and give you back the three duplicates. Your Marriage Certificate will go into the court file.

Step Three

Serve your ex with your Notice of Family Claim. You cannot serve your ex yourself; you must arrange for someone else to do it. Give the person who will be your process server two copies of your Notice of Family Claim, along with a photograph of your ex. The process server will serve one copy of the materials on your ex, and will use the photograph and the remaining copy in his or her Affidavit of Personal Service to prove that your ex was served.

Step Four

Once your ex is served, wait 40 days. Technically, you only need to wait 31 days from the date of service, but it doesn't hurt to add a few days just to be sure. If your ex files a Response to Family Claim or Counterclaim in this period, there's a problem. Read the discussion in "What happens if a response or counterclaim are filed?" at the end of this section.

Step Five

Prepare your Requisition asking the court for the divorce order, your Divorce Affidavit in support of the application, a draft of the order you want the court to make, and the Registrar's Certificate. If you have children, you will also have to prepare a Child Support Affidavit, which sets out the details of your income and your spouse's income and the terms on which child support will (or won't) be paid.

Step Six

Go to the court registry you filed your materials at, and file your Requisition, your Affidavit, your Child Support Affidavit if required, your Registrar's Certificate, your draft order, and your process server's Affidavit of Personal Service. Pay the \$80 court fee.

Step Seven

Once you've filed your application, wait four weeks.

Step Eight

Start calling the court registry to see whether your order is ready for you to pick-up. This should take four to eight weeks, depending on how busy the court is. When your order is ready, go to the courthouse to get the entered order, and then mail a copy to your ex.

Once you've got your entered divorce order and 31 days have passed, you are officially divorced, and you have a court order bearing the seal of the court to prove it. Some people may find that a Certificate of Divorce is necessary in order to remarry. If you wish to get this Certificate, this is what you must do:

Step Nine

Wait 32 days from the date the divorce order was made. The date will be shown on the first page of the order.

Step Ten

Prepare your draft Certificate of Divorce and file it in the court registry, together with a Requisition asking the registry to complete the Certificate. Pay the \$40 court fee, and grab a chair. The registry will normally complete your Certificate of Divorce while you wait.

The joint divorce application

The joint divorce application process is almost exactly the same as the sole divorce application process, except that some of the forms are different, service is not required, and the length of time it takes to get a divorce is about four to eight weeks in total.

These are the main differences between the joint application process and the sole application process:

- The parties are known as claimant 1 and claimant 2.
- A special form, Notice of Family Claim is required.
- Both parties sign the Notice of Family Claim.
- The Notice of Family Claim does not need to be served on anyone, and there is no waiting period that must pass before the application for the divorce order can be made.
- Both parties must swear an affidavit in support of the application for the divorce order.

- All of the documents can be filed at once, although at least one of the affidavits in support of the application must be sworn after everything else is filed, even if only by a few minutes.

If either party withdraws from the joint application process before the divorce order is made, there's a problem. Read the discussion in "What happens if a response or counterclaim are filed?" at the end of this section.

These instructions are for the joint divorce application process:

Step One

Prepare a joint Notice of Family Claim. Prepare and execute one Divorce Affidavit in support of the application; prepare your blank Registrar's Certificate; prepare and complete your Requisition to apply for the divorce order; and, prepare your draft order. Make two copies of everything. Prepare but do not execute the other Divorce Affidavit.

Step Two

Go to your local registry of the British Columbia Supreme Court. Bring all the documents listed in Step One and the original of your government-issued Marriage Certificate. Fill out the Registration of Divorce Proceeding form, which will be available at the family and divorce counter. File all of these materials (except the unexecuted affidavit) and pay the \$290 court fee. The court will stamp the action number and the court seal on all copies of your joint Notice of Family Claim, keep the original, and give you back the two duplicates. Your Marriage Certificate will go into the court file.

Step Three

While you're at the registry counter, execute the remaining affidavit in support of the application for divorce, and pay the \$40 court fee.

Step Four

Once you've filed your application, wait four weeks.

Step Five

Once four weeks have passed, start calling the court registry to see whether your order is ready for you to pick-up. This should take four to eight weeks, depending on how busy the court is. When your order is ready, go to the courthouse to pick the entered order up, and then mail a copy to your ex.

Once you've got your entered divorce order and 31 days have passed, you are officially divorced, and you have a court order bearing the seal of the court to prove it. Some people may find that a Certificate of Divorce is necessary in order to remarry. If you wish to get this Certificate, this is what you must do:

Step Six

Wait 32 days from the date the order was made. The date will be shown on the first page of the order.

Step Seven

Prepare your Certificate of Divorce and file it in the court registry, together with a Requisition asking the registry to complete the Certificate. Pay the \$40 court fee, and grab a chair. The registry will normally complete your Certificate of Divorce while you wait.

With the exception of the special form, Notice of Family Claim, all of the forms used in the joint process are the same as the sole process, except that the parties aren't called claimant and respondent, they're called claimant 1 and claimant 2.

Free services

Access Pro Bono ^[2] offers free meetings with lawyers who can review your forms with you before you file them in court. Although the lawyers available through this program are not likely to prepare your documents, they will give them a check to make sure that the registry will accept them.

The British Columbia Continuing Legal Education Society ^[3] has published an excellent guide to the desk order divorce process called the *Desk Order Divorce Manual*, which has samples of the different clauses you may need to complete your court forms. This book is available at your local courthouse library.

Services that are not free

Lawyers

You're usually best off if you hire a lawyer to handle your divorce for you, as your lawyer will be familiar with the nuances and complications of the desk order divorce process and can give you expert advice about the short- and long-term advantages and disadvantages of the arrangement you've worked out with your spouse. This can be critical where the terms or circumstances of your divorce are unusual or complicated.

Lawyers, however, come at a cost. You should expect that you will be charged fees of anywhere between \$500 and \$2,000 for your divorce, plus the lawyer's out-of-pocket expenses for things like court fees and photocopying.

Commercial services

A local company called Self-Counsel Press ^[4] publishes a kit for the desk order divorce process. The kit, which costs something like \$25 to \$35, contains all the forms necessary to apply for a desk order divorce, plus instructions on how to make the application. Make sure that the kit you buy has forms that are current to the changes made on 18 March 2013.

There are a number of commercial services available online that will prepare all of the necessary documents for you, including:

- www.divorceoptions.ca ^[5]
- www.untietheknot.ca ^[6]
- www.britishcolumbiadivorce.ca ^[7]

If I understand things correctly, [untietheknot.ca](http://www.untietheknot.ca) will also file your documents in court for you. A Google search for the phrase "desk order divorce BC" should provide you with a few other options, but whatever you do, make sure you're using a service that offers the forms required for a divorce in British Columbia!

What happens if a response or counterclaim are filed?

The do-it-yourself divorce process is based on the idea that either everyone agrees to get divorced or no one is going to object to the divorce. The process will go off the rails if:

- **Sole application:** the respondent files a Response to Family Claim or a Counterclaim; or,
- **Joint application:** a claimant withdraws from the process and files a Response to Family Claim or a Counterclaim.

In either situation, the divorce action will cease to qualify as an *undefended family law case* within the meaning of Rule 1-1(1) and cannot proceed as a desk order. The divorce action will continue like any other contested family law case and proceed to trial if a settlement cannot be reached.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Supreme Court Family Rules ^[1]
- Child Support Guidelines ^[8]

Resources

- DivorceOptions.ca ^[5]
- Untie The Knot Divorce Service ^[6]
- Canadian Divorce Online ^[7]

Links

- Legal Services Society's Family Law Website: Divorce ^[9]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [4] <http://www.self-counsel.com/>
- [5] <http://www.divorceoptions.ca>
- [6] <http://www.untietheknot.ca>
- [7] <http://www.britishcolumbiadivorce.ca>
- [8] <http://canlii.ca/t/80mh>
- [9] http://www.familylaw.lss.bc.ca/resources/fact_sheets/divorce.php

Other Family Law Issues

Other Family Law Issues

Problems like children's parenting arrangements, the payment of support, and the division of property are the everyday issues that crop up when a relationship breaks down. There is a whole host of other legal issues that fall under the family law umbrella, and it's a big umbrella.

This chapter deals with the more common of these other issues, including adoption, family violence and protection orders, determining parentage, changing names, and more. This first section is a bit of a grab bag and takes a look at a selection of relatively common family law problems. It talks about issues affecting the LGBTQ communities, wills and estates law, immigration law, parental support, and what happens when people and property are located in different legal jurisdictions.

Same-sex relationships

Not too long ago, this wiki had an entire chapter about the particular issues affecting those in same-sex relationships. That chapter, however, is no longer necessary. For the last 30 years or so, there has been a steady erosion of legislated discrimination between opposite- and same-sex relationships. While gays and lesbians may have to deal with homophobia and intolerance in their day-to-day lives, at least the discrimination that used to exist because of legislation has been on the wane. From the Little Sisters decision ^[1] on censorship to *Egan v. Canada* ^[2], [1995] 2 SCR 513 on spousal benefits, the courts of Canada have proven increasingly willing to extend the protection of the *Charter of Rights and Freedoms* ^[3] to overturn discriminatory legislation and, after some initial resistance, the governments of Canada have followed suit.

The realm of family law has proven no exception. To quote Barbara Findlay QC, a tireless advocate for queer rights, from a speech to the Canadian Bar Association British Columbia ^[4] a number of years ago:

"Gays and lesbians in British Columbia now have exactly the same rights and obligations towards one another as straight people do. Exactly the same. Full stop."

She is entirely correct. As far as the provincial statutes of British Columbia are concerned, and indeed the vast majority of federal statutes as well, there is equality. The Court of Appeal for British Columbia was among the first of Canada's appellate courts to acknowledge that restricting the right to marry to straight couples alone was an egregious breach of the equality rights of gays and lesbians, and our provincial *Adoption Act* ^[5] is one of the few in Canada that permit adoption by same-sex couples.

Gays and lesbians are just as entitled to pursue claims relating to the care of children, child support, spousal support, and the division of property as straight people are. Sexual orientation plays no part in the division of family property, nor is it a factor in determining issues relating to children or support.

How does family law intersect with gay and lesbian relationships? In every way. There is no relief known to family law of which straight couples can avail themselves that same-sex couples cannot.

Marriage

As a result of the 2005 federal *Civil Marriage Act* ^[6], same-sex couples can legally marry throughout Canada. Of course, not everyone can marry, such as close relatives or minors under a certain age. See the Marriage & Married Spouses section of the Family Relationships chapter for more information about the capacity to marry, valid marriages and invalid marriages.

It's not just Canadian couples who can marry. Anyone from anywhere can get married in Canada, as long as they meet the Canadian criteria for a valid marriage. However, while a Canadian marriage is certainly legal in Canada, it may not be recognized as a valid marriage at home. If a couple's home country does not recognize same-sex marriages as valid marriages, the Canadian marriage is unlikely to be valid in that country.

Children

Whether the battle over a child is between two parents of the same gender or between parents of opposite genders, the legal test that the parents and the court should consider is the same: what arrangements are in the child's best interests? That's the court's only concern. The courts have been crystal clear that the sexual orientation of the child's parents is only one of many factors to be considered and is often a non-issue. This is what a few judges have had to say:

Anger v. Anger ^[7], 1998 CanLII 4490 (BCSC):

Mother sought an order that the children live primarily with her. Father opposed application as he found mother's sexual orientation "repugnant on religious and moral grounds." Court finding father doing everything he could to cut mother out of children's lives, and accepting psychologist's recommendation that children should live with mother. Mother's application allowed. No weight given to mother's sexual orientation.

Murphy v. Laurence and Rogers, Ontario Superior Court, 2002:

Applications by biological mother and mother's lesbian partner for custody and child support. Parties had three year unmarried relationship in which mother remained at home and partner worked outside the home. Both acted as parents to child, and following separation, partner exercised liberal access to child. Child later, by agreement, going to live mostly with partner. Court finding child to have benefited from care of both women, and ordering joint custody with primary residence of child to mother based on blood tie. Negligible access given to father in light of history of disinterest in child. No weight given to mother's sexual orientation.

"The best interests of [the child] are, of course, what will govern any decision relating to custody in this matter. In this fundamental principle, same-sex parents seeking custody are no different than opposite-sex parents seeking custody."

Bubis v. Jones ^[8], 2000 CanLII 22571 (ONSC):

Application by mother for vary order to obtain custody. Mother in lesbian relationship following separation from father. Court finding father prejudiced against lesbians, that same-sex preference of parent merely one of many factors to be considered, and in light of positive psychologist's report and change in mother's employment and stability, giving custody to mother.

"Homophobia is being replaced by reason and bigotry by tolerance — but not completely, since history tells us that, in matters of this nature, there will always be pockets of prejudice."

"There is no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than are families with homosexual parents."

Child support

Whether you are straight, gay, lesbian, bisexual, or something in between, if you qualify as a *parent* for the purposes of the *Family Law Act*, or the child qualifies as a *child of the marriage* for the purposes of the *Divorce Act*, child support will be payable by the person who has the child for the least amount of time to the person who has the child for the most amount of time. Child support will be payable in the amount specified under the Child Support Guidelines unless the parent paying support, the *payor*, fits into one of a very narrow range of exceptions:

- payment of support in the usual amount would be too much and cause "undue hardship" (the recipient of support may ask for an increased amount of support if payment of the usual amount would be too little and also cause undue hardship),
- the payor is responsible for the care and control of the child for more than 40% of the child's time,
- the child is 19 or older,
- the payor earns more than \$150,000 per year, and payment of the table amount would result in an unfair windfall to the recipient, or
- other persons are also under a legal obligation to care for the child.

The only one of these exceptions that has any special relevance to same-sex couples is the last: where another person is also under an obligation to support the child. Assuming there is another parent in the picture apart from the other party to the relationship, that the other parent will also be obliged to contribute to the support of the child. In *Murphy v. Laurence and Rogers*, the biological mother of a child was entitled to receive child support from both her former lesbian partner and the child's father.

Divorce

The *Divorce Act* no longer requires spouses to be of opposite genders to qualify for a divorce order. Oh happy day.

Issues affecting transgendered and transsexual people

To be brutally frank, the jury is still out on how family law impacts on the trans community. Right now, the laws have slipped into a comfortable understanding of "the same or opposite genders" and only accommodates people on the spectrum in between with difficulty. While bisexuality is as close to a non-issue in this context as there can be, transgendered and transsexual people may well encounter difficulty in dealing with family law matters. This discussion offers only a gloss on some of the issues affecting this community.

If you have a family law problem and your orientation, gender or identity becomes an issue, contact a lawyer known to be sympathetic or activist on the issue, such as Barbara Findlay or another lawyer she can refer you to.

Marriage

As a result of the 2005 federal *Civil Marriage Act* ^[6], gender is irrelevant in determining the ability of a couple to marry.

Children

Those who have discovered another self-identity during a relationship may find their new identities hotly at issue in the event that the living arrangements for any children must be decided in court. The problem here is that while shows like *Will and Grace*, *The Birdcage* and *The L Word* have made homosexuality something commonly understood and empathized with, nothing similar has popularized and explained the experience of the trans community.

It can be very difficult for people, including ex-partners, to understand trans issues, and this problem is especially acute in courtroom discussions about the care and control of children. Often the most important task is to demystify the person's self-identity and explain why his or her self-identity has no impact at all on his or her ability to parent, nor on the expected outcomes for the children.

On the bright side, the single reported case I was able to find in researching transgendered and transsexual family law issues dealt fairly positively with the subject. (This research is a few years old.) In *Forrester v. Saliba* ^[9], 2000 CanLII 28722 ONCJ, a 2000 decision of the Ontario Court of Justice, the father of the child had begun the process of transitioning to female following the pronouncement of a consent order which provided that the parents would have joint custody of the child. The mother brought an application to vary the order to obtain sole custody of the child based on the stress and depression that affected the parents since the commencement of the transitioning process. Here are some interesting excerpts from the decision:

"I indicated at the beginning of the trial to both parties and their counsel that the [father's] transsexuality, in itself, without further evidence, would not constitute a material change in circumstances [necessary to consider varying a consent order], nor would it be considered a negative factor in a custody determination."

"The entire focus of this trial has been upon the consequences of the [father's] transgendering, the mental health issues that have arisen as a result of the [father's] transgendering process, and the [mother's] mental health issues. The evidence discloses that throughout all these problems suffered by the parties, the child Christine has remained happy and healthy and continues to enjoy a positive relationship with both parties. ... It appears from the evidence that Christine is a very well-adjusted, happy, healthy little girl, who in her own way has been able to accept the changes in her father and continues to enjoy a healthy relationship with her father, now a woman psychologically, as a person and a loving and caring human being."

The mother's application was dismissed.

Child support

Trans issues have no impact at all on the determination of child support. If you are a parent or qualify as a stepparent within the meaning of the applicable legislation, child support will be payable or receivable. End of story.

Spousal support

The simple fact of financial dependence, which would ordinarily have to be established to support a claim to spousal support, should be sufficient to prove an entitlement to support. If, however, the cause of the dependence or inability to be independent relates to or stems from the trans issue, be prepared to face some resistance. The problem will lie in establishing the legitimacy of the financial dependency arising from the trans issue; in other words, the problem will lie in convincing the judge dealing with the matter, if the matter has to go to court, that the issue you are dealing with isn't one of choice or a voluntary financial dependence.

Divorce

The *Divorce Act* no longer requires spouses to be of opposite genders, whether at the end of their marriage or at its beginning, to qualify for a divorce order.

Wills and estates issues

Wills and estates refers to the area of law that deals with the drafting and interpretation of wills, how a dead person's estate is distributed when there is a valid will, how a dead person's estate is distributed when there isn't a valid will, and how certain relatives can challenge a dead person's will. In family law, issues concerning a person's will usually only come up when a couple have separated or are getting a divorce.

Making, changing, revoking, and enforcing wills are governed by the provincial *Wills Act* ^[10]. Sections 3 and 4 set out the basic requirements for a valid will:

3 A will is valid only if it is in writing.

4 Subject to section 5, a will is not valid unless

(a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,

(b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and

(c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

The provincial *Wills Variation Act* ^[11] says that people are presumed to have a moral duty to provide for members of their immediate family. Under this act, spouses and children who have not been provided for in a will are able to challenge the will and ask the court that they be included and receive a share, or a bigger share, of the dead person's estate.

A person who dies without leaving a will is said to die *intestate*. If a person dies intestate, their assets are dealt with according to the terms of the provincial *Estate Administration Act* ^[12]. This law requires a person's estate to be distributed in a certain way, with the surviving spouse receiving a first, fixed share of the estate, and the remainder being split with any surviving children.

Married spouses

The law treats married spouses differently than unmarried couples, and it's important to be aware of the distinctions.

The effect of marriage

Under s. 15 of the *Wills Act* ^[10], a will is considered to be cancelled, or *revoked*, once a person marries. Unless you make a new will after your marriage, you will be considered not to have any will at all, and if you die your estate will be distributed under the *Estate Administration Act* ^[12].

The effect of separation and divorce

Although divorce doesn't revoke a will, divorce cancels those parts of a will which:

- name the dead person's former spouse to act as the executor of his or her estate, or
- make the former spouse a beneficiary under the will.

If a person dies intestate, only people who qualify as the person's spouse can benefit from the provisions of the *Estate Administration Act*. If the dead person has *divorced* or if his or her marriage has been *annulled*, a former spouse can't make a claim under the act.

If the dead person has only *separated* from his or her spouse, a surviving spouse is still a spouse who may be entitled to inherit under this act, even if an action for divorce has started or even if the parties have been separated for a long time. In the case of a couple who have been separated for more than a year before the death, however, the surviving spouse must apply to court to share in the estate.

Unmarried couples

A person can make a will making anyone a beneficiary of his or her estate. The nature of the person's relationship with a beneficiary only becomes important if a beneficiary, or a person who thinks he or she ought to be beneficiary, wants to make a claim against the person's estate.

The *Estate Administration Act* ^[12], the law that applies when someone dies without a will, requires that a certain amount of a dead person's estate go to people who qualify as a *spouse*. Spouse is defined as including "a common law spouse"; common law spouse is defined as:

- (a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
- (b) is living with another person in a marriage-like relationship, and has lived in that relationship for a period of at least 2 years;

The *Wills Variation Act* ^[11] defines *spouse* as a person who:

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

What's interesting about the *Estate Administration Act* and the *Wills Variation Act* is that they both require an unmarried spouses to be living with the person who has died at the time of his or her death. For married spouses, it's the fact of the parties' marriage that counts, not whether they are still living together.

Planning ahead

If you have separated and don't want your spouse to make a claim to your property after you die, you should change your will. If you are married and have separated, you should include wording in the new will to the effect that the new will is being made with your divorce in mind and stating that you do not wish to provide for your spouse as a result. You should then prepare another new will after the order for your divorce is made and is in effect.

If you are in an unmarried relationship, you should simply identify your former spouse as your former unmarried spouse, state that you do not wish to provide for him or her in your will, and briefly explain why you do not wish to provide for him or her.

In either case, it's a good idea to speak to a lawyer who specializes in wills and estates issues if you think you need to change your will.

Parental support

The old *Family Relations Act* ^[13] used to allow parents to sue their adult children for support. That part of the *Family Relations Act* was repealed on 24 November 2011 and is not carried forward in the new *Family Law Act*, and as result claims for parental support may no longer be brought in British Columbia.

The conflict of laws

The *conflict of laws* refers to the problems that arise when the courts and laws of two or more places may apply to the same problem. Problems with the conflict of laws usually arise in a family law context when:

- spouses have property in different provinces or countries,
- the courts of one jurisdiction have made an order and one or both of the parties have moved to a different jurisdiction, or
- the parties made a family agreement in one jurisdiction and have since moved to a new jurisdiction.

The law on this subject can be extremely complex. If you are involved in a family law problem involving the conflict of laws, you should seriously consider retaining a lawyer to help you.

Children

Different rules apply when orders about the care of children are made outside of British Columbia under the federal *Divorce Act*, outside of British Columbia under the law of another province or territory, and outside of Canada under another law altogether.

Divorce Act orders

When a court order about children has been made under the *Divorce Act*, a spouse who moves to a different province can apply to change that order in the new province under s. 5 of the act. The courts of British Columbia will hear an application for an order different than the original order as long as:

1. either spouse normally lives in this province, or
2. both spouses agree that our courts should deal with the matter.

Since the *Divorce Act* applies to the whole of Canada, *Divorce Act* orders have effect throughout Canada. An order made under the *Divorce Act* may be registered in any court in Canada under s. 20(3) of the act, and will be treated as an order of the court in which it is registered for enforcement purposes.

Other orders made outside British Columbia

When a court order about children has been made under a provincial law, such as Alberta's *Family Law Act* ^[14] or the *Children's Law Reform Act* ^[15] of Ontario, or the laws of another country altogether, the order can be *recognized* by the courts of British Columbia under s. 75 of our *Family Law Act*. A foreign order that has been recognized will be treated as an order of the British Columbia courts for enforcement purposes.

Under Division 7 of Part 4 of the *Family Law Act*, the courts of British Columbia can also change orders about children that were made under the laws of a different province or territory, or under the laws of another country. Our courts will usually be very cautious in meddling with the orders of another court. Our court will usually hear an application for an order different than the original order if:

1. the child normally lives in British Columbia, or
2. the child is physically present in the province but will be at serious risk unless the original order is changed.

Child support and spousal support

Different rules apply when orders about support are made outside of British Columbia under the federal *Divorce Act*, outside of British Columbia under the law of another province or territory, and outside of Canada under another law altogether.

Divorce Act orders

When a court order about support has been made under the *Divorce Act*, a spouse who moves to a different province can apply to change that order in the new province under s. 18 of the act. The order that the spouse gets, however, will only be a *provisional order* which has no immediate effect. The Attorney General is required to send the provisional order to the court that made the order, and that court will have a *confirmation hearing* under s. 19. If that court confirms the provisional order, the order will be changed. There's more information about this in the Making Changes section of the chapter on Child Support, under the heading "Orders made outside British Columbia."

An order for child support or spousal support made under the *Divorce Act* may be registered in any court in Canada under s. 20(3) of the act, and will be treated as an order of the court in which it is registered for enforcement purposes.

Other orders made outside British Columbia

Where a support order was made under the law of another province or territory, the order can be *registered* in the courts of British Columbia under the provincial *Interjurisdictional Support Orders Act* ^[16], and can be enforced as if the order were an order of our courts by the person to whom the payments are owed, the *recipient*, under the *Family Law Act*, or by the recipient and the Family Maintenance Enforcement Program under the *Family Maintenance Enforcement Act* ^[17].

The *Interjurisdictional Support Orders Act* also allows for someone in British Columbia to start a process that could result in the order being changed, either by the court that made the original order or by a new court in the jurisdiction where the other parent now lives. In addition to Canada's other provinces and territories, the *Interjurisdictional Support Orders Act* also applies to the orders of some other countries, including the United Kingdom, the United States, Australia and New Zealand.

Property and debt

The *Family Law Act* is the only law in British Columbia that deals with the division of family property and family debt between married and unmarried spouses, and, at Division 6 of Part 5, the act makes special provisions for dealing with property located outside the province. These provisions are extraordinarily complicated and very difficult to understand. You will almost certainly need to speak to a lawyer to figure them out.

Under s. 106 of the *Family Law Act*, where another court can make an order about the same parties and the same property, the court here must first decide whether it should make any orders at all. The court may decide to deal with a property claim if:

- the person against whom the claim is made, the *respondent*, has made a claim for the division of property under the *Family Law Act*,
- the parties agree that the court should deal with the claim,
- either party was "habitually resident" in the province when the court proceeding started, or
- there is a "real and substantial connection" between the province and the facts on which the property claim is based, because the property is located in the province, the parties' most recent common habitual residence was in the province, or a court proceeding under the *Divorce Act* has been started here.

If the court decides to deal with the claim, the court may make orders about property and debt located outside the province by:

- dividing property here to take into account the value of the property outside the province,
- making orders about respecting the care, management, or use of the property outside the province, and
- making orders about ownership of the property outside the province.

More information about how the *Family Law Act* deals with property outside of British Columbia is available in the Dividing Property & Debt section of the chapter on Property & Debt, under the heading "Determining jurisdiction".

Immigration issues

Problems involving immigration usually crop up because one spouse has sponsored the other spouse into Canada, or a spouse is concerned about deportation once the relationship ends. The discussion that follows provides only an overview of some of these problems. If you have an immigration concern, you really should speak to a lawyer who practises this kind of law.

Permanent resident spouses

Under new rules that were introduced in October 2012, sponsored spouses are under a *conditional* permanent residency status for the first two years. According to the press release from Citizenship and Immigration Canada ^[18]:

"The spouse or partner must live in a legitimate relationship with their sponsor for two years from the day on which they receive their permanent resident status in Canada. The status of the sponsored spouse or partner may be revoked if they do not remain in the relationship."

In other words, the spouse who has been sponsored into Canada must stay with his or her spouse for at least two years or the spouse risks losing his or her permanent residency. This could be a serious problem if the potential loss of status forced people to stay in abusive relationships. However, the new rules appear to come with some exceptions. Here's more from the press release:

"The regulations include an exception for sponsored spouses or partners suffering abuse or neglect. The conditional measure would cease to apply in instances where there is evidence of abuse or neglect by the sponsor or if the sponsor fails to protect the sponsored spouse or partner from abuse or neglect. This abuse or neglect could be perpetrated by the sponsor or a person related to the sponsor, whether or not the abusive party is living in the household or not during the conditional period. The exception would also apply in the event of the death of the sponsor."

However, no matter what, your spouse may still remain responsible for supporting you and your children. If you are married, you will also remain entitled to claim a share in the family assets.

Although your spouse still has an obligation to support you as a sponsor, you will not lose your permanent resident status after the first two-year period if you have to apply for welfare, although you will be expected to try to get support from your spouse. If your relationship ended because of abuse, you may not have to try to get support from your spouse. Speak to your caseworker right away.

Non-resident spouses

If you do not have permanent resident status, you must seek legal advice and help right away, as the breakdown of your relationship with your sponsor may affect your ability to remain in Canada (if that's in fact what you'd like to do). There are a number of agencies that help immigrants and refugees. Seek them out immediately.

Sponsoring spouses

If you have sponsored your spouse into Canada, you have certain obligations to continue to provide for your spouse's needs. These responsibilities are for a fixed amount of time, and you will have promised to support your spouse when you signed the immigration forms. You have these responsibilities in addition to your responsibilities under the *Divorce Act* and the *Family Law Act*. A 2004 case of the Supreme Court, *Aujla v. Aujla* ^[19], 2004 BCSC 1566 held that a sponsor's obligations under a sponsorship agreement were obligations between the sponsor and the federal government, separate from the sponsor's obligation to pay spousal support under those acts.

If you are a sponsor and your relationship has ended, contact an immigration lawyer right away to find out exactly what your rights and obligations are.

Resources and links

Legislation

- *Charter of Rights and Freedoms* ^[3]
- *Family Law Act*
- *Divorce Act*
- *Estate Administration Act* ^[12]
- *Wills Variation Act* ^[11]
- *Wills Act* ^[10]
- *Civil Marriage Act* ^[6]
- *Family Maintenance Enforcement Act* ^[17]
- *Adoption Act* ^[5]
- *Interjurisdictional Support Orders Act* ^[16]

Links

- Clicklaw resources on trans issues ^[20]
- Legal Services Society booklet, Sponsorship Breakdown ^[21]

✓ The above was last reviewed for legal accuracy by JP Boyd, May 20, 2013.

References

- [1] <http://canlii.ca/t/5239>
- [2] <http://canlii.ca/t/1frkt>
- [3] <http://canlii.ca/t/8q71>
- [4] <http://www.cba.org/bc/home/main/>
- [5] <http://canlii.ca/t/84g5>
- [6] <http://canlii.ca/t/7w02>
- [7] <http://canlii.ca/t/1f6rk>

- [8] <http://canlii.ca/t/1w5d8>
- [9] <http://canlii.ca/t/fvzvc>
- [10] <http://canlii.ca/t/84fx>
- [11] <http://canlii.ca/t/84g0>
- [12] <http://canlii.ca/t/840g>
- [13] <http://canlii.ca/t/52069>
- [14] <http://canlii.ca/t/81vc>
- [15] <http://canlii.ca/t/8k>
- [16] <http://canlii.ca/t/8413>
- [17] <http://canlii.ca/t/840m>
- [18] <http://www.cic.gc.ca/english/index-can.asp>
- [19] <http://canlii.ca/t/1q1m5>
- [20] <http://www.clicklaw.bc.ca/global/search?k=trans>
- [21] <http://www.clicklaw.bc.ca/resource/1073>

Adoption

Adoption is the voluntary creation of a brand new parent-child relationship where there wasn't one before. When an adoption order is made, the adoptive parents take on all of the rights, duties, obligations and liabilities of a parent of the child. At the same time, however, one or both of the child's natural parents are stripped of those rights, duties, obligations and liabilities as if they are and always have been strangers to the child.

This section provides an overview of adoption, describes the private adoption process and the process for adopting through the Ministry for Children and Family Development ^[1], and provides contact information for the four adoption agencies licensed in British Columbia.

Introduction

There are two basic kinds of adoption: adoption within a family unit by a relative or stepparent, with the consent of the natural parent; and, adoption by a stranger through an agency. The first kind can be handled privately through the court process. The second kind requires either the involvement of the Adoptive Families Association of British Columbia ^[2], a contractor of the provincial Ministry for Children and Family Development, in the case of children in the care of the government, or the use of licensed adoption agency in the case of children not in government care. A list of the four adoption agencies licensed in British Columbia is provided at the end of this section.

The provincial *Adoption Act* ^[3] sets out the rules that guide parents and the courts through the adoption process. As in all matters involving children, the courts are primarily concerned with the best interests of the child, and s. 3 of the act describes a number of factors that should be considered in determining what is in the child's best interests.

- (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 birth parent or other individual and the effect of maintaining that relationship;

- (f) the child's cultural, racial, linguistic and religious heritage;
- (g) the child's views;
- (h) the effect on the child if there is delay in making a decision.

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

The *Adoption Act* ^[3] recognizes four types of adoption:

1. relative adoption, where a child is adopted by a relative or stepparent,
2. placement of a child by the child's natural parent or guardian with a non-family member adoptive parent or parents, called a *direct placement*,
3. placement of a child by the Ministry for Children and Family Development, actually through the Ministry's contractor, and
4. placement of a child, sometimes from outside Canada, by an adoption agency licensed by the Ministry.

The effect of adoption

Section 37 of the *Adoption Act* ^[3] sets out the consequences and meaning of an adoption and says:

- (1) When an adoption order is made,
 - (a) the child becomes the child of the adoptive parent,
 - (b) the adoptive parent becomes the parent of the child, and
 - (c) the birth parents cease to have any parental rights or obligations with respect to the child, except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.
- (2) If the application for the adoption order was made by an adult to become a parent jointly with a birth parent of the child, then, for all purposes when the adoption order is made,
 - (a) the adult joins the birth parent as parent of the child, and
 - (b) the child's other birth parent ceases to have any parental rights or obligations with respect to the child.

In other words, an adopted child's new parents become that child's parents for all possible reasons and purposes. The adoptive parents take on all the rights and obligations the birth parents had, and, at the same time, the birth parent or parents lose all the rights and obligations they had in relation to the child.

Among other things, the natural parent will lose rights such as being kept up to speed on developments in the child's health and schooling, and obligations such as a duty to pay child support. In a 2003 case of the Supreme Court, *Zien v. Woda* ^[4], 2003 BCSC 1238 the court held that the adoption of a child by the mother's new partner stripped the natural father of his obligation to pay support, effective from the moment the adoption order was made.

From the time an adoption order is made, the birth parent has no more legal interest in the adopted child, including with respect to how the child is raised, where the child lives, where the child goes to school, what sort of medical treatment he or she receives, or how the child is disciplined. In the eyes of the law, the adoptive parents are the only parents the child has.

Who can place a child for adoption

Section 4 of the *Adoption Act* ^[3] says that:

The following may place a child for adoption:

- (a) the director;
- (b) an adoption agency;
- (c) a birth parent or other guardian of the child, by direct placement in accordance with this Part;
- (d) a birth parent or other guardian related to the child, if the child is placed with a relative of the child.

Who can receive a child for adoption

Section 5 of the *Adoption Act* ^[3] says that a child can be placed for adoption with one or two people, as long as they live in the province.

- (1) A child may be placed for adoption with one adult or 2 adults jointly.
- (2) Each prospective adoptive parent must be a resident of British Columbia

Section 29 says that one or two people can make an application to adopt a child, as long as they live in the province:

- (1) One adult alone or 2 adults jointly may apply to the court to adopt a child in accordance with this Act.
- (2) One adult may apply to the court to jointly become a parent of a child with a birth parent of the child.
- (3) Each applicant must be a resident of British Columbia.

The *Adoption Act* ^[3] doesn't say anything about the gender or sexual orientation of the adopting parents. There have in fact been many cases where same-sex couples have successfully adopted children in British Columbia; the sexual orientation of the adopting parents is not an issue in this province.

Who must consent to the adoption

According to s. 13 of the *Adoption Act* ^[3], the following people must provide their consent to a proposed adoption:

1. the birth mother of the child,
2. the natural father,
3. the child's guardian, if someone has been appointed to fill this role,
4. the child, if the child is 12 years of age or older, and
5. the Director under the *Child, Family and Community Service Act* ^[5], but only if the child is in the care and custody of the government.

The act also says that a birth mother's consent to the adoption is only valid if she gives it 10 or more days after the child's birth. The act also provides that a parent under the age of 19 may give a valid consent.

Revoking consent

The people who must give their consent can, if they choose, change their mind and revoke their consent, but only within certain time periods or before certain events happen.

- A birth mother may revoke her consent at any time until the child is 30 days old, or, afterwards at any time until the child is placed with the adoptive parents.
- A child can revoke his or her consent at any time until the adoption order is made.

After the child is placed, a consent can only be revoked after an application to the court, providing the application is made before the adoption order is pronounced.

The private adoption process

This discussion concerns the two types of adoptions that do not go through the Ministry or an adoption agency: the direct placement process and the relative adoption process.

Direct placement by a birth parent

Firstly, the adoptive parents must notify the Director of the Ministry for Children and Family Development's Adoption Division ^[6] of their intent to adopt a child by filing a Form 1 of the Adoption Act Regulation ^[7] with the Ministry. This form sets out: the name of the birth mother; the name of the natural father, if known; an explanation of the circumstances leading to the proposed adoption; and, the names of the adoptive parents.

The Director then contacts both the adoptive parents and the natural parents of the child and advises them of the legal consequences of adoption, prepares a *pre-placement assessment* of the adoptive parents, and provides the adoptive parents with information about the child's natural parents, including their medical history.

A pre-placement assessment includes a criminal records check of the adoptive parents, a check for past involvement with the ministry, an assessment of the birth mother and father, and an assessment of the suitability of the adoptive parents and their home to receive a new child.

The adoptive parents must obtain the consent of the following people to the adoption:

- the child, if the child is 12 years of age or older,
- the birth mother,
- the child's natural father, if known, and
- the child's guardian, if anyone has been appointed as such.

The *Adoption Act* ^[3] requires adoptive parents to make "reasonable efforts" to notify the father of the intended adoption. If the father's whereabouts are known, the adoptive parents should send a Notice of Proposed Adoption to the father by registered mail. The court may require that an ad be placed in the Legal Notices section of the newspaper classified ads to ensure that every effort has been made to find the father and alert him to the adoption. Under certain circumstances, it is possible to obtain an order that this requirement be disregarded.

Once the consent of the birth parent or guardian of the child has been obtained, the adoptive parents and the birth parent or guardian become joint guardians of the child. This joint guardianship will last until:

- the court makes an adoption order,
- any of the consents to the adoption are revoked, or
- the court otherwise terminates the joint guardianship.

Once these conditions have been met, the birth parent or guardian of the child will transfer the custody of the child to the adoptive parents in writing. The adoptive parents must notify the Director that they have received the adoptive child into

their home within 14 days. The Director must prepare a "post-placement report" within six months of the placement of the child in the new home.

Finally, the adoptive parents must prepare and file a Petition for the adoption of the child in the registry of the Supreme Court, under the Supreme Court Family Rules ^[8], once the child has spent six months in their care and custody. The filed Petition and supporting documents must be served on the Director. Part 3 of the *Adoption Act* ^[3] provides the details of the court process that will occur after this point, including: the documents that must be filed in court, who must be notified of the proceeding, and whether the application will require an oral hearing before a judge.

Relative adoption

The process for relative adoptions is a lot easier, mostly because the *Adoption Act* ^[3] exempts this sort of adoption from the notice requirements for direct placement adoptions. This means that the portion of the process described above, involving the Ministry and the Director of the Adoptions Division, can be bypassed, and no assessments or reports are required from the Director.

Stepparents may apply under this process for an order that they become "jointly" a parent of the child with his or her birth parent, usually the stepparent's spouse, the natural parent of the child. This is another form of relative adoption, and has the same effect as a normal adoption, meaning that the other natural parent (the one who isn't married to the stepparent) of the child loses his or her rights and obligations in relation to the child.

Adoption through the Ministry

People who seek to adopt through the Ministry for Children and Family Development usually do so because they wish to adopt a child but don't have any particular child in mind, as is the case in direct placements or relative adoptions.

The first step in this process is to contact the Adoptive Families Association of British Columbia and speak with an adoption worker. The worker will arrange a meeting with the adopting parents, who will have to fill out an adoption application and an adoption questionnaire. The questionnaire asks the adopting parents about the sorts of children they are prepared to adopt, including racial characteristics, illnesses, mental and physical disabilities, and so forth. The application asks for the following information:

- the name, address, education and present employment of each applicant,
- the work history of each applicant,
- the cultural and racial background, and religion or belief system of each applicant,
- the applicants' interests and hobbies,
- the names of other children and other members of the applicants' household, including boarders,
- a statement of the family finances, and
- the names and addresses of four personal references.

You can download the application ^[9] and questionnaire ^[10] at the Ministry's website ^[6], and read a helpful summary of the process. A more succinct summary is available at the Adoptive Families Association of BC website ^[2].

The ministry will also conduct a criminal records check and check for any past contact with the ministry involving child- and family-related problems.

The worker will then begin a *homestudy*. A homestudy is an assessment of the applicants completed over several months through visits to their home. It includes an educational component which prepares the adopting parents to meet the needs of the adopted child.

Once the homestudy is complete, the adoption worker begins the process of matching available children to adopting parents. Once a match is found and the adopting parents accept the child, they begin pre-placement visits with the child.

(If the child lives in a different community, the adopting parents will be asked to visit the child in his or her community.) For these first visits, a worker will be present. Over time, the adopting parents will begin to spend time alone with the child and have visits at their own home. If things go well, the adoption worker will make a decision about the suitability of the placement based on what he or she considers to be in the child's best interests.

The steps between the initial application and the match are not particularly quick. In recognition of this, be prepared for homestudies to be repeated every 12 months. Criminal records checks and checks for previous ministry involvement are conducted every two years.

Finally, if all parties are satisfied, the child is placed in the home of the adopting parents. At this point the adopting parents will fill out the Notice of Placement described above. After six months of the child living in the care and custody of the adopting parents, the parents can begin the process of applying to the Supreme Court for an adoption order. You should be aware that during the whole of this period, and until an adoption order is made, the Director remains the legal guardian of the child.

Note that if the child is between the ages of seven and 12, an independent worker will meet with him or her to do a report on the child's views of the proposed adoption. This report will form part of the materials that the court will consider in hearing the adoption application. A child over the age of 12 must consent to the adoption.

Adoption agencies

The following four organizations are licensed by the provincial government under the Adoption Act to operate as adoption agencies. These are *all* of the licensed agencies in British Columbia.

Choices Adoption & Counselling Services ^[11]

100-850 Blanshard Street

Victoria, British Columbia, V8W 2H2

Phone: 250-479-9811

Fax: 250-479-9850

Toll Free: 1-888-479-9811

Family Services of Greater Vancouver ^[12]

205-1600 West 6th Avenue

Vancouver, British Columbia, V6J 1R3

Phone: 604-736-7613

Fax: 604-736-7916

Toll Free: 1-866-582-3678

Sunrise Adoption Centre ^[13]

102-171 West Esplanade

North Vancouver, British Columbia, V7M 3J9

Phone: 604-984-2488

Fax: 604-984-2498

Toll Free: 1-888-984-2488

The Adoption Centre of British Columbia ^[14]

255 Lawrence Avenue

Kelowna, British Columbia, V1Y 6L2

Phone: 250-763-8002

Fax: (250) 763-6282

Toll Free: 1-800-935-4237

Resources and links

Legislation

- *Adoption Act* ^[3]
- Adoption Act Regulation ^[7]
- *Child, Family and Community Service Act* ^[5]
- Supreme Court Family Rules ^[8]

Documents

- Application to Adopt ^[9]
- Adoption Questionnaire ^[10]

Links

- Ministry of Children and Family Development Website ^[1]
- Adoptive Families Association of British Columbia ^[15]
- Ministry of Children and Family Development Adoption Division ^[6]
- Choices Adoption & Counselling Services ^[11]
- Family Services of Greater Vancouver ^[12]
- Sunrise Adoption Centre ^[13]
- The Adoption Centre of British Columbia ^[14]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://www.gov.bc.ca/mcf/>
- [2] <http://www.bcadoption.com>
- [3] <http://canlii.ca/t/84g5>
- [4] <http://canlii.ca/t/1pt0x>
- [5] <http://canlii.ca/t/84dv>
- [6] <http://www.mcf.gov.bc.ca/adoption/index.htm>
- [7] <http://canlii.ca/t/859w>
- [8] <http://canlii.ca/t/8mcr>
- [9] http://www.mcf.gov.bc.ca/adoption/pdf/cf_1013.pdf
- [10] http://www.mcf.gov.bc.ca/adoption/pdf/cf_1048.pdf
- [11] <http://www.choicesadoption.ca/home/index.php>
- [12] <http://www.fsgv.ca/>
- [13] <http://www.sunriseadoption.com/>
- [14] <http://kcr.ca/adoption-services/the-adoption-centre-of-british-columbia/>
- [15] <http://www.bcadoption.com/>

Parentage and Assisted Reproduction

Once upon a time, not all that long ago in fact, sex was the only way to have a child. Sometimes, however, a child was not the participants' desired outcome and rules were developed to help the courts figure out who a child's father was when paternity was denied.

These days, with the help of technology, it's possible for a couple who want a child to have that child using donated eggs or sperm or with the help of a surrogate mother. The question now is less often about who isn't a parent than who is.

This section talks about assisted reproduction and the rules that determine who is a parent under the *Family Law Act* when parentage is denied, and when a child has been conceived through assisted reproduction.

Determining parentage

Part 3 of the provincial *Family Law Act* provides a comprehensive scheme for determining the parentage of children that applies for all legal purposes in British Columbia, including for family law disputes and wills and estates matters, except when parentage is determined under the *Adoption Act*^[1]. Section 24 says this:

- (1) For all purposes of the law of British Columbia,
 - (a) a person is the child of his or her parents,
 - (b) a child's parent is the person determined under this Part to be the child's parent, and
 - (c) the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.
- (2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

Section 26(1) says who a child's parents are presumed to be:

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.

Now it's usually quite obvious who the birth mother of a child is. It not always evident who the biological father is. A paternity test will resolve any uncertainty as to whether a particular man is the father of a particular child, and with today's technologies, the odds of an incorrect result are on the order of a thousandth of one percent. For a father, proving paternity can be essential to establishing a right to be involved in a child's life. For a mother, proving paternity can be an essential step in securing a child support order.

The presumptions of fatherhood

Only biological parents and people who are stepparents because they are the married or unmarried spouse of a parent are required to pay child support. When a man denies a responsibility to pay child support on the ground that he is not the child's father, the first thing the court will do is see whether he should be presumed to be the father because of the nature of his relationship with the child's mother.

Under s. 26(2) of the *Family Law Act*, a man is presumed to be the biological father of a child in one of the following circumstances:

- (a) he was married to the child's birth mother on the day of the child's birth;
- (b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended
 - (i) by his death,
 - (ii) by a judgment of divorce, or
 - (iii) as referred to in section 21;
- (c) he married the child's birth mother after the child's birth and acknowledges that he is the father;
- (d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;
- (e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the Vital Statistics Act

Presumptions like these were once very important when there was no reliable way to scientifically verify that a particular man was the father of a child. These days, however, we do have the technology and a man who disputes paternity despite these presumptions can ask for an order that a parentage test be conducted. Without challenging these presumptions, however, the man will likely be required to pay child support for the benefit of the child.

Parentage tests

Under s. 33(2) of the *Family Law Act*, the court may

order a person, including a child, to have a tissue sample or blood sample, or both, taken by a medical practitioner or other qualified person for the purpose of conducting parentage tests

Under s. 33(1) a parentage test can be a human leukocyte antigen test, a DNA test, or "any other test the court considers appropriate." These are your choices:

- **Human leukocyte antigen tests:** Human leukocyte antigen tests are a kind of advanced blood test that looks at the genetic markers on white blood cells to determine the likelihood that the child's antigens were inherited from a particular man. Their accuracy is northward of 96% but can be spoofed if the purported father has had a recent transfusion.
- **Deoxyribonucleic acid tests:** DNA tests look for overlaps in the child's unique genetic code with the genetic code from the purported father and the child's mother. Today's DNA tests deal with the probability of fatherhood in terms approaching absolute certainty; if a DNA test shows a man is probably the father, the odds that the test is wrong are

about 0.0001%. Testing is performed on biological samples, most commonly blood samples. It is possible to have tests conducted based on mouth swabs.

- **Chorionic villi sampling:** This is a prenatal procedure that can be performed during the 10th to 13th week of pregnancy. It consists of a DNA test on a sample of the baby's placenta. It is an unpleasant procedure that must be conducted either through the mother's cervix or her abdominal wall.
- **Amniocentesis:** This is a prenatal procedure that can be performed during the 14th to 24th week of pregnancy. It consists of a DNA test on a sample of amniotic fluid drawn through the mother's abdominal wall.

The DNA of a child is a combination of the DNA of the child's mother and father. DNA tests compare the child's DNA to that of the father and mother, and provide a calculation of the odds that the man is the child's father. Because of the accuracy of DNA testing, a positive result will prove extremely convincing to a court. Unless you have a doctorate in genetics or convincing proof that a sample was tampered with, I don't recommend that you challenge the results of a DNA test. Save your money.

A number of companies in British Columbia, such as Genetrack Biolabs ^[2], Maxxam Analytics ^[3] and Orchid PRO-DNA ^[4], will perform paternity tests at a cost of between \$400 and \$800 plus taxes.

Arranging for a parentage test

If the mother and the purported father agree to have a paternity test conducted, no order of the court is necessary. You simply contact the appropriate company and arrange to have blood or saliva samples taken and tested. The results will be delivered to you directly. These companies even offer home sampling kits at a somewhat lower rate.

Where the parties don't agree to a test, one of them, usually the alleged father, must make an application to court for an order that samples be taken from the parties and the child and that a paternity test be conducted under s. 33(2) of the *Family Law Act*. Under s 33(3), the court can also make an order about who must pay for the cost of the test.

Assisted reproduction

Assisted reproduction relies on the assistance of, and often genetic contributions from, other people to create a child. It is necessary when:

- a single person wants to have a child,
- one or both people in an opposite-sex relationship are infertile or the woman is unable to carry a baby to term,
- a couple in a same-sex relationship want to have a child and they want the child to share in the genetic heritage of at least one of them, or
- a couple wish to include another person as the parent of their child.

Whatever circumstances are at hand, assisted reproduction inevitably involves of one or more of:

- the use of donated eggs,
- the use of donated sperm, and
- the cooperation of a woman who will carry the baby to term.

The 2004 federal *Assisted Human Reproduction Act* ^[5] regulates the scientific and commercial aspects of assisted reproduction. From a family law perspective, the important parts of this act make it illegal to sell eggs or sperm, and say that a surrogate mother can't be paid for her services but she can be compensated for her expenses.

The provincial *Family Law Act* lets people make agreements when they are having a child by assisted reproduction that say which of the parties to the agreement will and won't be a legal parent of the child. Under the act, a child can have up to five parents if everyone agrees: up to two people who intend to have the child; an egg donor; a sperm donor; and, a surrogate mother.

Donors

Under s. 24 of the *Family Law Act* the donor of eggs or sperm is not the parent of a child merely because of the donation, and may not be declared to be a parent of a child. This section is very important. It means that a person can donate eggs or sperm without worrying that they will be asked to pay child support down the road.

A donor can be a parent if the intended parents and the donor sign a written assisted reproduction agreement before the child is conceived that says that the donor will be a parent. Donors who are parents under an assisted reproduction agreement are parents for all purposes under the *Family Law Act*; they are presumed to be the guardians of a child and may be required to pay child support for the benefit of the child.

Surrogate mothers

A surrogate mother is a birth mother who is presumed to be the parent of a child under ss. 26 and 27 of the *Family Law Act*. However, a surrogate mother will not be a parent if the intended parents and the surrogate mother sign a written assisted reproduction agreement before the child is conceived that says that the surrogate mother will not be a parent.

Without an assisted reproduction agreement, the child's parents will be presumed to be the surrogate mother and the child's biological father, and the surrogate mother will be a parent for all purposes under the *Family Law Act*.

Assisted reproduction after death

People who aim to have children by assisted reproduction — including through *in vitro* fertilization when no one other than the intended parents are involved — often freeze eggs, sperm and embryos for future use. This is especially common where multiple attempts may be necessary to have a successful pregnancy. It sometimes happens that one of the people who provide the genetic material dies before a child is conceived.

Section 28 of the *Family Law Act* says that when the donor dies before the child is conceived and there is proof that the donor:

- consented to the use of the genetic material or embryo by his or her married or unmarried spouse,
- consented to being the parent of a child conceived after his or her death, and
- did not withdraw his or her consent before death,

the parents of a child conceived with the genetic material or embryo are the deceased donor and the donor's married or unmarried spouse.

Resources and links

Legislation

- *Family Law Act*
- *Adoption Act* ^[1]
- *Assisted Human Reproduction Act* ^[5]
- *Vital Statistics Act* ^[6]

Links

- Genetrack Biolabs ^[2]
- Orchid PRO-DNA ^[4]
- Maxxam Analytics ^[3]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/84g5>
- [2] <http://www.genetrackcanada.com>
- [3] <http://www.thednalab.com>
- [4] <http://www.orchidcellmark.ca>
- [5] <http://canlii.ca/t/7vzj>
- [6] <http://canlii.ca/t/84fk>

Naming and Changes of Name

Issues about names mostly come up when a child is born, when people enter into new relationships and when they separate, and, after separation, sometimes when someone wants to change the name of a child. In a family law context, people usually change their names when they marry and when they divorce. The provincial *Name Act* ^[1] also allows people to change their names just because they feel like it, without the necessity of a marriage or a divorce.

This section provides a brief introduction to this subject and discusses the naming of children, changes of name on marriage and divorce, and changes of name under the *Name Act*.

Naming children

The provincial Ministry of Health's Vital Statistics Agency ^[2] is the government organization that keeps track of people's births, their deaths, their wills, and their names. Under s. 3(1) of the *Vital Statistics Act* ^[3], one or both of the parents must file a Registration of Live Birth ^[4] with the agency within 30 days of the birth of a child. This form must be completed before the child's birth certificate can be issued.

The form must state, among other things: the name of the mother; the name of the father (if known and acknowledged); the gender of the child; the date of birth; and, the name given to the child. Under s. 4 of the act, the child's surname can be:

- the name of either of the natural parents,
- the name of one of the parents,
- a combination of the parents' names, or
- another name entirely.

If one parent alone registers the birth with the agency, usually the mother, that parent has the final say on the child's name unless the father obtains a court order for a new surname.

A 2003 decision of the Supreme Court of Canada, *Trociuk v. British Columbia* ^[5], 2003 1 S.C.R. 835, held that fathers should have a say in their children's names, contrary to the provisions of the *Vital Statistics Act* in force at the time. This decision also affects the right of unacknowledged fathers to be listed on their children's birth certificates. On June 4, 2004, the act was amended to comply with the court's decision, and s. 4.1 of the *Vital Statistics Act* now allows the courts of British Columbia to make an order changing a child's surname when it makes a declaration of paternity.

Now, while you're free to name your child as you wish, there are some limits. You've probably heard of Dweezel and Moon Unit Zappa, and you probably know people named Sunshine and Starlight. Under s. 9 of the act, the agency's chief executive officer has the authority to refuse to register the birth — and consequently to refuse to issue a birth certificate

- for children whose names the chief executive officer believes:
 - (a) might reasonably be expected to cause
 - (i) mistake or confusion, or
 - (ii) embarrassment to the child or another person,
 - (b) is sought for an improper purpose, or
 - (c) is, on any other ground, objectionable.

While it seems that the chief executive officer rarely rejects a name, you should still be aware that this power exists.

Changing names

It is not illegal to use an alias in British Columbia, although you will not be allowed to obtain government identification or to make certain legal transactions, like the transfer of property, using an alias. An *alias* is a name other than your legal, registered name.

People often use aliases just because that's how people have come to know them, like a nickname, or because their real name is too hard for native English-speakers to pronounce or spell easily. Most people who want to legally change their names do so because they were adopted, married, or divorced. Others do so for purely personal reasons. I remember reading a change of name notice for a fellow with the unfortunate name of Donald Duck.

You can apply to have a legal, registered name that differs from your birth or married name under the provincial *Name Act*. This is a purely paper process and a hearing before a judge won't be necessary in most cases. Section 4 of the act sets out who may apply for a change of name:

- (1) Subject to this section, a person who has attained the age of majority or, if the age of majority has not been attained, is a parent having custody of his or her child and who is domiciled in British Columbia for at least 3 months, or has resided in British Columbia for at least 3 months immediately before the date of the application, may, unless prohibited by this or another Act, change his or her name on complying with this Act.
- (2) If the minister is satisfied that it is in the public interest to do so, the minister may waive the residency requirements of subsection (1).
- (3) Subject to subsection (4), a person who is the parent of and who has custody of an unmarried minor child may, with the consent of the other parent of the child, apply to change the child's name, but, if the application is to change the child's surname to that of the applicant's spouse, the consent of the spouse is required.
- (4) If a person applies to change the name of an unmarried minor child who has attained the age of 12 years, he or she must first obtain the consent in writing of the child.
- (5) If a person whose consent is required under this Act
 - (a) is deceased or mentally disordered or cannot after reasonable, diligent and adequate search be located, or

(b) is, in the opinion of the director, unreasonably withholding his or her consent,

the applicant may, with the approval of the director, proceed with the application without the consent of that person.

(6) If, in the opinion of the director, exceptional circumstances make it unreasonable to seek the consent of a person as required under this Act, the applicant may, with the approval of the director, proceed with the application without the consent of that person.

When your name has been legally changed, the chief executive officer of the Ministry of Health Services' Vital Statistics Agency is required to make a notation on your birth certificate and on the registration of any current marriage. After the notation has been made, any future birth, marriage, or death certificates will show the new name. A Certificate of Change of Name will be issued that will allow you to obtain new identification, such as drivers' licences or BC Identification cards, in the new name.

Change of name on marriage

Many people change their names when they marry. Out of custom, wives often take their husbands' surnames, but there's no requirement that they do so, and there's nothing stopping a husband from taking his wife's surname. The options are wide open for same-sex couples.

Choice of name

On marriage, s. 3 of the *Name Act* allows a spouse to:

- (a) use the surname he or she had immediately before the marriage,
- (b) use the surname he or she had at birth or by adoption, or
- (c) use the surname of his or her spouse by marriage.

This applies to both men and women, and to same- and opposite-sex couples, and no court application is required; the newly-married spouse simply starts using that name. To get identification in the new name, you will have to produce proof of your marriage (the government-issued marriage certificate) and proof of your old name (a driver's licence or BC ID).

The sort of marriage the act is referring to is a legal marriage solemnized by a marriage commissioner or licensed religious official; the rules about change of name on marriage do not apply to common-law relationships.

Hyphenated names

The *Name Act* does not deal with situations where spouses wish to take each other's surnames and use a hyphenated name, like Smith-Jones. Spouses who want to adopt a hyphenated name as their legal name will have to follow the *Name Act* process for obtaining a change of name, described below, to make their new name their registered, legal name.

On the other hand, the new hyphenated name can be used as an alias, the day-to-day name by which most people know you, without a formal change of name. It is not illegal to go by an alias in British Columbia. Note, however, that if you do not apply to have the new name registered as your legal name, you cannot use the alias for legal transactions, such as the transfer of property or obtaining a loan.

Change of name on divorce

Once an order for divorce or an order declaring the marriage to be a nullity has been made, a former spouse may begin using any legal name he or she had before marriage. No court application is necessary. Where identification was obtained in the married name or assets were purchased in the married name, a legal change of name will be required.

Orders for change of name

Where a spouse needs a legal change of name, the spouse may seek an order to this effect in the divorce proceeding and simply claim the change of name as part of what he or she is asking for in the Notice of Family Claim or Counterclaim.

An application for a change of name can also be dealt with in a separate proceeding altogether, usually by Petition and likely without an oral hearing. An application for a change of both given and last names may be dealt with by a hearing before a judge.

Children's names

An application for a change of name of the children of the marriage must be made with the consent of the other parent, even when the person making the application has custody of the children. The consent of the affected children must also be obtained where they are 12 or more years old.

Change of name under the *Name Act*

If you don't qualify for an automatic change of name, you will have to follow the process outlined in the *Name Act* to change your name. The Ministry of Health's Vital Statistics Agency ^[6] has a change of name package ^[7] that includes all the forms you will require and instructions on how to complete them. Although you don't have to run an ad in the newspaper to change your name, you will have to get your fingerprints taken and submit to a criminal records check. As well, a fee will be charged by the police department that takes your fingerprints.

The process is fairly straightforward and a hearing before a judge is usually not necessary. The steps for most people are as follows:

1. get the change of name package from the Vital Statistics Agency,
2. if you're seeking to also change the name of a child, you must obtain the consents of the other parent, the child (if the child is 12 or more years old), and your present spouse (if you are seeking to change the child's name to that of your spouse),
3. gather proof of identity, like birth certificates, for everyone affected by the change of name (usually, yourself and any children),
4. go to your local police detachment and submit to fingerprinting (you have to pay a fee for this service),
5. the police will send in all the required information — the identification, the consents, your fingerprints, and so forth — to the agency, along with payment of the agency's fee, and
6. once your name change has been registered, the fingerprints will be returned to the police for a criminal records check.

Once the agency receives all of this information with their fee, they will begin processing the request. (Bear in mind that the agency's chief executive officer has the authority to refuse to register objectionable names. This is discussed earlier in this section.) If all is well, the chief executive officer will make the required changes to the birth certificates of the people affected by the application and, if applicable, to any current marriage certificate, and will issue a Certificate of Change of Name.

Resources and links

Legislation

- *Vital Statistics Act* ^[3]
- *Name Act* ^[1]

Resources

- Registration of Live Birth Form ^[4]
- Application for Change of Name ^[7]

Links

- Vital Statistics Agency ^[8]
- Vital Statistics Agency: How to apply for a name change ^[6]
- Vital Statistics Agency Website: Most popular baby names ^[9]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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- [7] <http://www.vs.gov.bc.ca/forms/vsa529.pdf>
- [8] <http://www.vs.gov.bc.ca/>
- [9] <http://www.vs.gov.bc.ca/babynames/>

Aboriginal Family Law Issues

Aboriginal people who are dealing with a family law problem may face some particular issues. Some of them involve cultural concerns while others stem from the federal government's *Indian Act* ^[1]. This section addresses these issues briefly. However, for more complete information I strongly encourage you to consult with a family law lawyer who has expertise in Aboriginal legal issues.

This section look at issues specific to Aboriginal people that relate to the care and control of children, calculating the amount of child and spousal support payments, and dividing family property and family debt.

The care of children

All of the usual factors that govern the court's consideration of issues involving the care and control of children apply to the care and control of Aboriginal children, whether the child's ancestry comes from one parent or from both. In addition to the usual factors, however, the court will also look at a few other issues related to the child's Aboriginal heritage.

Custody under the *Divorce Act*

In addition to the usual factors governing an award of child custody under s. 16 of the *Divorce Act*, the court must also take into consideration a child's Aboriginal heritage when making a decision about custody. This is not expressly set out anywhere in the legislation, but past cases have decided that a child's Aboriginal heritage should be considered as part of the general "best interests of the child" test.

This principle was established in British Columbia by *D.H. v. D.M.* ^[2], [1999] 1 S.C.R. 761, a decision of the Supreme Court of Canada. In its decision, the court said that:

"... the trial judge had given careful attention to the aboriginal ancestry of [the child], together with all the other factors relevant to [the child's] best interests, and that there was no error in his decision ..."

In another case, *Van de Perre v. Edwards* ^[3], 2001 SCC 60, the Supreme Court of Canada commented that:

"... racial identity is but one factor that may be considered in determining personal identity; the relevancy of this factor depends on the context. ... All factors must be considered pragmatically, as different situations and different philosophies require an individual analysis on the basis of reliable evidence."

Guardianship under the *Family Law Act*

In addition to the usual rules dealing with guardianship under the *Family Law Act*, members of Canada's First Nations are subject to an additional and unwelcome burden under the federal *Indian Act* ^[1], which allows the Minister of Aboriginal Affairs and Northern Development to appoint a person to be the guardian of the child. You should expect that this authority will only be exercised when both parents die without leaving a will that passes guardianship to some other person, or when there are serious concerns about the parents' ability to properly care for the child.

Where there is an application for guardianship of a treaty First Nation child in a family law court proceeding, under ss. 208 and 209 of the *Family Law Act*:

1. the First Nation government must be served with notice of the application,
2. the First Nation government has standing in the court proceeding, and
3. the court must consider the laws and customs of the First Nation in making its decision.

Section 208 applies to Nisga'a children; s. 209 deals with other treaty First Nation children and says this:

(1) If an application for guardianship is made respecting a treaty first nation child and the final agreement of the treaty first nation to which the child belongs provides for it, the treaty first nation

(a) must be served with notice of the proceeding, and

(b) has standing in the proceeding.

(2) In a proceeding to which subsection (1) applies, the court must consider, in addition to any other matters it is required by law to consider and subject to any limits or conditions set out in the final agreement, any evidence or representations respecting the laws and customs of the treaty first nation.

Under s. 29.1 of the provincial *Interpretation Act* ^[4], the present treaty First Nations are the Tsawwassen First Nation and the Maa-nulth First Nations.

Remember that the only time an application must be made for guardianship is where a person, including a parent, is not presumed to have guardianship under s. 39 and has not been appointed as a guardian by a guardian's will or a Form 2 Appointment under the Family Law Act Regulation ^[5].

Access, parenting time and contact

The same concerns relating to a child's Aboriginal ancestry that apply to determining custody under the *Divorce Act* will also come up in determining access, as well as parenting time and contact under the *Family Law Act*, especially where one of the parents isn't Aboriginal.

Aboriginal children have the right to keep a connection to their culture and heritage. This may influence the schedule of parenting time or contact an Aboriginal parent has, and where a non-Aboriginal parent may exercise parenting time or contact. It may also result in the court extending contact to a third party, such as an elder or another family member, who will keep the child in touch with his or her culture.

If a non-Aboriginal parent or a non-band member parent tries to exercise access to a child living on a reserve, the band may restrict that parent's ability to go onto the reserve to see the child. While this doesn't happen a great deal, the usual solution is for the parent trying to exercise access to ensure that the order or agreement which provides for the access requires the other parent to take the child off reserve for access visits.

Child support and spousal support

Exactly the same rules apply to Aboriginal parents as apply to non-Aboriginal parents when it comes to paying child support and spousal support.

There is, however, one significant additional issue about the calculation of income for the purposes of support calculations. Aboriginal people who qualify as "status Indians" under the federal *Indian Act* and who live on reserve may not be required to pay income tax. Because the Child Support Guidelines are based on the assumption that the payor of child support is also paying income tax, the standard method of calculating income under the Guidelines would give a distorted result.

Under s. 19(1)(b) of the Guidelines, a tax-exempt payor may have his or her income *grossed up* to account for this tax advantage. The grossing-up process essentially involves figuring out how much money a taxed payor would have to earn to have the tax-exempt person's income once income taxes are taken off.

Think of it like this:

Say a non-exempt payor makes a gross income of \$40,000 per year. This is the non-exempt payor's income for the purposes of the Guidelines. Now, the non-exempt payor also pays taxes on that income, so his or her net income might really be about \$30,000.

A tax-exempt payor making \$40,000, on the other hand, would actually keep the whole \$40,000 since no income taxes are paid on the \$40,000. This, according to the Guidelines, is unfair, and the exempt payor's income should be re-calculated upwards.

Under the Guidelines, the tax-exempt payor must pay child support at a Guidelines income of what he or she would earn to have an after-tax income of \$40,000, as if taxes were paid on his or her income. If a non-exempt payor would have to earn \$55,000 to have a net income of \$40,000, the tax-exempt payor's income will be set, for the purposes of child support, at \$55,000.

In this example, a tax-exempt payor who earns \$40,000 per year free of income tax, might be deemed to earn \$55,000 per year for the purposes of child support, and child support will be calculated based on a Guidelines income of \$55,000 per year. Grossing-up a payor's income is intended to ensure that the children benefit from the amount of support available based on an a gross income equivalent to what a non-exempt payor would earn to have the same net income.

The same sort of grossing-up process will apply when determining how much spousal support a tax-exempt payor should have to pay, particularly if the amount payable is being determined using the Spousal Support Advisory Guidelines, since the Advisory Guidelines use the same approach to calculate income as the Child Support Guidelines.

Family property and family debt

Dividing property can be a bit of a problem for Aboriginal spouses when real property on reserve is involved.

In a nutshell, the *Constitution Act* ^[6] gives the federal government exclusive authority over laws relating to First Nations people and reserve lands. This means that the provincial government cannot make laws that deal with First Nations people, and that in some circumstances provincial laws do not apply on reserve lands. The problem here, from a family law point of view, is that since the federal government cannot pass laws dealing with personal property and real property (only the provincial governments can), and since the provincial governments cannot pass laws dealing with members of Canada's First Nations or their lands (only the federal government can), the *Family Law Act* can't be used to divide an interest in real property on reserve lands. Making matters worse, people living on reserve generally don't own their property the way that off-reserve property can be owned. The only kind of ownership individuals on reserve lands can have is a Certificate of Possession that gives the owner the right to occupy the land but not the legal title to that land.

However, if a treaty First Nation has negotiated the right to dispose of reserve lands, the rules are a bit different and the court may be able to make orders about real property on reserve lands. Section 210 of the *Family Law Act* says this:

- (1) If provided for by the final agreement of a treaty first nation, the treaty first nation has standing in a proceeding under Part 5, in which
 - (a) the treaty first nation is entitled under its final agreement to make laws restricting alienation of its treaty lands,
 - (b) a parcel of its treaty lands is at issue, and
 - (c) at least one spouse is a treaty first nation member of the treaty first nation.
- (2) In a proceeding to which subsection (1) applies, the Supreme Court must consider, among other matters, any evidence or representations respecting the applicable treaty first nation's laws restricting

alienation of its treaty lands.

(3) The participation of a treaty first nation in a proceeding to which subsection (1) applies must be in accordance with the Supreme Court Family Rules and does not affect the court's ability to control the court's process.

These are the general rules about family property and the court's authority under the *Family Law Act*:

- **Financial Assets:** Cash, bank accounts, stocks, bonds and whatnot are called *moveable property*. The court can deal with these sorts of assets.
- **Real Property:** Property and structures on reserve lands are *immovable property*. The court cannot order the transfer of immovable property, but it can deal with other assets, like moveable property, to compensate a spouse for an interest in property which the court cannot deal with.
- **Certificates of Possession:** The court generally cannot deal with real property located on a reserve, however, the bulk of real property located within reserve lands is not "owned" the way a house off-reserve can be. People holding real property on reserve lands are generally only allowed to have and use the land by way of a Certificate of Possession. Since Certificates of Possession are dispensed under the authority of the federal government, the court cannot make an order for the transfer of the Certificate under the *Family Law Act*. The spouse who has the Certificate will usually have to compensate the other spouse for their interest in the Certificate, providing that the Certificate can be shown to have a value.
- **Exclusive Use of Property:** Section 90 of the *Family Law Act* allows someone to apply for an order giving them exclusive use of the family home, but does not apply to family homes located on reserve lands.

Getting legal help

This section is only a brief sketch of some of the special issues that Aboriginal people might have to deal with in the course of a family law dispute. If you have a problem touching on one of these areas, you should get advice from a lawyer.

You may be able to get legal help from the Legal Services Society's Aboriginal band outreach program or an Aboriginal community legal worker. Look for these agencies on www.clicklaw.ca^[7] using the HelpMap feature to find help near to where you are.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Indian Act*^[1]
- *Interpretation Act*^[4]
- Child Support Guidelines^[8]
- *Constitution Acts, 1867 to 1982*^[6]

Documents

- Spousal Support Advisory Guidelines ^[9]

Links

- Legal Services Society Website: Aboriginal section ^[10]
- Clicklaw Resources on Aboriginal Law ^[11]
- Nisga'a Final Agreement and Background Information ^[12]
- First Nations of the Maa-Nulth Treaty ^[13]
- Tsawwassen First Nation Treaty ^[14]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

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Family Violence

Some relationships are scarred by violence and abuse, sometimes toward a spouse and sometimes toward a child. This may mean that both family law and criminal law are involved when a relationship ends. It may also mean that a family law court proceeding will include a claim for damages as a result of the violence.

This section provides an introduction to the differences between criminal law and tort law, the law about personal injuries. It reviews the ways that criminal law, tort law, and the *Family Law Act* can address issues of family violence, including through peace bonds and protection orders. It also takes a brief look at some child protection issues.

Introduction

Two of the most important branches of the law are *civil law* and *criminal law*; there are plenty of others, like constitutional law and administrative law, but these are two of the big ones.

Tort law is a branch of civil law, as is family law. Other branches of civil law include contract law, property law, and the law on negligence.

Criminal law mostly deals with regulatory legislation, laws created by the government that list the things we're not supposed to do and the range of potential penalties for doing those things. Legislation that falls under this heading includes the *Criminal Code* ^[1], the *Controlled Drugs and Substances Act* ^[2], and the *Youth Criminal Justice Act* ^[3].

Criminal law deals with a person's offences against the rules of the state. Tort law, on the other hand, deals with a person's offences against other people, such as personal injuries, motor vehicle accidents, negligence, assault and battery, trespass, and so forth.

The legal definition of a tort is "a breach of a duty owed by someone to someone else which gives rise to a cause of action," like a duty not to hit someone, a duty to drive carefully, or a duty not to dig a hole in your lawn that someone might fall into. Generally speaking, these sort of civil offences aren't set out in laws the way that the rules against robbery or rape are set out in *Criminal Code*; they're creatures of the common law, the law that the courts have created.

That explanation of the difference between tort law and criminal law was a bit technical. Another way of looking at it is through the example of O.J. Simpson. If you recall, O.J. was tried twice for the same basic issue. First, he was criminally tried for an alleged murder. Second, the family of the victim sued him in civil court for the alleged wrongful death of the victim or something to that effect.

Essentially, the criminal trial was because of O.J.'s alleged crime of killing someone contrary to the criminal law (his alleged crime against the state) and the civil trial was because of his alleged tort offence against the family of the victim (his wrong against the family). The important point here is that the one thing O.J. was alleged to have done gave rise to both the criminal charges and the family's tort claim: two separate court proceedings, one in criminal court and one in civil court.

If you are punched by someone, for example, that person's conduct may result in both:

1. a criminal prosecution, for a breach of the criminal law that makes it an offence to intentionally cause an injury to someone else, and
2. a civil court proceeding, for a breach of the civil duty not to harm someone else, which may give you a cause of action in tort and allow you to sue the person who hit you for damages.

The criminal law punishes someone who is found guilty of breaching the laws of the land by imposing fines, a jail sentence, both a fine and a jail sentence, or by imposing terms or conditions on the guilty person's conduct, like a restraining order or a peace bond.

The goal of civil law, however, isn't to punish someone who has breached a duty owed to someone else; the goal is to compensate the person who suffered the harm for the harm he or she suffered. Normally, this takes the form of damages, a financial award intended to account for things like pain and suffering, lost wages, rehabilitation and medical costs, and so forth. Damages are an attempt to provide monetary compensation for the harm suffered as a result of the wrongful act.

The *Criminal Code*

The *Criminal Code* is the main federal legislation on criminal law. The *Criminal Code* does not specifically address family violence, but there are a number of possible criminal offences that could apply where there has been family violence, including:

- common assault,
- assault causing bodily harm,
- aggravated assault,
- sexual assault,
- attempted murder,
- stalking (criminal harassment),
- making threats (uttering threats),
- keeping someone against their will (unlawful confinement), and
- kidnapping.

In order for any of these charges to be laid, a complaint must be made to the police. Normally, this takes the form of an emergency 9-1-1 call. The police will come to your home and interview you and anyone else who witnessed the event.

After the police have conducted their investigation, the lead officer sends the lawyer for the government, *crown counsel*, a document called a Report to Crown Counsel which, among other things, describes the witnesses' statements and the officer's recommendation as to whether charges ought to be laid or not. Crown counsel then decides whether there is enough evidence to lay charges. If the crown counsel reviewing the police file thinks there is there is enough evidence, the crown counsel will approve the charges and the matter will be set for a hearing before a judge.

Information for abused persons

If you have suffered family violence, call the police; nothing will happen until you do. If there is evidence of abuse, the police can arrest your partner and may take him or her into custody. To find out more about what the police can do, you may wish to read *Getting Help from the Police or RCMP* ^[4] and *Surviving Relationship Violence and Abuse* ^[5]. If your partner is taken into custody, he or she will stay there until a judge is able to speak to him or her. Most of the time, your partner will be released from custody until the trial date following the brief hearing, and the release will be on specific terms and conditions set out in a document called a Recognizance or an Undertaking.

It's important that you call the police right away, or at least fairly soon after the violence. The police will sometimes refuse to take action against your partner on the ground that the complaint was made out of malice or a desire for revenge because of the breakdown of the relationship.

You should tell the police — and perhaps crown counsel — about all of your concerns with your partner, whether they're about yourself or your children. You should also tell the police about past incidents of family violence, and whether your partner has ever been arrested for similar problems in the past. If your partner is taken into custody, you will want your concerns addressed in the recognizance on which your partner will be released. Among other things, the court can require that your partner:

- not go to your home, school or workplace,

- not go to your children's school or daycare,
- not come within a certain distance of your home,
- not contact you or the children, directly or indirectly, and
- fulfill any other condition that may be necessary for the safety of you and your children.

Finally, ask that the police and crown counsel keep you up to speed on the progress of the criminal case; you should also ask for a copy of your statement and the recognizance that your partner is released on.

Breaching the recognizance

If your partner doesn't follow the terms of his or her recognizance or undertaking, call the police. They won't be aware that there's a further problem unless you let them know.

Call VictimLink

Sometimes calling the police isn't enough. Sometimes you may need counselling to help you cope with the violence, and, in particularly bad situations, you may need a safe place to stay with your children until the criminal proceeding can be dealt with.

Call VictimLink BC at 1-800-563-0808 for assistance. VictimLink BC is a province-wide telephone help line for victims of family violence, and all other crimes. At VictimLink BC a support worker can provide information and referrals to help you deal with the effects of family violence, and arrange for crisis support counselling. VictimLink BC is available free to people across BC and Yukon 24 hours a day, seven days a week.

You may feel that you need to leave the family home, or you may want to develop a safety plan in case your partner becomes violent again. A victim support worker can help you develop a safety plan or find a place to stay. Again, call VictimLink BC and ask to speak with a victim support worker.

Getting back together

You must speak to crown counsel if you want to get back together with your partner, or if you want to contact him or her, or stop the criminal process. You cannot change the terms of your partner's recognizance or drop the charges yourself. Only crown counsel can do that. If you contact your partner, you could be making matters worse since you'll be inviting him or her to break the terms of the recognizance, which might result in further criminal charges against your spouse.

Information for accused persons

It is the policy of the provincial Ministry of Justice that incidents of spousal assault are to be treated as significant crimes. As a result, if your partner accuses you of assault, you may be arrested and you could be taken to jail overnight.

If this happens, you will appear before a justice of the peace or a judge for a bail hearing. If you are arrested on a Friday, this may mean that you'll spend the weekend in custody, although provincial court judges are usually available by telephone or video link. At the bail hearing, the judge will normally require that you promise to follow certain conditions if you want to be released from custody. If you do not agree to abide by the terms the judge wants, you will not be released and you'll stay in jail until the hearing of the charges against you.

Typically, bail conditions include:

- not to have contact with your spouse, either directly or indirectly,
- not to go to your spouse's home, school or workplace, and
- to keep the peace and be of good behaviour.

Other conditions might include restrictions on your use of alcohol and drugs, a curfew, a requirement that you report to a parole officer or the police, a requirement that you not go within a certain number of blocks of the complainant's home, a requirement that you not possess firearms or other weapons, and so forth.

The conditions which the judge requires will be written down in a document called a Recognizance or an Undertaking. It is critical that you follow the terms set out in your recognizance. If you don't, you can be arrested for breaching them, and face a criminal trial on that charge as well. The terms of your recognizance will remain in effect until the trial or until they are changed at a hearing before trial.

Lawyers and your bail hearing

You have a right to contact a lawyer when you are arrested. Most importantly, you have a right to have a lawyer represent you at your bail hearing. Call one. If family law proceedings have already started in civil court, make sure that the lawyer is aware of the fact, especially if you have children.

Whether you're able to get a lawyer or not, make sure you speak to duty counsel before your bail hearing. ("Duty counsel" are lawyers paid by the Legal Services Society ^[6] to give advice and limited help to people who have been arrested and do not have legal representation.) Usually, duty counsel will try to speak to everyone who has been arrested before the bail hearing. However, if the number of people stuck in cells is high, you may not have that much time with him or her.

The point of all this is that you will doubtless want to ensure that the terms of your recognizance are fair, not too restrictive, and don't interfere with your ability to see your children or go to work.

Under certain circumstances, you may not be released from custody, regardless of the conditions you're prepared to agree to. This will depend on things such as the gravity of the alleged offence, any history of related criminal convictions, and the opinion of the crown as to the circumstances of the offence.

Getting back together

Often a couple will want to get back together or even just want to talk about things after an arrest has been made. Sometimes the complainant will want to "drop the charges." A couple of points need to be mentioned:

- **Dropping the charges:** Criminal charges are laid by crown counsel, not by the complainant. The complainant cannot "drop the charges." Only the crown can do that.
- **Communication with your spouse:** Do not talk to the complainant, even if he or she contacts you, if your recognizance does not allow you to communicate with him or her. No matter who initiates the contact, communicating with the complainant is still a breach of the terms of your recognizance and you may face criminal charges from that breach, as well as the other charges.
- **Reconciliation:** If the complainant truly wishes to get back together with you, he or she must talk to crown counsel and ask that the terms of your recognizance be changed to allow you to communicate with each other or share the same residence. There must be a hearing to vary the terms of the recognizance before those terms will be officially changed.

The consequences of criminal charges

Among other things, criminal charges relating to family violence can lead to:

- a *stay of proceedings*, when the crown doesn't take the charges to trial and no criminal conviction is entered,
- a *discharge* following trial or a guilty plea (a discharge can be absolute or come with certain conditions, like a probation period, and depending on the type of discharge, there may or may not be a conviction and a criminal record),
- a *suspended sentence*, with conditions, a period of probation and a criminal conviction,
- a *peace bond* under s. 810 of the *Criminal Code*, under which the accused will be required to comply with certain conditions, but which is not a criminal conviction and won't give the accused a criminal record, or
- a conviction punished by a fine, jail time, or both a fine and time in jail.

The most common results of family violence charges are a suspended sentence with probation or a short period of time in jail. Of course, the consequences of a guilty verdict will depend on the circumstances of the offence and any past record of conduct related to the offence.

Tort law

Unlike criminal matters where the crown handles everything, a claim in tort must be advanced and prosecuted by the person who has suffered the family violence. In family law proceedings, tort claims are usually included with the other relief asked for in the Notice of Family Claim or Counterclaim, although a tort claim can be made by itself, without other claims relating to things like divorce, parenting arrangements, and so forth. Tort claims can only be heard by the Supreme Court; the Provincial Court does not have the jurisdiction to deal with tort claims.

Also unlike criminal matters, the remedies that can be sought aren't *protective*, in the sense of no-contact and no-go orders, or *punitive*, in the sense of jail time, criminal records and fines. The remedy the person who has suffered the family violence seeks is primarily *restorative*: he or she would be asking for an award of *damages* to make good the harm he or she suffered and its consequences. Damages are money payments and may be awarded for, among other things:

- pain and suffering resulting from the violence,
- loss of enjoyment of life as a result of the impact of the violence,
- past wages lost because of the violence,
- future wages lost because of some inability, illness or other impairment resulting from the violence,
- rehabilitation and job retraining costs, and
- past and future medical care expenses related to the injuries suffered from the violence.

Damages can also be claimed as *punitive damages* or *aggravated damages*, both of which are in fact intended to punish an alleged abuser for his or her conduct rather than to compensate the person who has suffered the family violence for his or her losses. Aggravated damages are awarded when the wrongful act took place in humiliating or undignified circumstances. Punitive damages are awarded when the wrongful act deserves additional punishment because it was of a "harsh, vindictive, reprehensible and malicious nature."

The most common tort claim in situations of family violence is a claim based on *assault and battery*. *Assault* technically means wrongfully threatening to harm someone; *battery* means wrongfully attacking and harming someone.

The drawbacks of tort claims

This discussion is not meant to discourage persons who have suffered family violence from making tort claims for damages resulting from family violence; it's only meant to bring to readers' attentions the difficulties that can sometimes accompany tort claims relating to family violence.

Firstly, you will, in all likelihood, have to hire a lawyer if you want to make a claim in tort against your spouse. The law governing tort claims is not set out in a statute, like the *Family Law Act* or the *Negligence Act* ^[7], it's mostly based on the common law, as a result of which it can be terribly complex to present your case.

Lawyers, of course, are expensive. While you may get some of your legal costs awarded to you if you're successful, that only happens at the end of the day after you've already paid a few months' or a few years' worth of bills. Lawyers who practise family law do not work on a contingency basis where they get paid out of the client's award; they charge by the hour.

Secondly, even if you're successful, your spouse must have some money or other assets from which he or she can pay your damages if you win. It's no good to spend tens of thousands of dollars on legal fees and win only to find that your spouse has no way to pay your award. This is called a *dry judgment*.

On this last point, however, I should mention the 1997 BC Supreme Court case of *Megeval v. Megeval* ^[8], 1997 CanLII 3721 (BCSC). In this case, the effect of the court's judgment in the family law part of the case was to divide the family assets equally between the parties. However, the amount awarded to Ms. Megeval for her tort claim took up the whole of Mr. Megeval's one-half share — Ms. Megeval got it all. Sometimes there are ways to be compensated.

Thirdly, you will have to testify about the family violence and the effect it had on you in a very open, honest and personal manner. You will have to disclose your medical and counselling records, if there are any. You may also have to submit to medical and psychological examinations, both to prove your claim and sometimes at the demand of your partner. All of this can be very trying and sometimes humiliating, for obvious reasons.

Limitation periods

A *limitation period* is a deadline by which a claim must be made and an action started. After the applicable limitation period has expired, you cannot make your claim.

In British Columbia, the limitation period for actions based on personal injury — which is what a tort claim based on family violence is — is two years. If your spouse assaulted you on 1 January 2010, you won't be able to advance your claim after 2 January 2012. There are, however, some exceptions to this rule.

- There is no limitation period to claims based on sexual assault, according to s. 3(4)(k)(i) of the provincial *Limitation Act* ^[9].
- The limitation period doesn't begin to run until the last incident of violence.
- Because of the 1992 Supreme Court of Canada decision in *K.M. v. H.M.* ^[10], [1992] 3 S.C.R. 6, the limitation period may not begin to run until the person who suffered the family violence makes the connection between the violence and the harm he or she has suffered.

Awards

The amount of the damages that a court may award for tort claims based on family violence always depends on the circumstances. Sometimes the assault is of a minor nature with little resulting harm. Sometimes the abuser can successfully argue that the violence was consented to, that it was situational, or that the violence resulted from self-defence. Sometimes the court will find that the family violence was reciprocal in the relationship, in other words, that it went both ways. Sometimes the amount of damages awarded are low simply because the abuser doesn't have the

financial resources to pay anything more.

In any event, here are some awards that the courts have made for assault and battery in a family context.

- *Bain v. Boulaine*, 1996: Sex without consent, \$7,000 for pain and suffering, plus \$4,000 in punitive damages.
- *Bellsmith v. Bellsmith* ^[11], 1996 CanLII 448 (BCSC): Multiple assaults, \$13,000 for pain and suffering, plus \$2,000 in punitive damages and \$19,000 for wage loss.
- *C. v. M.*, 1990: Assault and sex without consent, \$40,000 for pain and suffering.
- *Glendale v. Drozdziak* ^[12], 1993 CanLII 6867 (BCCA): Date rape, \$25,000 for pain and suffering plus \$10,000 in wage loss.
- *Gould v. Sandau*, 2003: Assault causing broken bone in hand, \$2,500.
- *Harder v. Brown*, 1989: Repeated sexual assaults, \$40,000 in general and aggravated damages, plus \$10,000 in punitive damages.
- *Hurley v. Moore*, 1990: Severe assault resulting in scarring, \$3,000 for pain and suffering, \$2,000 for the scarring, plus \$20,000 in general damages.
- *Kooner v. Kooner*, 1989: Two assaults, \$5,000 in general damages plus \$2,500 in aggravated damages.
- *Kovacic v. Kovacic* ^[13], 1998 CanLII 1083 (BCSC): Assault, \$2,000 for pain and suffering plus \$1,000 for aggravated damages.
- *Megeval v. Megeval* ^[8], 1997 CanLII 3721 (BCSC): Assault causing permanent disability, \$45,000 for the injury, \$66,000 for lost wages and retraining, \$2,500 for medical care and \$5,000 in punitive damages.
- *Twardowski v. Twardowski*, 1994: Multiple assaults without lasting physical damage, \$8,500 for pain and suffering.
- *White v. White*, 2003: Multiple assaults, \$10,000 in damages.

These cases have been included to give readers of this website a general idea of how the courts have treated tort claims based on family violence in the past. You should not rely on these cases to fix a dollar amount to your claim without reading each case to understand the circumstances in which the violence occurred and the award was made, and without doing a fair bit of other research on your own.

The Family Law Act

The provincial *Family Law Act* offers a number of different restraining orders that can be very helpful and can provide the same kind of protection as a criminal recognizance does, discussed above.

Protection orders

Protection orders are the primary way family violence is addressed under the *Family Law Act*. Under s. 183(1), an *at-risk family member*, someone on behalf of an at-risk family member, or the court itself can ask for a protection order, and the claim for a protection order needn't be made with any other claims under the act.

The act has a number of really important definitions that relate to protection orders. *At-risk family member* and *family member* are defined in ss. 182 and 1, respectively:

"at-risk family member" means a person whose safety and security is or is likely at risk from family violence carried out by a family member

"family member", with respect to a person, means

(a) the person's spouse or former spouse,

(b) a person with whom the person is living, or has lived, in a marriage-like relationship,

- (c) a parent or guardian of the person's child,
 - (d) a person who lives with, and is related to,
 - (i) the person, or
 - (ii) a person referred to in any of paragraphs (a) to (c), or
 - (e) the person's child,
- and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e)

If you read the definition of *family member* carefully, you'll see that people who are just dating or are in another casual relationship aren't "family members" as the act defines the term. This means that people who are just dating or are in another casual relationship can't apply for protection orders.

The definition of *family violence* is in s. 1 and is very broad:

- "family violence" includes
- (a) 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,
 - (b) sexual abuse of a family member,
 - (c) attempts to physically or sexually abuse a family member,
 - (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (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
 - (e) in the case of a child, direct or indirect exposure to family violence

Making protection orders

When the court is asked to make a protection order, it must consider certain risk factors set out at s. 184(1):

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family

member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member's perception of risks to his or her own safety and security;

(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Essentially, the court is required to look at the family violence in the overall context of the couple and the history and present circumstances of their relationship. When a child is a family member, under s. 185, the court must also consider:

1. whether the child might be exposed to family violence if a protection order isn't made; and,
2. whether a protection order should also be made for the protection of the child.

Protection orders

The available protection orders are listed at s. 183(3) and include orders:

- restraining a person from communicating with or contacting the at-risk family member, going to the at-risk family member's home, workplace or school, and stalking the at-risk family member,
- limiting how the person communicates with the at-risk family member,
- directing the police to remove the person from the family home or accompany him or her to remove personal property, and
- requiring the person to report to the court or to another person.

Under s. 183(3)(e), the court can impose any other terms in a protection order that may be necessary to protect the at-risk family member or implement the protection order. Protection orders remain in place for one year, unless the order specifies another term.

If a protection order, an order from another jurisdiction that is like a protection order, or a *Criminal Code* no-contact or no-communication order is made, any previous *Family Law Act* orders are suspended to the extent of any conflict with the protection order. In other words, if there's an older order for contact with the children, but a protection order is made that stops the person with contact from communicating with the children, the parts of the older order about contact would be suspended.

To find out more about protection orders, you may wish to read the booklet *For Your Protection: Peace Bonds and Family Law Protection Orders* ^[14].

Changing protection orders

When a protection order has been made and hasn't yet expired, either party can apply to vary the order to:

1. extend or shorten the period of time that the order is in effect,
2. vary the terms of the order, or
3. end the order.

When a protection order has been made without notice, that is, if the application was made without letting the other party know about the application ahead of time, the other party can ask the court to cancel the order.

Enforcing protection orders

Protection orders can't be enforced under the *Family Law Act*, only by s. 127 of the *Criminal Code*, which makes it an offence to breach of a court order. However, s. 188(2) says this;

A police officer having reasonable and probable grounds to believe that a person has contravened a term of an order made under this Part may

- (a) take action to enforce the order, whether or not there is proof that the order has been served on the person, and
- (b) if necessary for the purpose of paragraph (a), use reasonable force.

Conduct orders

The court can make a variety of special orders, called *conduct orders*, under Division 5 of Part 10 of the *Family Law Act* that may be used to address concerns relating to family violence. Conduct orders may only be made for one of four purposes set out at s. 222:

At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

Conduct orders include orders:

- requiring a person to attend counselling, or a specified service or a program like an anti-violence or anger management course,
- restricting communication between the parties,
- requiring a person to pay the costs associated with the family home, like mortgage or rent payments, property taxes and utilities,
- restricting a person from terminating the utilities serving the family home,
- requiring a person to supervise the removal of personal property from the family home,
- requiring a person to post security to guarantee his or her good behaviour, and
- requiring a person to report to the court to another person, like a counsellor or therapist.

Conduct orders can be enforced in a number of ways, including by requiring a person to pay up to \$5,000 as a fine or to a party, or by jailing the person for up to 30 days. Jail will only be ordered when nothing else will secure the person's compliance with the conduct order.

Other orders

Other orders are available under the *Family Law Act* that could be used to address issues relating to family violence.

- **Exclusive occupancy:** Under s. 90, the court may give one party exclusive occupancy of the family home and the property in the family home. This isn't a restraining order, in the sense that it prohibits the other party from entering the home, but only the person with exclusive occupancy is allowed to live there.
- **Supervised parenting time and contact:** Under ss. 45 and 59, a person's parenting time or contact can be subject to a requirement that it be supervised by a third party, like a relative or a professional supervisor.
- **Conditions of parenting time and contact:** Under s. 218, the court may impose terms and conditions on any order it makes. Where family violence is an issue, appropriate terms and conditions might restrict where the children are exchanged, and how the parties interact when the children are exchanged, or they might say that a party's parenting time or contact will not happen if the party is impaired by drugs or alcohol.

Child protection issues

The provincial Ministry for Children and Family Development ^[15] is authorized to protect children from neglect and harm under the provincial *Child, Family and Community Service Act* ^[16]. Section 2 of the act sets out the guiding principles of the legislation:

This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

- (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
- (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
- (d) the child's views should be taken into account when decisions relating to a child are made;
- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) the cultural identity of aboriginal children should be preserved;
- (g) decisions relating to children should be made and implemented in a timely manner.

Unlike the majority of the general rules governing how children are dealt with in family law, the best interests of the children is not the most important consideration under this act. The most important considerations under the *Child, Family and Community Service Act* are the safety and well-being of the children.

Reporting children to the ministry

Certain people, including mediators, parenting coordinators, doctors, teachers, psychologists and psychiatrists, have a positive duty to report children in need of protection to the ministry. Section 14 of the act imposes a similar duty on anyone who believes a child is in need of protection, and makes it an offence not to report a child to the ministry. In other words, anyone — including a parent — who thinks a child needs to be protected from abuse, neglect, harm or the threat of harm, must report the problem to the Ministry for Children and Family Development ^[15].

Once a child is reported as being at risk, the ministry will assess the report and determine whether an investigation by a social worker is necessary. The act gives the social worker looking into the alleged problem a fairly broad authority to investigate the complaint.

The consequences of a report

If the investigating social worker comes to the conclusion that there is a problem, he or she can do a number of things to protect the child or attempt to solve the problem. These include:

- providing support services to the family in the home, including referrals to outside social agencies,
- supervising the child's care in the home, including random unannounced visits by the worker, or
- removing the child from the home and placing the child temporarily or permanently with relatives, a foster family, or a group home.

Of course, removing the child from the home is the most extreme step the worker can take, and is normally only used as a last resort.

Information for reported parents

Sometimes, in the middle of a nasty family law dispute, one parent will report the other to the ministry, and claim that the child is suffering in the care of the other parent. Surprisingly, these claims often involve allegations of sexual abuse. Not surprisingly, many of these claims are unfounded.

Whether the complaint is justified or not, you must cooperate with the social worker who investigates the report. Obviously, you'll want to prove that there's no justification for the report, and it may help you to refer the worker to the child's family doctor, teachers, and daycare providers who can say that the child isn't at risk and hasn't been abused.

You cannot take any action against a person who has made a false complaint, such as suing them for damages, unless that person made a false report knowing it to be untrue.

Once the social worker has concluded that there is a problem, there's very little you can do to get the worker out of your hair except do what he or she wants. It is critical that you comply with his or her "suggestions" about things like parenting courses, help from outside agencies, homemaking services, and so forth. If you don't do the things the worker suggests, you may be flagged as "resistant" to those remedies. This can trigger an escalation in the worker's involvement in your family and can lead to harsher conditions being imposed, such as the removal of your child.

The impact of a report to the ministry on your family law action will obviously depend on the circumstances and whether the investigation shows that there is actually a problem in your home. The simple fact that a report has been made will not give the other parent grounds to apply for a change in the child's residence; in fact, if other parent reported you to the ministry and there was no substance to the claim, it may stand as further evidence of the other parent's unwillingness to cooperate with you in raising your child.

Information for parents making a report

Unless you are fairly certain that your child is being harmed by the other parent or stands in real risk of being harmed, you should not make a report to the ministry. There are a few reasons for this.

Firstly, there is no guarantee that if the worker removes the child from the care of the other parent, that you will get custody of the child. The worker may well discover problems in your own household and give the child into the care of someone else altogether.

Secondly, you run the risk of giving the other parent more ammunition in your family law dispute, allowing him or her to characterize you as mean-spirited and vindictive, and willing to stoop to anything to win. Worse, the other parent may be able to claim that you were using the ministry to make an end-run around the court process.

Thirdly, you run the risk of inviting the ministry's continued interest (and interference) in your family. Nothing is as unpleasant as being subject to random, unannounced visits by a social worker whose job is to critique your parenting abilities and the child's home environment.

What happens if a problem is found

If the worker investigating the report is sufficiently concerned about the child's living conditions and risk of harm, or the reported parent's willingness to cooperate with the ministry, the ministry may begin court proceedings.

If the ministry has taken a child out of the care of his or her parents, the ministry must commence a child protection action and seek a court order approving the removal. All child protection proceedings are held in the Provincial Court, and are run under special rules of court, the Provincial Court (Child, Family and Community Service Act) Rules ^[17].

When your child is not removed

Among other things, the court can make, at the request of the ministry, protective intervention orders for the following relief:

- the on-going supervision of the child,
- the on-going supervision of the child on conditions, including things like daycare, services for the parent, and the right of the ministry to visit the child in the home,
- prohibiting a person from contacting and interfering with the child,
- prohibiting a person from living with the child or entering the child's home,
- a term requiring the police to enforce the order, and
- the removal of the child if the parent fails to comply with the terms of a supervision order.

The ministry must serve you with notice of the hearing of their application, and you are entitled to attend court and oppose the application. You may call witnesses and present other evidence against the ministry's application.

You are not required to have a lawyer at this hearing, although the help of a lawyer is strongly recommended.

When your child is removed

If the ministry has removed a child from your care, the ministry is required to set a "presentation hearing" within seven days, at which the ministry's action is either confirmed or overruled. The issue at this hearing is whether or not the child was in need of protection and was properly removed from the home. You will be served with notice of the presentation hearing and you may attend the hearing where you will be allowed to address the court and call evidence in support of your position.

At the presentation hearing, the court may make interim orders for the following:

- that the ministry have custody of your child,
- that the child be returned to you under the supervision of the ministry,
- that the child be returned to you, or
- that the child be placed in the care of someone other than yourself.

It is important to know that at a presentation hearing the ministry only has to show that there is a likelihood that the child was in need of protection to succeed and get an order that the child continue to live in their care. It can be very difficult to get your child back at a presentation hearing since the case the ministry must prove is so slight.

Within 45 days of the presentation hearing, assuming the ministry was successful at that hearing, a "protection hearing" is held. At this hearing the court may direct the parties (you and the ministry) to attend a case conference, if you and the ministry cannot agree on the terms of the order that the court should make at the beginning of the hearing.

A case conference is a relatively informal meeting between you, the ministry's representative, and the judge. Sometimes the social worker also attends. If you and the ministry cannot negotiate and agree on the terms of an order about your child during the case conference, the judge may make some directions about the conduct of the proceeding, such as the exchange of information and the scheduling of dates, and set a date for the continuation of the protection hearing.

A protection hearing is a formal hearing before the judge. The ministry will attempt to prove that the order they seek is necessary, and will call witnesses, such as relatives, teachers, and social workers, to give evidence about the facts of the case. Since this is a formal hearing, you are allowed to cross-examine the ministry's witnesses. You will then be able to present your own case and argue about why the ministry's request is not justified.

Remember that at the presentation hearing, the ministry only has to prove that there is a likelihood that the child is at risk and that the course of action sought by the ministry is reasonable. At the protection hearing, however, the ministry must prove that it is more probable than not that the child is at risk and that the course of action sought by the ministry is reasonable. This is a lot more difficult to prove than a mere "likelihood" of risk.

At the protection hearing, the court may make orders for the following relief:

- that the child be returned to you under the supervision of the ministry for a period of up to six months,
- that the child be placed in someone else's custody for a specific period of time,
- that the child be placed in the custody of the ministry for a specific period of time, or
- that the child continue to be in the custody of the ministry.

Again, while you are not required to have a lawyer at this hearing, the help of one is strongly recommended.

At the conclusion of the period of time specified in the court order, the status of your child will normally be reviewed. It may be critical that you use the intervening period of time to comply with any directions made by the court or the recommendations of the ministry about things such as special courses, programs or services that you should take, since the court will be looking to see whether the risks or deficiencies that caused the child to be removed are still there. If nothing has changed, the terms of the order will likely be continued.

To find out more about your rights when the ministry has concerns about a child's safety or plans to remove a child from the family home, you may wish to read the booklet *Parents' Rights, Kids' Rights*.^[18]

Resources and links

Legislation

- *Family Law Act*
- *Criminal Code*^[1]
- Provincial Court (Child, Family and Community Service Act) Rules^[17]
- *Negligence Act*^[7]
- *Controlled Drugs and Substances Act*^[2]
- *Youth Criminal Justice Act*^[3]
- *Limitation Act*^[9]

Links

- Canadian Bar Association BC Branch: Script on applying for a peace bond and filing assault charges^[19]
- Community Safety and Crime Prevention Branch and Legal Services Society: Peace bonds and family law protection orders^[14]
- Clicklaw resources for abuse and family violence^[20];
- Clicklaw resources for child protection^[21]
- Legal Services Society publications on abuse and family violence^[21]
- Family Law in British Columbia website information on child protection/removal^[22]

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://canlii.ca/t/7vf2>
- [2] <http://canlii.ca/t/7vtc>
- [3] <http://canlii.ca/t/7vx2>
- [4] <http://www.lss.bc.ca/publications/pub.php?pub=379>
- [5] <http://resources.lss.bc.ca/pdfs/pubs/Surviving-Relationship-Violence-and-Abuse-eng.pdf>
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- [17] <http://canlii.ca/t/85tk>
- [18] <http://resources.lss.bc.ca/pdfs/pubs/Parents-Rights-Kids-Rights-eng.pdf>
- [19] <http://www.clicklaw.bc.ca/resource/1317>
- [20] <http://www.clicklaw.bc.ca/global/search?f=Abuse+%26+family+violence>
- [21] <http://www.clicklaw.bc.ca/global/search?k=child%20protection>

[22] http://www.familylaw.lss.bc.ca/legal_issues/childProtection.php

Court Forms, Documents and Glossary

Supreme Court Forms (Family Law)

This section has links to the forms that are prescribed by the Supreme Court Family Rules ^[1].

Check the section Other Forms and Documents (Family Law) for other forms mentioned in this resource that are required by legislation other than the Supreme Court Family Rules, or are examples of documents used by people solving family law problems inside or outside of court.

Blank PDF: These forms are fillable forms available from the Ministry of Justice in .PDF format.

Blank Word: These are templates prepared by John-Paul Boyd in Word .DOC format that you can download and prepare on your computer. (Green text shows where you must make a choice, add information or provide an explanation.)

Blank HTML: These are links to the forms as they appear in the text of the rules of court. These forms are good for reference but will be difficult to work with in a word processing program like Word or Pages.

Completed Example: These are examples of what John-Paul's forms look like when they're filled out.

The example forms are based on the pretend court proceeding between John and Jane Doe and are provided for illustration purposes only. These forms show how John and Jane are dealing with their case involving the care of children, child support, spousal support and the division of property and debt, but you can't and shouldn't assume that the way these forms are filled out will apply to your situation.

Forms under the Supreme Court Family Rules

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|-----------|-------------------------------------|---------------------|------------|----------------------|-------------------|-----------------|
| Form F62 | Acknowledgment of Payment | PDF ^[2] | | HTML ^[3] | | |
| Form F30 | Affidavit | PDF ^[4] | | HTML ^[5] | PDF | |
| Form F86 | Affidavit in Support to Waive Fees | PDF ^[6] | | HTML ^[7] | | |
| Form F84 | Affidavit of Attainment of Majority | PDF ^[8] | | HTML ^[9] | | |
| Form F16 | Affidavit of Ordinary Service | PDF ^[10] | DOC | HTML ^[11] | PDF | |
| Form F15 | Affidavit of Personal Service | PDF ^[12] | DOC | HTML ^[13] | PDF | |
| Form F38 | Affidavit - Desk Order Divorce | PDF ^[14] | | HTML ^[15] | Multi | |
| Form F101 | Affidavit - Section 51 | PDF ^[16] | | HTML ^[17] | | |
| Form F9 | Agreement as to Annual Income | PDF ^[18] | | HTML ^[19] | | |
| Form F32 | Application Response | PDF ^[20] | DOC | HTML ^[21] | PDF | |
| Form F55 | Appointment | PDF ^[22] | | HTML ^[23] | | |

Supreme Court Forms (Family Law)

| | | | | | | |
|------------|--|----------|-------|-----------|-------|--|
| Form F21 | Appointment to Examine for Discovery | PDF [24] | DOC | HTML [25] | PDF | |
| Form F65 | Arrest Warrant | PDF [26] | | HTML [27] | | |
| Form F71 | Bill of Costs | PDF [28] | | HTML [29] | | |
| Form F14 | Certificate | PDF [30] | | HTML [31] | | |
| Form F72 | Certificate of Costs | PDF [32] | | HTML [33] | | |
| Form F56 | Certificate of Divorce | PDF [34] | Multi | HTML [35] | Multi | |
| Form F100 | Certificate of Mediation | PDF [36] | | HTML [37] | | |
| Form F36 | Certificate of Pleadings | PDF [38] | DOC | HTML [39] | PDF | |
| Form F70 | Certificate of Result of Sale | PDF [40] | | HTML [41] | | |
| Form F18 | Certificate of Service by Sheriff | PDF [42] | | HTML [43] | | |
| Form F54.1 | Change to Protection Order | PDF [44] | | HTML [45] | | |
| Form F37 | Child Support Affidavit | PDF [46] | DOC | HTML [47] | PDF | |
| Form F33 | Consent Order | PDF [48] | | HTML [49] | | |
| Form F5 | Counterclaim | PDF [50] | DOC | HTML [51] | PDF | |
| Form F97 | Declaration | PDF [52] | | HTML [53] | | |
| Form F99 | Demand | PDF [54] | | HTML [55] | | |
| Form F96 | Electronic Filing Statement | PDF [56] | | HTML [57] | | |
| Form F67 | Examiner's Report | PDF [58] | | HTML [59] | | |
| Form F95 | Fax Cover Sheet | PDF [60] | | HTML [61] | | |
| Form F52 | Final Order | PDF [62] | | HTML [63] | | |
| Form F8 | Financial Statement | PDF [64] | DOC | HTML [65] | PDF | |
| Form F26 | Instructions to Examiner | PDF [66] | | HTML [67] | | |
| Form F22 | Interrogatories | PDF [68] | | HTML [69] | | |
| Form F78 | Jurisdictional Response | PDF [70] | DOC | HTML [71] | PDF | |
| Form F28 | Letter of Request for Examination of Witness out of Jurisdiction | PDF [72] | | HTML [73] | | |
| Form F20 | List of Documents | PDF [74] | DOC | HTML [75] | PDF | |
| Form F71.1 | List of Expenses | PDF [76] | | HTML [77] | | |
| Form F13 | Notice and Summary of Document | PDF [78] | | HTML [79] | | |
| Form F11 | Notice for Publication | PDF [80] | | HTML [81] | | |

Supreme Court Forms (Family Law)

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|----------|---|-----------|-----|------------|-----|--|
| Form F82 | Notice of Abandonment of Appeal | PDF [82] | DOC | HTML [83] | PDF | |
| Form F10 | Notice of Address for Service | PDF [84] | DOC | HTML [85] | PDF | |
| Form F80 | Notice of Appeal | PDF [86] | | HTML [87] | | |
| Form F98 | Notice of Appeal from Master Registrar or Special Referee | PDF [88] | | HTML [89] | | |
| Form F79 | Notice of Appeal if Directions Required | PDF [90] | | HTML [91] | | |
| Form F31 | Notice of Application | PDF [92] | DOC | HTML [93] | PDF | |
| Form F68 | Notice of Application for Committal | PDF [94] | | HTML [95] | | |
| Form F87 | Notice of Appointment or Change of Lawyer | PDF [96] | | HTML [97] | | |
| Form F39 | Notice of Discontinuance | PDF [98] | DOC | HTML [99] | PDF | |
| Form F3 | Notice of Family Claim | PDF [100] | DOC | HTML [101] | PDF | |
| Form F75 | Notice of Hearing | PDF [102] | DOC | HTML [103] | PDF | |
| Form F81 | Notice of Hearing of Appeal | PDF [104] | DOC | HTML [105] | PDF | |
| Form F88 | Notice of Intention to Act in Person | PDF [106] | DOC | HTML [107] | PDF | |
| Form F49 | Notice of Intention to Call Adverse Party as a Witness | PDF [108] | | HTML [109] | | |
| Form F48 | Notice of Intention to Proceed | PDF [110] | | HTML [111] | | |
| Form F89 | Notice of Intention to Withdraw as Lawyer | PDF [112] | | HTML [113] | | |
| Form F77 | Notice of Interest | PDF [114] | DOC | HTML [115] | PDF | |
| Form F1 | Notice of Joint Family Claim | PDF [116] | DOC | HTML [117] | PDF | |
| Form F19 | Notice of Judicial Case Conference | PDF [118] | DOC | HTML [119] | PDF | |
| Form F76 | Notice of Order | PDF [120] | | HTML [121] | | |
| Form F44 | Notice of Trial | PDF [122] | DOC | HTML [123] | PDF | |
| Form F40 | Notice of Withdrawal | PDF [124] | DOC | HTML [125] | PDF | |

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| Form F2 | Notice of Withdrawal from Joint Family Law Case | PDF [126] | DOC | HTML [127] | PDF | |
| Form F7 | Notice of Withdrawal in Family Law Case in which a Divorce Is Claimed | PDF [128] | | HTML [129] | | |
| Form F91 | Notice of Withdrawal of Lawyer | PDF [130] | | HTML [131] | | |
| Form F24 | Notice to Admit | PDF [132] | | HTML [133] | | |
| Form F43 | Notice to Cross-examine | PDF [134] | | HTML [135] | | |
| Form F47 | Notice to Produce | PDF [136] | | HTML [137] | | |
| Form F90 | Objection | PDF [138] | | HTML [139] | | |
| Form F25 | Order for Examination of Persons Outside the Jurisdiction | PDF [140] | | HTML [141] | | |
| Form F85 | Order to Waive Fees | PDF [142] | | HTML [143] | | |
| Form F27 | Order for Issue of a Letter of Request to Judicial Authority of Another Jurisdiction | PDF [144] | | HTML [145] | | |
| Form F34 | Order Made Without Notice | PDF [146] | | HTML [147] | | |
| Form F69 | Order of Committal | PDF [148] | | HTML [149] | | |
| Form F83 | Order to Register Foreign Judgment | PDF [150] | | HTML [151] | | |
| Form F51 | Order Made After Application | PDF [152] | | HTML [153] | | |
| Form F73 | Petition to the Court | PDF [154] | DOC | HTML [155] | PDF | |
| Form F94 | Release Order | PDF [156] | | HTML [157] | | |
| Form F12 | Request | PDF [158] | | HTML [159] | | |
| Form F17.1 | Requisition (to File Agreement) | PDF [160] | DOC | HTML [161] | PDF | |
| Form F17.2 | Requisition (to File Determination of Parenting Coordinator) | PDF [162] | DOC | HTML [163] | PDF | |

Supreme Court Forms (Family Law)

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| Form F35 | Requisition (Divorce) | PDF [164] | Multi | HTML [165] | Multi | |
| Form F29 | Requisition for Consent Order or for Order Without Notice | PDF [166] | | HTML [167] | | |
| Form F17 | Requisition (General) | PDF [168] | Multi | HTML [169] | Multi | |
| Form F6 | Response to Counterclaim | PDF [170] | DOC | HTML [171] | PDF | |
| Form F4 | Response to Family Claim | PDF [172] | DOC | HTML [173] | PDF | |
| Form F74 | Response to Petition | PDF [174] | DOC | HTML [175] | PDF | |
| Form F54 | Protection Order | PDF [176] | | HTML [177] | | |
| Form F54.2 | Restraining Order | PDF [178] | | HTML [179] | | |
| Form F41 | Security for Receiver | PDF [180] | | HTML [181] | | |
| Form F42 | Security of Receiver by Undertaking | PDF [182] | | HTML [183] | | |
| Form F66 | Subpoena to Debtor | PDF [184] | | HTML [185] | | |
| Form F23 | Subpoena to Witness | PDF [186] | | HTML [187] | | |
| Form F64 | Summons to a Committal Hearing Under the Family Maintenance Enforcement Act | PDF [188] | | HTML [189] | | |
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| Form F45 | Trial Brief | PDF [192] | | HTML [193] | | |
| Form F46 | Trial Certificate | PDF [194] | | HTML [195] | | |
| Form F93 | Undertaking | PDF [196] | | HTML [197] | | |
| Form F92 | Warrant - Contempt | PDF [198] | | HTML [199] | | |
| Form F50 | Warrant After Subpoena | PDF [200] | | HTML [201] | | |

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| Form F60 | Writ of Delivery | PDF [202] | | HTML [203] | | |
| Form F61 | Writ of Delivery or Assessed Value | PDF [204] | | HTML [205] | | |
| Form F59 | Writ of Possession | PDF [206] | | HTML [207] | | |
| Form F57 | Writ of Seizure and Sale | PDF [208] | | HTML [209] | | |
| Form F58 | Writ of Sequestration | PDF [210] | | HTML [211] | | |

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Provincial Court Forms (Family Law)

This section has links to the forms that are prescribed by the Provincial Court (Family) Rules ^[1].

Check the section Other Forms and Documents (Family Law) for other forms mentioned in this resource that are required by legislation other than the Supreme Court Family Rules, or are examples of documents used by people solving family law problems inside or outside of court.

Blank PDF: These forms are fillable forms available from the Ministry of Justice in .PDF format.

Blank Word: These are templates prepared by John-Paul Boyd in Word .DOC format that you can download and prepare on your computer. (Green text shows where you must make a choice, add information or provide an explanation.)

Blank HTML: These are links to the forms as they appear in the text of the rules of court. These forms are good for reference but will be difficult to work with in a word processing program like Word or Pages.

Completed Example: These are examples of what John-Paul's forms look like when they're filled out.

The example forms are based on the pretend court proceeding between John and Jane Doe and are provided for illustration purposes only. These forms show how John and Jane are dealing with their case involving the care of children, child support, spousal support and the division of property and debt, but you can't and shouldn't assume that the way these forms are filled out will apply to your situation.

Forms under the Provincial Court Family Rules

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|---------|---|--------------------|------------|------------|-------------------|-----------------|
| Form 17 | Affidavit | PDF ^[2] | | | | |
| Form 2 | Application Respecting Existing Orders or Agreements | PDF ^[3] | DOC | | PDF | |
| Form 21 | Application to Enforce a Custody Order | PDF ^[4] | | | | |
| Form 1 | Application to Obtain an Order | PDF ^[5] | DOC | | PDF | |
| Form 22 | Application to Recognize an ExtraProvincial Order for Guardianship, Parenting Arrangements or Contact | PDF ^[6] | | | | |
| Form 11 | Change of Address Notice | PDF ^[7] | | | | |
| Form 19 | Consent | PDF ^[8] | | | | |
| Form 20 | Consent Order | PDF ^[9] | | | | |

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|---------|---|-------------|-----|--|-----|--|
| Form 28 | Consent to File Agreement | PDF [10] | | | | |
| Form 10 | Fax Cover Page (For Use Between Parties) | PDF [11] | | | | |
| Form 32 | Fax Cover Sheet (For Use When Transmitting to Court Registries) | PDF [12] | | | | |
| Form 4 | Financial Statement | PDF [13] | DOC | | PDF | |
| Form 16 | Notice of Motion | PDF [14] | DOC | | PDF | |
| Form 24 | Notice of Motion in Maintenance Enforcement Proceedings | PDF [15] | | | | |
| Form 26 | Order | PDF [16] | | | | |
| Form 31 | Parenting After Separation Exemption Request | Multi | | | | |
| Form 6 | Referral Request | PDF [17] | | | | |
| Form 3 | Reply | PDF [18] | DOC | | PDF | |
| Form 18 | Request | PDF [19] | | | | |
| Form 25 | Protection Order | PDF [20] | | | | |
| Form 15 | Subpoena | PDF [21] | | | | |
| Form 27 | Transfer Consent | PDF [22] | | | | |

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- [10] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa810.pdf>
- [11] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa892.pdf>
- [12] <http://www.ag.gov.bc.ca/courts/forms/adm/adm833family.pdf>
- [13] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa022.pdf>

- [14] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa048a.pdf>
- [15] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa067a.pdf>
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- [20] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa098.pdf>
- [21] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa058a.pdf>
- [22] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa069a.pdf>

Other Forms and Documents (Family Law)

This section lists sample legal documents, agreements, precedents, etc., and forms required by legislation other than the Supreme Court Family Rules ^[1] or the Provincial Court (Family) Rules ^[2].

For court forms required by the court rules, see the sections on:

- Supreme Court Forms (Family Law), or
- Provincial Court Forms (Family Law)

Assorted Family Law Forms and Precedents

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|----------------|--|--------------------|------------|------------|-------------------|-----------------|
| n/a | Agreement to Mediate | | | | PDF | |
| n/a | Application Record Cover Page | | DOC | | PDF | |
| Form 5 FLA Reg | Section 51 - Consent for Child Protection Record Check | PDF ^[3] | | | | |
| n/a | Request for Protection Order Registry Search | PDF ^[4] | | | | |

References

- [1] <http://canlii.ca/t/8mcr>
- [2] <http://canlii.ca/t/85pb>
- [3] http://www.ag.gov.bc.ca/courts/forms/sup_family/s-51-consent-child-protection-record-check.pdf
- [4] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa914.pdf>

Terminology

This section offers my own plain-language definitions of common legal words and phrases. For more complete, more precise definitions you might want to have a look at *Black's Law Dictionary*, an American reference book published by Thomson West, or at Barron's *Canadian Law Dictionary*. Many public libraries will carry one or both of these dictionaries. The websites of the provincial Queen's Printer ^[1] and the Legal Services Society ^[2] also feature helpful definitions.

A

ab initio

A Latin phrase meaning "from the beginning." A marriage that is unlawful is void *ab initio*, as if it never happened.

abduction

The taking of a person by force or fraud. In family law, also the taking of a child contrary to a court order or without the permission of a guardian. In certain circumstances, this may be a criminal offence.

access

Under the *Divorce Act*, the schedule of a parent's time with his or her children under an order or agreement. Access usually refers to the schedule of the parent with the least time with the child. See "custody."

account

In law, a lawyer's bill to his or her client or a statement; one person's recollection of events.

act

Intentionally doing a thing; a law passed by a government, also called "legislation" or a "statute." See "regulations."

action

A court proceeding in which one party sues another for a specific remedy or relief, also called a "lawsuit" or a "case." An action for divorce, for example, is a court proceeding in which the claimant sues the respondent for the relief of a divorce order.

address for service

The address at which a party to a court proceeding agrees to accept delivery of legal documents. An address for service must be a proper street address within British Columbia; additional addresses for service may include postal addresses, fax numbers, and email addresses.

adjournment

The suspension of a hearing or trial, usually when the hearing or trial cannot proceed on the date scheduled or because it cannot complete within the time scheduled.

adoption

In family law, the act or process of taking another person's natural child as one's own. The child becomes the adopting parent's legal child as if the child were the adopting parent's natural child, while the natural parent loses all rights and obligations with respect to the child. See "natural parent."

Adoption Act

A provincial law dealing with the adoption process and the ability to adopt.

adoptive parent

A person who has formally assumed the status of parent to a child who is not his or her biological offspring. See "adoption" and "natural parent."

adultery

A married person's voluntary sexual intercourse with a person other than his or her spouse; playing the field; fishing out of season. Proof of adultery is grounds for an immediate divorce, providing that the other spouse has not consented to or forgiven the adulterous act. See "collusion," "condonation," and "divorce, grounds of."

advance

In family law, this usually refers to one party obtaining a share of the family property before the property has been finally divided by court order or the parties' agreement.

Advisory Guidelines

Short for the Spousal Support Advisory Guidelines, an academic paper released by the Department of Justice that describes a variety of mathematical formulas that can be applied to determine how much spousal support should be paid and how long spousal support should be paid for, once a spouse is found to be entitled to receive support. The Advisory Guidelines is not a law.

advocate

A lawyer or a person other than a lawyer who helps clients with legal issues; to advocate a position on behalf of a client.

affidavit

A legal document in which a person provides evidence of certain facts and events in writing, as if the evidence was given orally in court. Affidavits must be notarized by a lawyer or notary public who takes the oath or affirmation of the person making the affidavit to confirm the truth of the affidavit. Affidavits are used as evidence, just as if the deponent, the person making the affidavit, had made the statements as a witness. See "deponent" and "witness."

affidavit of service

A legal document required by the rules of court in which a person who has personally served someone describes the circumstances in which the person was served. This may be essential to prove personal service, particularly if the serving party intends to seek a default judgment, as is usually the case in a desk order divorce. See "default judgment" and "personal service."

affirm

To promise that a statement is true. When someone "swears" to tell the truth, they are taking an oath on their faith in a god. Affirming is a substitute for taking an oath, and is most often employed where the person making the statement is an atheist or under a religious proscription from making oaths. See "affidavit," "oath," "perjury" and "witness."

age of majority

The age at which a child becomes a legal adult with the full capacity to act on their own, including the capacity to sue and be sued. In British Columbia, the age of majority is 19. The age of majority has nothing to do with being entitled to vote or buy alcohol, although federal and provincial laws sometimes link those privileges with the age at which one attains majority. See "disability" and "infant."

agent

In law, someone acting on behalf of someone else, with that person's express permission and normally at their express direction.

alias

A name by which people know you other than your legal name. Aliases are not illegal in British Columbia.

alienating

In family law, the actions or statements of one parent that tend to sever, damage, or harm a child's relationship with or affections for the other parent.

allegation

A claim that a certain set of facts is true, such as "on Monday, I had soup for lunch" or "Bob drives a blue Camaro." Also called an "allegation of fact" or a "statement of fact."

alternative

A phrase used to indicate secondary relief or a secondary ground of relief in a claim or application, usually presented as an option to the primary relief or primary ground of relief. See "motion," "pleadings," and "relief."

alternative dispute resolution

A phrase referring to a family of processes intended to resolve disputes outside of the court system, including arbitration, mediation, negotiation, and collaborative settlement processes. In family law, the purpose of alternative dispute resolution is to offer a less adversarial and less expensive way to resolve a dispute than having to go to court and have a judge resolve things.

amend

To change or alter a pleading or document that has already been filed in court or given to the other party. The resulting document is a separate document from the original and is called, for example, the "amended Notice of Family Claim" or the "amended separation agreement."

amicus curiae

A Latin phrase meaning "friend of the court." Usually refers to a lawyer who does not act for any of the parties and assists or brings relevant information to the attention of the judge.

annulment

A declaration by a judge that a marriage is invalid. The effect of such a declaration is to make it as if the marriage never occurred. See "ab initio," "declaration" and "marriage, validity of."

answer

A response to an allegation of fact or to a claim. Usually refers to documents which reply to the allegations or claims made by the other party, such as a "Response to Family Claim" or a "Reply."

appeal

An application to a higher court for a review of the correctness of a decision of a lower court. A decision of a judge of the Provincial Court of British Columbia can be appealed to the Supreme Court of British Columbia. A decision of a judge of the Supreme Court can be appealed to the Court of Appeal for British Columbia.

appellant

The party who brings an appeal of a lower court's decision. See also "appeal" and "respondent."

applicant

A party who brings an application to the court for a specific remedy or relief. Usually refers to the party making an interim application, but in the Provincial Court can mean the person who starts a court proceeding. See also "court proceeding," "application respondent" and "interim application."

application

A request to the court that it make an order for a specific remedy or relief usually on an interim or temporary basis, also called a "chambers application" or a "motion." See also "interim application" and "relief."

Application to Obtain an Order

A legal document required by the Provincial Court Family Rules to bring a court proceeding, which sets out the relief sought by the applicant against the person named as respondent. See "action," "applicant," "pleadings," "relief," and "respondent."

application respondent

A party against whom an interim application has been brought. See also "applicant" and "interim application."

Application Response

A legal document required by the Supreme Court Family Rules to reply to a Notice of Application, which sets out the relief agreed to and opposed by the application respondent and the facts in support of that position. See "interim application."

apportion

In family law, to divide equally, usually referring to the division of family property between spouses. See also "reapportion."

appraisal

A professional estimate of the worth of an asset. In family law, this is sometimes required for the court to fix the value of property such as an art collection or a house.

apprehend

In law, to take or to seize. In family law, this term usually refers to the taking of a child out of the care of his or her parents by the police or child welfare authorities.

arbitration

A dispute resolution process in which an arbitrator hears the evidence and arguments presented by the parties to a legal dispute and makes an award which resolves the dispute and which is binding on the parties. See "alternative dispute resolution" and "family law arbitrator."

argument

In law, an attempt to persuade by logical reasoning. Usually refers to oral or written argument presented to a judge following the presentation of evidence, or to a written summary of argument.

arrear

Child support or spousal support that is owing because of an order or agreement but is unpaid.

assent

Agreement, approval.

assess

To determine the value or amount of something. A lawyer's bill may be *assessed* by a registrar to determine the actual amount the client should pay. See "appraisal."

assign

In law, to transfer an interest or right in something to someone else. People who go on welfare, for example, are required to assign their rights to apply for child support and spousal support to the provincial government.

attest

To swear or affirm something to be true, usually in the context of oral evidence or affidavit evidence.

B

bad faith

Intentionally misleading someone else, whether by doing or not doing something; acting in a manner contrary to one's actual intention; failing to act honestly and openly. Also known by the Latin phrase *male fides*. See *bona fides*.

bar

In law, the physical railing separating the public gallery in a courtroom from the portion where the judge and lawyers sit; lawyers as a group; where lawyers go after work.

barrister and solicitor

A lawyer; a person licensed to practise law in a particular jurisdiction. In England "barristers" do trial work and "solicitors" draft legal documents. In Canada, lawyers are both barristers and solicitors.

bastard

A child of unmarried parents; an illegitimate child. Bastards used to be at a profound legal disadvantage; however, the law has changed so that such children are treated no differently than children born of a marriage. The appearance of this definition below that of "barrister and solicitor" is purely coincidental.

bench

The court; judges as a group; the place where a judge sits in a courtroom.

beneficiary

A person for whom a trustee holds a trust; the recipient or intended recipient of property given in a will. See "heir," and "trust."

bigamy

The act of going through a form of marriage ceremony with one person while being already married to someone else. This is a criminal offence in Canada, although one that is rarely, if ever, enforced. Bigamous marriages, subsequent to the first marriage, are void *ab initio*. See "ab initio" and "marriage, validity of."

bill

In law, a piece of draft legislation presented to the legislature for its approval; a lawyer's statement of account for services rendered to his or her client. See "account," "act," and "lawyer's fees."

bill of costs

In British Columbia, an account prepared by the party who is awarded their costs of an action or application and is presented to the other party for payment. A bill of costs is prepared according to a formula set out in the Supreme Court Family Rules.

binding

In law, a requirement or obligation to honour and abide by something, such as a contract or order of the court. A judge's order is "binding" in the sense that it must be obeyed or a certain punishment will be imposed. Also refers to the principle that a higher court's decision on a point of law must be adopted by a lower court. See "contempt of court" and "precedent."

bona fide

A Latin phrase meaning "in good faith." Doing something honestly and openly, without intending to mislead, deceive, or harm someone else. See "bad faith."

breach of contract

Acting or not acting in a manner that is contrary to the terms of a contract. In family law, the breach of one party usually gives rise to a cause of action for the other party, but the breach is unlikely to allow the other party to treat the agreement as if it were cancelled or had been voided.

brief

In law, a written argument; a memorandum of law. A brief is usually presented to a judge as a summary of an argument or the law on a particular issue. Curiously, briefs are rarely brief.

BTW

A law student's mnemonic device, short for "Bigamy = Two Wives."

burden of proof

The obligation of a party to prove his or her case; the onus of proof. The burden of proof usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of statute. In civil litigation, a party must prove his or her case on the balance of probabilities. See "onus."

business days

A method of calculating time under which the days for a legal deadline are determined based on when the court is open for business, excluding weekends and holidays. See "calendar days" and "clear days."

C

calendar days

A method of calculating time under which the days for a legal deadline are counted as they appear in the calendar, including weekends and holidays. See "business days" and "clear days."

case

In law, a court proceeding; a lawsuit; an action; a cause of action; a claim. Also the historic decisions of the court. See "action," "case law," "court proceeding," and "precedent."

case at bar

The case presently before the court; the case being argued.

case law

The law as is established and developed by the decisions made in each court proceeding. See "common law."

cause

In law, a lawsuit, an action, or a cause of action; the wrongful act of another which gives rise to a claim for relief. See "action," "cause of action."

cause of action

The behaviour of a person that gives rise to a claim for relief. For example, a spouse's adultery gives rise to the other spouse's right to claim a divorce. The adulterous act is the cause of action for the divorce claim.

certificate of costs

A document endorsed by a master or registrar stating the amount owed as "costs" by one party to the other after a trial, usually issued following a hearing to settle the amount of the costs justly owed. A certificate of costs is a judgment of the Supreme Court and enforced as like a judgment debt.

certificate of fees

A document endorsed by a master or registrar stating the amount a client owes to his or her lawyer, issued following a hearing to "assess" or "tax" a lawyer's bill and determine what portion of the lawyer's bill was reasonable and is properly owed to or refundable by that lawyer. See "account."

Certificate of Pending Litigation

A document filed in the office of the Land Title and Survey Authority against the title of real property, stating that the property is the subject of a court proceeding and that ownership of the property may change as a result; formerly called a *lis pendens*. In family law, a CPL is used to protect the interest of a party in a piece of property by notifying potential purchasers or mortgagees about the court proceeding. See "clear title," "encumbrance," and "real property."

Charter of Rights and Freedoms

Also known as the *Charter*, the part of the *Constitution Act, 1982* that sets out the fundamental rights and freedoms enjoyed by all Canadians, including the freedoms of religion and expression and the rights to life and liberty. Neither the federal nor the provincial governments can pass laws or act in ways contrary to the *Charter*.

chattel

Personal property; an item of property other than real estate. See "real property."

child

A person who is younger than the legal age of majority, 19 in British Columbia. See "age of majority."

child support

Money paid by one parent or guardian to another parent or guardian as a contribution to the cost of a child's living expenses.

Child Support Guidelines

A regulation to the federal *Divorce Act*, adopted by every province and territory except Quebec, that sets the amount of child support a parent or guardian must pay, usually based on the person's income and the number of children involved.

circumstantial evidence

Evidence that doesn't prove a fact but allows a court to logically infer a fact; indirect proof of a fact. For example, a fixed amount of money deposited every two weeks into someone's bank account may allow the court to infer that the person has a job even though there is no direct evidence of that person's employment.

civil action

A court proceeding other than a criminal court proceeding. All family law court proceedings are civil actions.

Civil Marriage Act

Federal legislation that expands the common law definition of spouse to include persons of the same gender, thereby allowing persons of the same sex to marry one another.

claim

The assertion of a legal right to an order or to a thing; the remedy or relief sought by a party to a court proceeding.

claimant

The person who starts a court proceeding seeking an order for specific remedy or relief against another person, the respondent. See "action" and "respondent."

clear days

A method of calculating time under which the days for an action to occur are counted by excluding the first day and the last day in the period. For example, a court order obtained on Monday that says that someone can apply to vary the order on "two clear days' notice" means that the soonest the person could apply is Thursday. See "business days" and "calendar days."

clear title

Ownership of property without any debt, liens, or claims being registered against the property. For example, owning a piece of land without a mortgage or a CPL on the property, or owning a car without a car loan. See "Certificate of Pending Litigation."

coercion

The use of force or intimidation, whether emotional or physical, to compel another person to do something; interference with another person's freedom of choice to obtain an outcome, action or behaviour.

cohabitation

Living with another person, shacking up. Cohabitation in a "marriage-like relationship" is necessary to qualify as "spouse" under the *Family Law Act*. See "marriage-like relationship" and "spouse."

cohabitation agreement

An agreement signed by people who are or have begun to live together in a marriage-like relationship that is intended to govern their rights and obligations in the event of the breakdown of their relationship and, sometimes, their rights and obligations during their relationship. See "family law agreement."

collaborative settlement processes

A dispute resolution process in which the parties to a legal dispute and their lawyers agree that they will make every effort to resolve the dispute through cooperative, transparent negotiations, with the assistance of counsellors and neutral experts in financial issues and children's issues as necessary, without going to court. See "alternative dispute resolution."

collusion

An agreement to do something with another person towards an illegal or harmful goal. In family law, the court must satisfy itself that there has been no collusion between the parties as to the ground of divorce before a divorce order will be made.

common law

The legal principle under which courts are bound to follow the principles established by previous courts in similar cases dealing with similar facts. The system of justice used in non-criminal cases in all provinces and territories except Quebec.

common-law marriage

A form of marriage without government or church licence, and often without ceremony, in which a couple acquired certain rights and obligations toward each other under the common law, banned as a result of the 1753

English *Marriage Act*. Common-law marriages have never been lawful in British Columbia. See "unmarried spouse."

common-law spouse

A popular misconception under which people are supposed to become married spouses simply by living together. Common-law marriages have never been lawful in British Columbia. See "common-law marriage," "married spouse" and "unmarried spouse."

competent

In law, having the capacity, ability or authorization to do a thing. A person who is competent to give evidence is sane and able to understand the issues and results of his or her evidence. A court that is competent has the authority to deal with the issues in a case and authority over the parties to that case.

conclusion of fact

A judge's decisions as to what the facts of a case are, based on the evidence he or she has heard and his or her evaluation of the credibility of the witnesses giving the evidence. See "conclusion of law," "evidence," "question of fact," and "witness."

conclusion of law

A judge's decision as to how the law, including any relevant legislation or principles of the common law, should be applied to the facts of a particular case. See "common law," "conclusion of fact," "question of law," and "legislation."

concur

To agree.

concurrent

Happening or existing at the same time. Two courts with concurrent jurisdiction each have the jurisdiction to hear the same case and deal with the same issues.

condonation

Forgiving the wrongful or harmful act of another. In family law, condonation usually refers to forgiving an act of adultery or cruelty and the continuation of the parties' relationship as it had been before. See "adultery," "cruelty, mental or physical," and "divorce, grounds of."

conjugal rights

A somewhat outdated idea involving each spouse's entitlement to the benefits of the different aspects of married life from the other, including the comforts of living together, eating at the same table, sympathy, mutual confidence, sex and so forth.

connivance

Intentionally causing or permitting a wrongful act to happen to obtain a goal. In family law, a married spouse conspiring towards the adultery of the other spouse for the purpose of claiming adultery as a ground of divorce. A divorce will not be granted where connivance as to the ground of divorce relied on is found. See "adultery," "collusion," "condonation," and "divorce, grounds of."

consanguinity

Being related to another person by blood. For a marriage to be valid, the parties must not be within the prohibited degrees of consanguinity or adoption. See "marriage," "*Marriage (Prohibited Degrees) Act*" and "marriage, validity of."

consent

Agreement; the giving of permission for a thing to happen or not happen.

consent order

An order resolving all or part of a court proceeding, on an interim or final basis, that the parties agree the court should make.

consortium

The marital relationship between spouses, specifically the right of each spouse to the company and aid of the other. See "conjugal rights."

conspiracy

The agreement of two or more people to perform an unlawful act or to do a lawful act by unlawful means. A conspirator is a party to a conspiracy. See "lawful."

constitution

The rules that set out the political and legal organization of a state. The power and authority of the governments and the courts, as well as their limits, stem from the constitution. In Canada, there are two primary constitutional documents, the *Constitution Act, 1867* and the *Constitution Act, 1982*. The *Charter of Rights and Freedoms* is part of the "*Constitution Act, 1982*."

construction

In law, the interpretation of something, like a document or a set of circumstances, so as to give it meaning. For example, if a separation agreement stated that one guardian "will have the children on Monday, Tuesday, and Friday" but didn't say anything about the other guardian, the agreement would be *constructed* to mean that the other guardian would have the children on the days that weren't mentioned.

contact

A term under the *Family Law Act* that describes the visitation rights of a person who is not a guardian with a child. Contact may be provided by court order or by the agreement among the child's guardians who have parental responsibility for determining contact. See "guardian" and "parental responsibilities."

constructive trust

In family law, the finding by a court that a person holds a portion of his or her assets for the benefit of the other party without an express agreement to that effect between the parties. See "resulting trust" and "trust."

contempt of court

Doing something or failing to do something that impairs the administration of justice or respect for the court's authority, such as bribing a witness, disobeying a court order, or misleading the court. Contempt of court can be a civil offence as well as a criminal offence.

contingency fees

An arrangement whereby a lawyer is paid by taking a percentage of the money awarded to his or her client by the court or a settlement. Contingency fee agreements are not allowed in family matters, although sometimes a lawyer will agree to be paid from the assets held by a party following the final resolution of an action, such as the proceeds of the sale of a family asset. See "account," "lawyer's fees" and "retainer."

continuance

The continued hearing of an application or trial following a partial hearing at an earlier date. See "adjournment."

contract

An agreement between two or more people that gives them mutual obligations towards each other that can be enforced in court. A valid contract must be offered by one person and accepted by the other, and some form of payment or other thing of value must generally be exchanged between the parties to the contract.

contract law

The branch of law dealing with the interpretation and enforcement of contracts. The principles of contract law are usually but not always applicable to family law agreements.

corollary relief

In court proceeding for divorce, this term refers to all relief claimed apart from the divorce order itself. For example, in a court proceeding for divorce and custody, the claim for custody is corollary relief. See "action" and "relief."

corporal punishment

In family law, the physical punishment of a child by a parent, guardian, or other authorized person. Corporal punishment is permitted under the *Criminal Code*, but only to a limited extent and only by certain persons, including parents and teachers.

costs

A calculation of the allowable legal expenses of a party to a court proceeding, as determined by the Supreme Court Family Rules. The party who is most successful in a court proceeding is usually awarded their "costs" of the proceeding. See "account, "bill of costs," "certificate of costs," and "lawyer's fees."

counsel

A lawyer; the advice given by a lawyer to his or her client.

Counterclaim

A legal document required by the Supreme Court Family Rules in which a respondent sets out a claim for a specific remedy or relief against a claimant. See "Notice of Family Claim" and "Response to Family Claim."

Court of Appeal

The highest level of court in this province, having the jurisdiction to review decisions of the Supreme Court, all provincial lower courts and certain tribunals. See "appeal."

court proceeding

A legal proceeding in which one party sues another for a specific remedy or relief, also called an "action," a "lawsuit" or a "case." A court proceeding for divorce, for example, is a proceeding in which the claimant sues the respondent for the relief of a divorce order.

court registry

A central office, located in each judicial district, at which the court files for each court proceeding in that district are maintained, and at which legal documents can be filed, searched, and reviewed.

covenant

A promise to do or not do a particular thing. See "contract," "family law agreements" and "separation agreements."

CPL

The short form for "Certificate of Pending Legislation." A CPL is a document filed in the office of the Land Title and Survey Authority against the title of real property stating that the property is the subject of a court proceeding and that ownership of the property may change as a result, formerly called a *lis pendens*. In family law, a CPL is used to protect the interest of a party in a piece of property by notifying potential purchasers or mortgagees about

the court proceeding. See "clear title," "encumbrance," and "real property."

cross-examination

The portion of a trial where a party asks questions of a witness presented by the other party in order to challenge the witness's recollection and truthfulness. The questions asked of the witness must be relevant to the issues and may be leading, that is, the question may suggest the answer. See "examination-in-chief," "evidence," and "leading question."

Crown

In law, the federal and provincial governments and their departments and agencies. Lawyers employed by the federal and provincial governments to prosecute criminal offences.

cruelty

In family law, the physical, verbal, emotional or mental abuse of one married spouse by the other. Proof of cruelty is grounds for an immediate divorce, providing that the other spouse has not forgiven the adulterous act. See "condonation" and "divorce, grounds of"

custody

In family law, an antiquated term used by the *Divorce Act* to describe the right to possess a child and make parenting decisions concerning the child's health, welfare and upbringing. See "access."

D

damages

An award of money payable by one party to a court proceeding to another, usually as compensation for loss or harm suffered as a result of the other party's actions or omissions. In family law, damages are usually awarded to one party in compensation for breach of contract or spousal abuse. See "breach of contract" and "tort."

debt

A sum of money or an obligation owed by one person to another. A "debtor" is a person responsible for paying a debt; a "creditor" is the person to whom the debt is owed.

decision

In law, a judge's conclusions after hearing argument and considering the evidence presented at a trial or an application; a judgment; the judge's reasons. A judge's written or oral decision will include the judge's conclusions about the relief or remedies claimed as well as his or her findings of fact and conclusions of law. A written decision is called the judge's "reasons for judgment." See "common law," "conclusions of law," and "findings of fact."

declaration

In law, a pronouncement of the court about a fact or a state of affairs, such as a declaration that a marriage is void or that a person is the guardian of a child. Not to be confused with an order, which is a mandatory direction of the court requiring a party to do or not do something. See "order."

deem

To make an assumption that one thing follows logically from another; a presumption of a fact based on other facts. Sometimes, a presumption of a fact required by law, such as the presumption that a respondent who files a Response to Family Claim is presumed to have been served with the Notice of Family Claim.

de facto

A Latin phrase meaning "in fact."

default

In law, failing to do something which is either optional or mandatory, such as failing to respond to an application or to a claim within the time limits set out in the rules of court. See "default judgment."

default judgment

A judgment obtained by a claimant following the respondent's failure to reply to the claimant's claim within the proper time from service. In the Supreme Court, a respondent who has been properly served with a Notice of Family Claim has 30 days to file a Response to Family Claim. Once those 30 days have elapsed without the response being served on the claimant, the claimant may apply to the court for a judgment in default. This is the basis for divorce orders made under the desk order divorce process. See "desk order divorce" and "Response to Family Claim."

defence

A reply, a rebuttal, an answer to a court proceeding or an application; a statement as to why a particular claim or application should not succeed.

de jure

A Latin phrase meaning "by law." By operation of law; as a matter of law; by legal right.

delivery

Sending legal documents to a party at that party's "address for service," usually by mail, fax or email, called "ordinary service" in proceedings before the Supreme Court. Certain documents, like a Notice of Family Claim, must be served on the other party by personal service. Most other documents may be served by ordinary service. See also "address for service" and "personal service."

demand letter

A letter describing a legal claim sent to the person against whom the claim might be made, offering to settle the claim without the necessity of legal action. Demand letters are usually issued before court proceedings have commenced in order to settle a potential claim without the need for litigation.

de minimus non curat lex

A Latin maxim meaning "the law does not concern itself with trifles," also known by its short form, *de minimus*. This maxim stands for the idea that some claims or arguments, even though legally correct or valid, are too small or trivial to be dealt with by the court.

denial

Defending a claim by denying the truth of a fact supporting the claim; a rejection of the truth of facts alleged.

de novo

A Latin phrase meaning "anew." Renewed; from the beginning. An application or trial heard *de novo* is heard for a second time without considering or the court being bound by the result of the first hearing.

dependant

A person who relies on someone else for their support and the necessities of life. See "child," "child support" and "spousal support."

deponent

A person giving information under affirmation or oath; a witness. Refers to both a person giving testimony at a trial and a person making an affidavit. See "affidavit," "evidence," "testimony" and "witness."

desertion

The abandonment of one married spouse by the other. This is an old ground of divorce that has been replaced in the modern *Divorce Act* with simple separation for a period of at least one year. See "divorce, grounds of" and "separation."

desk order divorce

A process in which a divorce order, with or without other corollary relief, is obtained following the respondent's failure to file a Response to Family Claim. A desk order divorce does not require a hearing in court and is the cheapest way to obtain a divorce order. See "corollary relief" and "divorce."

disability

In law, a legal incapacity to do certain things, like enter into a contract or start a court proceeding. Legal disabilities include insanity and being under the age of majority. See "age of majority."

disbar

To strip a lawyer of his or her right to practice law, usually after a formal inquiry by the Law Society.

disclosure

A step in a court proceeding in which each party advises the other of the documents in his or her possession which relate to the issues in the court proceeding and produces copies of any requested documents before trial. This process is regulated by the rules of court, which put each party under an ongoing obligation to continue to advise the other of new documents coming into their possession or control. The purpose of this step is to encourage the settlement of court proceedings and to prevent a party from springing new evidence on the other party at trial.

discontinuance

The termination of a claim by the claimant or the termination of a counterclaim by a respondent. The discontinuance of a claim indicates the party's intention not to proceed with his or her claim. See "action" and "Counterclaim."

discovery

A step in a court proceeding in which a party is entitled to demand that the other produce requested documents and submit to a cross-examination on oath or affirmation outside of court before trial. This process is regulated by the rules of court. The purpose of this step is to encourage the settlement of court proceedings and to make sure that each party knows what the other party's case will be trial. See "examination for discovery."

dismiss

In law, a judge's decision not to grant a claim or to reject a court proceeding with or without trial. An application that is *dismissed* has been rejected by the judge. See "application."

dispute resolution

A phrase referring to a family of processes used for resolving legal disputes including negotiation, collaborative settlement processes, mediation, arbitration and litigation.

dissent

Disagreement; the decision of a judge of the Court of Appeal who disagrees with the decision reached by the majority of the judges who heard the same appeal. See "appeal" and "Court of Appeal."

divorce

The legal termination of a valid marriage by an order of a judge; the ending of a marital relationship and the conjugal obligations of each spouse to the other. See "conjugal rights," "marriage," and "marriage, validity of."

Divorce Act

Federal legislation that deals with divorce, custody and access, child support, spousal support and the recognition of divorce orders made outside of Canada.

divorce, grounds of

The *Divorce Act* provides one ground upon which the court may make a divorce order, marriage breakdown. Marriage breakdown may be established on proof of the spouses' separation for at least one year, a spouse's adultery, or a spouse's cruelty toward the other spouse. See "adultery," "cruelty," "divorce," and "separation."

domestic contract

In family law, an agreement between two or more persons about legal issues that have arisen or made arise, dealing with their respective rights and obligations to one another, that the parties expect will be binding on them and be enforceable in court. Typical domestic contracts include marriage agreements, cohabitation agreements and separation agreements

domicile

The place where one has one's permanent home, where one lives most of the time; sometimes the place where one intends to have a permanent home. A party's domicile may have an impact on the jurisdiction of the court to hear a court proceeding, deal with certain claims made in a court proceeding and on the law that applied to divide property and debt. See "jurisdiction" and "residence."

donee

A person who receives a gift or bequest.

donor

A person giving something as a gift or as a bequest, and does so freely and without expectation of payment in return.

dower

The entitlement of a wife to a portion of her husband's estate on his death under the common law. This right is extinguished in British Columbia and is replaced by the provisions of the *Estate Administration Act* and the *Wills Variation Act* that give a surviving spouse certain rights to share in the estate of the deceased person.

dowry

In some cultures, the real property and personal property brought into the marriage by the wife; the property given to a wife by her husband in return for her marriage to him. There is no legal entitlement to dowry in Canada, and agreements for dowry will not normally be enforceable. See "chattels" and "real property."

draft

A preliminary version of a document; an order prepared following judgment submitted to the court for its approval; to prepare, or *draw*, a legal document.

duress

Forcing someone to do something through psychological or emotional pressure; a defence to the enforcement of a contract. If, for example, a separation agreement was entered into under duress, that may be a ground to dispute or set aside that agreement.

duty

In law, a legal obligation to do or not do something, whether under the common law or pursuant to legislation.

duty counsel

A lawyer paid by legal aid or the government who provides limited legal services to people on the day that they are in court.

E

election

In law, the making of a choice between two or more options.

enactment

A government action or declaration intended to have a legal effect, usually in the form of legislation or regulation. See "act" and "regulations."

encumbrance

A legal right, usually to payment of a debt, that is secured by registration of the right on the title of property. For example, a mortgage is secured against the title of real property and is registered as an *encumbrance* on title. See "Certificate of Pending Litigation," "clear title," and "real property."

endorse

In law, to sign a document or otherwise formally signal one's approval or acceptance of a document, proposal, contract or draft order.

endowment

In family law, the giving of dower to a wife or dowry by a wife. See "dower" and "dowry."

enjoin

To prohibit or restrain someone from doing something, normally by order of the court. See "restraining order."

enticement

In family law, the act of intentionally causing a wife to leave her husband or intentionally interfering with a married couple's consortium, formerly a common law cause of action. The *Family Law Act* expressly forbids legal actions based on enticement. See "cause of action," "conjugal rights," and "consortium."

ergo

A Latin word meaning "therefore."

error of law

A ground of appeal based on a claim that the trial judge did not apply the law correctly in reaching his or her decision. This is the most common ground of appeal. See "appeal."

estate

The personal property and real property that a person owns or in which he or she has an interest, usually in connection with the prospect or event of the person's death.

et al.

A Latin phrase meaning "and others," short for *et alia* — because "alia" is just such a pain to write out. Formerly used in a style of cause to indicate that there are more parties to a legal action than are listed, and now replaced with the English phrase. See "style of cause."

evidence

Facts or proof of facts presented to a judge at a hearing or trial. Evidence can be given through the oral testimony of witnesses, in writing as business records and other documents, or in the form of physical objects. Evidence must

be admissible according to the rules of court and the rules of evidence. See "circumstantial evidence," "hearsay," and "testimony."

evidentiary burden

The obligation of a party to prove his or her case, the onus of proof. The burden of proof usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of statute. In civil litigation, a party must prove his or her case on the balance of probabilities.

examination-in-chief

The portion of a trial where a party asks questions of their own witnesses to elicit evidence of certain facts. The questions asked of the witness cannot be leading, that is, the answer cannot be suggested in the question. See "cross-examination" and "evidence."

examination for discovery

The cross-examination of a party under oath or affirmation about the matters at issue in a court proceeding conducted prior to trial. An examination for discovery is held outside court, with no one in attendance except for the parties, the parties' lawyers and a court reporter. The court reporter produces a transcript of the examination, which may, in certain circumstances, be used at trial. See "discovery."

excluded property

A term under the *Family Law Act* referring to property acquired by a spouse prior to the commencement of the spouses' relationship and certain property acquired by a spouse during the relationship, including gifts, inheritances, court awards and insurance proceedings. A spouse is presumed to be entitled to keep his or her excluded property without having to share it with the other spouse. See "family property," "gift," and "inheritance."

execute

In contract law, to complete or accomplish; to complete the legal formalities necessary to give a document effect. One "executes" a separation agreement, for example, by signing it in the presence of a witness.

executor

The person responsible for carrying out the instructions in a will and wrapping up a deceased person's estate and debts. The lovely feminine form of the word is "executrix," though the masculine form is commonly applied to executrices. See "estate," "testator," and "will."

ex parte

A Latin phrase meaning "from one party." Refers to an application that is brought before the court without notice being given to the other party. Such applications are only heard in urgent situations, for example, where a guardian has threatened to flee with the children. See "application."

expert evidence

Opinion evidence given by an expert at trial, in an affidavit or in a report. Opinion evidence is a statement about what a witness thinks or believes, rather than something personally known as a fact, and is generally not admissible at trial except when the opinion is provided by an expert. A person presented as an expert witness must be approved by the court as a qualified expert in his or her field. In family law, experts typically called to give evidence include accountants, business valuers, doctors, and psychologists. See "evidence" and "witness."

F

family debt

A term under the *Family Law Act* referring to debt owed by either or both spouses that accumulated during the spouses' relationship and after separation, if used to maintain family property. Both spouses are presumed to be equally liable for family debt.

family home

In family law, the dwelling occupied by a family as their primary residence. See "family property" and "real property."

Family Law Act

Provincial legislation that deals with parentage, guardianship, parental responsibilities and parenting time, contact, child support, spousal support and the division of property and debt.

Family Law Act Regulation

A provincial regulation that prescribes the training necessary to work as a family law mediator, a family law arbitrator and a parenting coordinator and adapts the federal Child Support Guidelines for the purpose of the *Family Law Act*. See "Child Support Guidelines" and "*Family Law Act*."

family law agreement

An agreement between two or more persons about family law issues that have arisen or made arise, dealing with their respective rights and obligations to one another, which the parties expect will be binding on them and be enforceable in court. Typical family law agreements include marriage agreements, cohabitation agreements and separation agreements.

family law arbitrator

A lawyer or another person with special training in the arbitration of family law disputes who meets the training and experience requirements set out in the provincial Family Law Act Regulation. See "arbitration."

family law mediator

A lawyer or another person with special training in the mediation of family law disputes who meets the training and experience requirements set out in the provincial Family Law Act Regulation. See "mediation."

family property

A term under the *Family Law Act* referring to property acquired by either or both spouses during their relationship and after separation, if bought with family property. Both spouses are presumed to be equally entitled to share in family property. See "excluded property."

Family Relations Act

Former provincial legislation that dealt with custody, guardianship, access, child support, spousal support and, for married spouses, the division of family assets. Now repealed except for certain lingering effects involving the division of property. See "*Family Law Act*."

final judgment

A judge's decision that finally determines some or all of the claims in a court proceeding, following which there is no other recourse open to a dissatisfied party except an appeal. See "decision."

Financial Statement

A legal document required by the rules of court in which a party to a court proceeding involving child support, spousal support, the division of property or the division of debt must describe his or her income, expenses, assets and liabilities under oath or affirmation. See "affirm," "oath," and "perjury."

finding

A conclusion made by a judge, which decides a point of law or a disputed fact.

finding of fact

A judge's conclusion about the facts in a court proceeding, made after hearing all the evidence. See "decision" and "question of fact."

finding of law

A judge's conclusion about the law to be applied to the facts in a court proceeding, or how the law should be applied to the facts in a proceeding, made after hearing the parties' arguments on the applicable law. See "decision" and "question of law."

fornication

Sex between two unmarried people. No longer a criminal offence in Canada, thankfully, although it remains an offence in certain American states. See "adultery."

forum

In law, a particular court or level of court, sometimes used in reference to the court's jurisdiction over a particular issue.

foster care

A home where a child lives other than with his or her natural or adoptive parents. Such a situation usually arises when the child welfare authorities have apprehended a child or when a child's parents voluntarily give the child up. See "apprehension."

foster parent

An adult charged with the care of a child who is not his or her own natural or adoptive child, usually in the position of a guardian to the child, who receives money in exchange for caring for the child. See "apprehension" and "guardian."

frivolous and vexatious

A term under the provincial *Supreme Court Act* describing court proceedings or applications brought by a litigant that are clearly unsupported by the evidence or the law. Such behaviour is considered to be a nuisance to other parties to those proceedings and a waste of the court's time, and may result in an order preventing the litigant from taking further legal steps without permission from the court. See "action" and "litigant."

frustration

In contract law, the inability to complete or fulfill a contract, whether intentional or unintentional; the intentional interference with a person's rights under a contract or court order. In family law, the motivation for an application for annulment based on non-consummation of the marriage. A contract that cannot be completed or fulfilled is said to be "frustrated."

G

gainful employment

Steady work for pay. In family law, a dependent spouse usually has a duty to find gainful employment and become self-sufficient following the breakdown of a relationship. Under certain circumstances, a failure to find gainful employment, or to take reasonable steps toward finding gainful employment, may justify the termination of spousal support. See "dependent" and "spousal support."

gift

A voluntary transfer of property from one person to another, without expectation of payment or reward. Gifts to one spouse do not usually qualify as family property, and are excluded from the pool of property to be divided. See "donee," "donor," "excluded property," and "family property."

good faith

Acting in an honest, truthful, open and fair manner, without the intent to deceive or defraud. Also known by the Latin phrase *bona fide*. See "bad faith."

guardian

A person charged with the legal care of someone under a legal disability. A term under the *Family Law Act* referring to a person, including a parent, who is responsible for the care and upbringing of a child through the exercise of parental responsibilities. See "disability," "parental responsibilities" and "parenting time."

guardian *ad litem*

A Latin phrase meaning a guardian "for the litigation." A person conducting a court proceeding on behalf of someone under a legal disability, as if they were that person. Also called a "litigation guardian." See "disability."

Guidelines

Short for the Child Support Guidelines, a regulation to the federal *Divorce Act*, adopted by each province and territory except Quebec, that sets the amount of child support a parent or guardian must pay based on the person's income and the number of children involved.

H

Hague Conventions

Legal agreements binding between signatory nations at the Hague. While there are a number of these agreements, the most important for family law matters is the Hague Convention on the Civil Aspects of International Child Abduction, which deals with the return of children from foreign countries to which they have been wrongly removed by a parent or guardian.

hearing

In law, any proceeding before a judicial official to determine questions of law and questions of fact, including the hearing of an application and the hearing of a trial. See "decision" and "evidence."

hearsay

Evidence of which a witness has no direct, personal knowledge. For example, evidence to the effect that "Pierre told me that Mitsou trashed the car" or "Mitsou told me she trashed the car" are both hearsay. Hearsay evidence is not usually admissible. There are a number of exceptions to the general rule against hearsay, the most important of which allows hearsay evidence in interim applications as long as the source of the hearsay information is identified. See "affidavit," "application," "evidence," and "witness."

heirs

In wills and estates law, the people intended or expected to receive property or other benefits under a will; a person's direct lineal descendants. See "executor" and "will."

I

indemnify

To make good financial loss or harm suffered by another.

indigent

Being flat broke. Persons with limited or no income may apply to the Supreme Court and Court of Appeal for *indigent status*, which will exempt them from paying the usual court fees for all or a part of a court proceeding.

infant

A person not yet of the age of majority, a minor, a child. See "age of majority," "child," and "disability."

Infants Act

Provincial legislation that governs the legal capacity of minors and contracts involving minors. See "age of majority," "child," and "disability."

inheritance

Real property or personal property received as a result of the provisions of a will or the *Estate Administration Act*. Inheritances do not usually qualify as family property subject to division between spouses. See "family property," "real property" and "will."

injunction

A court order that someone not do or cease doing a thing; a restraining order. In family law, injunctions are often sought, for example, to stop someone from removing the children from a place, from disposing of assets or from harassing someone. See "application" and "ex parte."

in loco parentis

A Latin phrase meaning "in the place of a parent." Acting as a parent in the place of the child's natural parent or intending to stand in the place of that parent. A married spouse found to be *in loco parentis* to a child may be responsible to pay child support for that child under the *Divorce Act*. See "natural parent" and "stepparent."

in personam

A Latin phrase meaning "against the person." Refers to a right or an order made against a person rather than in reference to a thing.

in rem

A Latin phrase meaning "against the thing." Refers to a right or an order made in reference to objects or property rather than against a person.

inspection of documents

The right of a party to a court proceeding to look at and copy documents held by the other party that relate to any matters at issue in the proceeding; part of the discovery and production process. See "disclosure" and "discovery."

instructions

In law, the directions given by a client to his or her lawyer about the conduct of his or her affairs or a court proceeding.

instrument

In law, a legal document that sets out certain rights and obligations, or records certain facts or entitlements to certain benefits and obligations, such as a contract, a waiver and a will. See "family law agreements" and "will."

inter alia

A Latin phrase meaning "among other things."

interim application

An application, also called in "interlocutory application," made after the start of a court proceeding but before its conclusion, usually for temporary relief pending the final resolution of the proceeding at trial or by settlement. In family law, interim applications are useful to determine issues like where the children will live, who will pay child support and whether spousal support should be paid on a rough and ready basis. See "application" and "interim order."

interim order

Any order made prior to the final resolution of a court proceeding by trial or by settlement; a temporary, rather than permanent or final order. See "application" and "interim application."

interlocutory

Literally, "between speakings;" refers to interim applications brought after the start of a court proceeding but before its conclusion. See "interim application" and "interim order."

interrogatories

Written questions given by one party to a court proceeding to the other that must be answered on the party's affirmation or oath in affidavit form; part of the discovery process. See "discovery."

intestate

Dying without a will. In such circumstances, the distribution of the dead person's estate is governed by the *Estate Administration Act*. See also "estate," "inheritance" and "will."

in the alternative

A phrase used to indicate secondary relief or a secondary ground of relief in a claim or application, usually presented as an option to the primary relief or primary ground of relief. See "motion," "pleadings" and "relief."

in trust

A phrase describing how property is held by one person for the benefit of another person who is ultimately entitled to the use or proceeds of sale of that property. Money held *in trust* is held in a lawyer's bank account on the lawyer's promise not to use that money except as may be agreed.

in utero

A Latin phrase meaning "in the womb." Used in reference to fetuses.

J

JD

To practise law in British Columbia one requires a law degree in the form of either a Bachelor of Laws degree (LL.B.) or a Juris Doctor degree (J.D.). "LL.M." stands for a Master of Laws degree and "LL.D." for a Doctor of Laws. A J.D. is the same thing as a LL.B. but sounds way more impressive.

joint account

A bank account owned by more than one person, normally with an equal entitlement to deposit or withdraw, with or without the consent of the other account holders.

joint custody

A term used by the *Divorce Act* when both spouses have custody of a child, giving both the right to make parenting decisions concerning the child's health, welfare and upbringing but not necessarily requiring or implying that the spouses have equal or near-equal amounts of time with the child. See "access" and "custody."

joint tenancy

A form of property co-ownership in which each joint tenant has a right of ownership of the whole property that is indistinct from the ownership rights of the other joint tenants. See "tenancy in common."

judge

A person appointed by the federal or provincial governments to manage and decide court proceedings in an impartial manner, independent of influence by the parties, the government or agents of the government. The decisions of a judge are binding upon the parties to the proceeding, and are subject to appeal.

judgment

A judge's conclusions after hearing argument and considering the evidence presented at a trial or an application; a decision, the judge's reasons. A judge's written or oral decision will include the judge's conclusions about the relief or remedies claimed as well as his or her findings of fact and conclusions of law. A written decision is called the judge's "reasons for judgment." See "common law," "conclusions of law," "findings of fact," and "final judgment."

jurisdiction

With respect to judges, the authority of the court to hear an action and make orders; the limits of the authority of a particular judicial official; the geographic location of a court; the territorial limits of a court's authority. With respect to governments, the authority of a government to make legislation as determined by the constitution; the limits of authority of a particular government agents. See "constitution."

justice

A judge of the superior courts of British Columbia, being the Supreme Court and the Court of Appeal.

justice of the peace

A court official appointed by the provincial government with limited decision-making authority and jurisdiction, usually charged with managing court schedules, the terms of release of arrested persons and other administrative tasks with a discretionary element. See "judge" and "jurisdiction."

L

land

Real property; a parcel of real property and the buildings upon it. See also "chattel," "ownership" and "possession."

Land (Spouse Protection) Act

Provincial legislation allowing married and unmarried spouses to file an "entry" on the title of the family home, whether court proceedings have been started or not, that will prevent the property from being transferred without their consent.

Land Title Act

Provincial legislation governing the ownership and transfer of land, in British Columbia, including the registration of Certificates of Pending Litigation, liens, judgments and mortgages. See "encumbrance" and "real property."

Land Title and Survey Authority

The provincial government agency responsible for maintaining written records of the ownership of real property in the province, together with a record of the encumbrances which may be registered against a property. See "Land Title Act" and "real property."

last will and testament

A legal document in which a person sets out how he wishes his or her property to be disposed of after death; a will. See "will."

lawful

Conduct that is permitted both by legislation and by the common law; conduct that is not prohibited by law. See "unlawful."

lawyer

A person licensed to practice law in a particular jurisdiction. See "barrister and solicitor."

lawyer's fees

The money charged by a lawyer to his or her client for the lawyer's services, usually pursuant to the terms of the lawyer's retainer agreement. Most lawyers bill by the hour with a premium for success or the difficulty or novelty of the case. A lawyer's bill may include "disbursements," costs incurred by the lawyer for such things as courier fees, court fees or photocopying expenses. See "account" and "certificate of fees."

lay litigant

A party to a court proceeding who is not represented by a lawyer and acts on his or her own behalf, a self-represented litigant, a *pro se* litigant. "Lay" in this context means without professional training. See "action," "lawyer" and "litigant."

leading question

A question asked of a witness, normally during cross-examination, which suggests the answer. For example: "You've never worked a day in your life, have you?" See "cross-examination."

lease

An agreement which requires payment for the use of property, under which the owner of property, like a car or an apartment, gives up the right to occupy and use that property in exchange for a sum of money. A "lessor" is the person who retains ownership of the property and receives money for its use. A "lessee" is the person who purchases the right of possession and use of the property.

legal description

In real property law, the full formal identification of a particular piece of property by its lot number, district lot number, block number, plan number and land district, rather than by its street address. See "Land Title and Survey Authority," "PID" and "real property."

legal duty

An obligation at law to do or not do a thing, whether by legislation, the common law or an order of the court. For example, the *Criminal Code* imposes a legal duty on parents that requires them to provide the necessities of life to their children until they turn 16. See "duty."

legislate

The power of a government to create and revise written laws governing things, people and places; a right of the provincial and federal governments to propose, enact and enforce laws derived from the *Constitution*. See "act" and "constitution."

legislation

An act; a statute; a written law made by a government. See "regulations."

lis pendens

The old name of a document filed in the Land Title and Survey Authority against the title of real property stating that the property is the subject of a court proceeding and that ownership of the property may change as a result, now known as a Certificate of Pending Litigation. See "Certificate of Pending Litigation."

litigant

A party to a court proceeding, such as an appellant, an applicant, a claimant or a respondent. See "action."

LL.B

To practise law in British Columbia one requires a law degree in the form of either a Bachelor of Laws degree (LL.B.) or a Juris Doctor degree (J.D.). "LL.M." stands for a Master of Laws degree and "LL.D." for a Doctor of Laws.

llama

A domesticated South American camelid, widely used as a meat and pack animal by Andean cultures.

M

maintenance

In family law, an antiquated term referring to child support and spousal support. See "child support" and "spousal support."

male fides

A Latin phrase meaning "in bad faith." Intentionally misleading someone else, whether by doing or not doing something; acting in a manner contrary to one's actual intention; failing to act honestly and openly. See "good faith."

malfeasance

Doing an act that is wrongful or unlawful by operation of law. A "malfeasant" is a person who has committed a wrongful or unlawful act. See "unlawful."

marriage

A legal relationship between two persons, whether of the same or opposite genders, that is solemnized by a marriage commissioner or licenced religious official and gives rise to certain mutual rights, benefits and obligations. See also "conjugal rights," "consortium" and "marriage, validity of."

marriage, validity of

For a marriage to be valid, the spouses must be unmarried at the time of the marriage, not within the prohibited degrees of consanguinity, and capable of understanding the meaning of marriage, and the marriage must be performed by a person entitled to solemnize marriage in the jurisdiction where the marriage is performed under the laws of that jurisdiction. See "age of majority," "bigamy," "consanguinity" and "disability."

Marriage Act

Provincial legislation that governs the capacity to marry and the formalities of the marriage ceremony.

marriage agreement

An agreement signed by people who are planning on marrying or have married that is intended to govern their rights and obligations in the event of the breakdown of their marriage and, sometimes, their rights and obligations during their marriage. See "family law agreement."

marriage-like relationship

In family law, the quality of an unmarried couple's relationship that demonstrates their commitment to each other, their perception of themselves as a couple and their willingness to sacrifice individual advantages for the advantage of themselves as a couple; a legal requirement for a couple to be considered spouses without marrying. See "cohabitation," "marriage" and "spouse."

Marriage (Prohibited Degrees) Act

Federal legislation that describes the degrees of relatedness within which persons cannot marry.

married spouse

A person who is legally married to another person as a result of a ceremony presided over by someone with the authority to conduct marriages. See "marriage" and "unmarried spouse."

master

A provincially-appointed judicial official with limited jurisdiction usually charged with making decisions before and after final judgment in a court proceeding, including the hearing of interim applications, the assessment of lawyers' bills and the settling of bills of cost. See "interim application," "judge," and "jurisdiction."

material

In law, something that is relevant, important. A material fact is a fact relevant to a claim or a defence to a claim. See "claim," "evidence," and "fact."

matrimonial home

In family law, the dwelling occupied by a family as their primary residence. See "family property" and "real property."

mediation

A dispute resolution process in which a mediator facilitates discussions between the parties to a legal dispute and helps them reach a compromise settling the dispute. See "alternative dispute resolution" and "family law mediator."

memorandum of understanding

A document setting out the essential terms of a settlement reached between two or more people resolving a legal dispute, often used as a guide to the more complete terms of a final agreement or final order to be made with the consent of the signatories. See "consent order" and "family law agreements."

minor

A person who is younger than the legal age of majority, 19 in British Columbia. See "age of majority."

minutes of settlement

A document setting out the essential terms of an agreement reached between two or more parties to a court proceeding, produced after negotiations and signed by the parties and their lawyers. Minutes of settlement are normally used as a guide to the more complete terms of a final order to be made with the consent of the parties and are often attached to that order as a schedule. See "consent order," "family law agreements," "litigant" and "order."

miscarriage of justice

A term referring to the demonstrable and traumatic failure of the justice system in a particular court proceeding.

misrepresentation

Acts or words tending or intended to give a misleading or false impression as to the true state of affairs. See "bad faith."

mistake

In law, an unintentional act or failure to act arising from a misunderstanding of the true state of affairs, from ignorance, or from an error not made in bad faith. In contract law, an unintended misunderstanding as to the nature of a term agreed to in a contract. See "bad faith" and "contract."

mortgage

The conditional transfer of the title to real property by an owner to another person in return for money given as a loan, while retaining possession of the property. The party to whom title is given, the "mortgagee," usually a bank, is allowed to register the title of the property in his or her name if the person taking the loan, the "mortgagor," fails to make the required payments. See "encumbrance" and "real property."

motion

In law, an application to the court for an order, usually brought after the commencement of a court proceeding but before its conclusion following by trial or settlement; an interim application. See "action," "interim application" and "order."

N

natural parent

A biological or birth parent of a child, as opposed to an adoptive parent or a stepparent. See "adoptive parent" and "stepparent."

negligence

Failing to do something that a reasonable person would do, or doing something that a reasonable person would not do, which results in harm to someone else.

negotiation

In family law, the process by which an agreement is formed between the parties to a legal dispute, usually consisting of mutual compromise from the parties' original positions to the extent tolerable by each party. See "alternative dispute resolution" and "family law agreements."

net income

The remainder of a person's annual income after the mandatory deductions have been paid, which may include CPP, EI, income taxes and union or professional dues. For self-employed persons, necessary and reasonable business and operating expenses may also be deducted to determine net income.

nil

A short form of the Latin word *nihil* meaning "nothing"; usually used to indicate a zero value. See "null and void."

non compos mentis

A Latin phrase meaning "not of sound mind." A legal disability arising from mental infirmity. See "disability."

notary public

A person authorized to administer affirmations and oaths, and to execute or certify documents. All lawyers are notaries public in addition to being barristers and solicitors. See "barrister and solicitor."

Notice of Appeal

A legal document required by the rules of court which is used to give notice of a party's intention to appeal a decision. See "appeal" and "decision."

Notice of Application

A legal document required by the Supreme Court Family Rules to bring an interim application, setting out the relief claimed by the applicant, the grounds on which that relief is claimed, and the date on which the application will be heard. See "applicant," "grounds," "interim application" and "relief."

Notice of Family Claim

A legal document required by the Supreme Court Family Rules to begin a court proceeding, setting out the relief claimed by the claimant and the grounds on which that relief is claimed. See "action," "claim," "claimant," "pleadings" and "relief."

Notice of Hearing

A legal document required by the Supreme Court Family Rules that fixes the date for the hearing of a Petition. See "hearing" and "Petition."

O

oath

In law, a promise of the truth of a statement secured by one's faith in a god, and the prospect of torment in the afterlife in the event the promise is falsely made. Someone making an affidavit will often give his or her evidence in that affidavit under oath; a witness giving oral evidence will often give his or her evidence in court under oath. See "affidavit," "affirm," "perjury" and "witness."

obligation

A duty, whether contractual, moral or legal in origin, to do or not do something. See "duty."

obstruction of justice

Doing a thing or not doing a thing with the intention or effect of hindering the proper administration of justice. See "contempt of court."

Offence Act

Provincial legislation that sets out the consequences for committing an offence under provincial laws, and the process by which a complaint is made and heard.

offer

In contract law, the expression, either orally or in writing, of a willingness to be bound by a proposed agreement, contract or settlement proposal. See "offer to settle."

offer to settle

A proposal made by one party to the other, prior to the trial of a court proceeding or the hearing of an application, setting out the terms on which the party is prepared to settle the trial or application. Offers to settle can have important consequences with respect to costs if the offer is close to what the judge decides following trial, but must be clear and precise and contain certain language required by the Supreme Court Family Rules. See "costs."

officer of the court

An official of the court, including court clerks, sheriffs, lawyers, and judges.

onus

The obligation of a party to prove his or her case; the burden of proof. The onus usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of statute.

omission

In law, a failure to do something, whether the failure was intentional or unintentional.

opinion

In law, a lawyer's advice to his or her client; a lawyer's analysis of a legal problem; the views of an expert as to a matter at issue in an action. See "expert evidence."

opinion evidence

Evidence given orally at trial or in writing in by affidavit concerning a witness' convictions, feelings or views on something. Opinion evidence is inadmissible except when the opinion is offered by an expert. See "affidavit," "evidence," "expert" and "witness."

order

A mandatory direction of the court, binding and enforceable upon the parties to a court proceeding. An "interim order" is a temporary order made following the hearing of an interim application. A "final order" is a permanent order, made following the trial of the court proceeding or the parties' settlement, following which the only recourse open to a dissatisfied party is to appeal. See "appeal," "consent order," "decision" and "declaration."

ordinary service

Sending legal documents to a party at that party's "address for service," usually by mail, fax or email. Certain documents, like a Notice of Family Claim, must be served on the other party by personal service. Most other documents may be served by ordinary service. See also "address for service" and "personal service."

ownership

A legal right to have a thing that is enforceable in court. See "possession."

P

paramountcy, doctrine of

In constitutional law, the rule that a federal law on a subject is superior to and takes precedence over a provincial law on the same subject. See "act" and "constitution."

parens patriae

A Latin phrase meaning "parent of the country." Refers to the court's inherent jurisdiction to deal with issues concerning persons under a legal disability, such as children. See "children," "disability" and "jurisdiction."

parent

In family law, the natural or adoptive father or mother of a child; may also include stepparents, depending on the circumstances and the applicable legislation; may include the donors of eggs or sperm and surrogate mothers, depending on the circumstances and the terms of any assisted reproduction agreement. See "adoptive parent," "natural parent" and "stepparent."

parental responsibilities

A term under the *Family Law Act* which describes the various responsibilities exercised by guardians in the care, upbringing and management of the children in their care, including determining the child's education, diet, religious instruction or lack thereof, medical care, linguistic and cultural instruction, and so forth. See "guardian."

parenting arrangements

A term under the *Family Law Act* which describes the arrangements for parental responsibilities and parenting time among guardians, made in an order or agreement. "Parenting arrangements" does not include contact. See "contact," "guardian," "parental responsibilities" and "parenting time."

parenting coordination

A child-focused dispute resolution process used to resolve disputes about parenting arrangements and the implementation of a parenting plan set out in a final order or agreement. See "alternative dispute resolution" and "parenting coordinator."

parenting coordinator

A lawyer or mental health professional with special training in the mediation and arbitration of family law disputes, family dynamics and child developmental psychology who meets the training and experience requirements set out in the provincial Family Law Act Regulation.

parenting time

A term under the *Family Law Act* which describes the time a guardian has with a child and during which is responsible for the day to day care of the child. See "guardian."

parol evidence

Oral evidence given in court, as opposed to written or physical evidence. See "evidence" and "witness."

partition

In law, the division of the ownership of a piece of real property between two or more people. See "real property."

party

In law, a person named as an applicant, claimant, respondent or third party in a court proceeding; someone asserting a claim in a court proceeding or against whom a claim has been brought. See "action" and "litigant."

paternity

Fatherhood of a child. See "bastard."

paternity test

A scientific test performed to determine the parentage of a child, usually performed by the genetic testing of the blood or saliva of the alleged parents and the child.

peace officer

A person having a duty to enforce the law as a result of his or her position or employment, including police officers as well as RCMP officers, sheriffs, customs officers and mayors, among others.

pecuniary

Relating to money, which is exactly what someone who is "impecunious" doesn't have a great deal of. See "indigent."

peremptory

Something which is fixed, mandatory or absolute. A peremptory hearing date, for example, is a date on which a hearing will absolutely proceed without any further adjournments or delay.

perfected

In contract law, finished, legally complete and enforceable; executed. A "perfected" agreement is one that has been dated and signed by all parties in the presence of one or more witnesses.

performance

In contract law, the fulfillment of an obligation or duty arising from a contract.

perjury

Intentionally lying to the court while giving evidence under oath or affirmation, including lying in a document made on oath or affirmation, such as an affidavit or a Financial Statement. This is a criminal offence and may also be addressed by the court through its powers to punish for contempt. See "contempt of court."

personal property

Chattels, goods, money; property other than real property. See "chattel" and "real property."

personal service

In law, the delivery of a legal document to a party in a court proceeding in a manner which complies with the rules of court, usually by physically handing the document to the party and verifying his or her identity. Personal service is usually required for the proper delivery of the pleadings that are used to start a proceeding to ensure that the party is given proper notice of the proceeding and the opportunity to mount a defence. See also "ordinary service," "pleadings" and "service, substituted."

Petition

A court form required by the Supreme Court Family Rules used to commence court proceedings that can be dealt with in the manner of an application, without the need for a protracted process of disclosure and discovery. See "action," "application," "disclosure" and "discovery."

petition respondent

The person against whom a court proceeding has been started by Petition. See "Petition."

petitioner

A person starting a court proceeding by Petition. See "Petition."

PID

The short form for "Parcel Identifier Description," a unique nine-digit number assigned by the Land Title and Survey Authority assigned to each parcel of real property in the province. See "Land Title and Survey Authority" and "real property."

platypus

A duck-billed egg-laying aquatic mammal, the males of which are venomous.

pleading

A legal document setting out either a claim or a defence to a claim prepared at or following the start of a court proceeding. In the Provincial Court, the pleadings are the Application to Obtain an Order and Reply. In the Supreme Court, the pleadings include the Notice of Family Claim, Response to Family Claim, Counterclaim, Petition and Response to Petition. See "action," "claim" and "Counterclaim."

polygamy

Being married to more than one person at the same time. A criminal offence in parts of Canada other than Bountiful, British Columbia it seems. Polygamous marriages subsequent to the first are void *ab initio*. See "ab initio," "marriage" and "marriage, validity of."

possession

In law, the right to have the control and use of a thing. One can have a right to the possession of a thing without owning it, as in the case of a car lease, or ownership without possession, as in the case of a landlord who rents an apartment suite. See "ownership."

preamble

An introductory statement in legislation, an order or an agreement usually describing the purpose of the legislation or the parties to the order or agreement. Preambles are normally used to provide a guide the to interpretation of the rest of the document. See "act" and "family law agreements."

precedent

Historical decisions of the courts; the principle that such historic decisions of the court are binding on subsequent judges hearing cases of a similar nature or of a similar circumstances. Templates or sample documents used to draft new documents. See "common law."

premises

In real property law, a piece of property and a building situated on it, usually including the area of the property surrounding a building on that property. In law generally, a premise is an assumption that founds a logical argument. See "argument" and "real property."

prima facie

A Latin phrase meaning at "first face." Refers to a fact or circumstance that is obvious at first glance or that is easily proven.

privilege

In law, the duty a lawyer has to keep his or her client's information confidential, including communications between the lawyer and client and advice given to the client; the client's right to have his or her confidential communications kept secret and protected from disclosure. See "lawyer."

probate

The process of checking the validity of a will, distributing a dead person's estate and settling his or her debts according to the instructions set out in that person's will. See "estate" and "will."

pro bono

A Latin phrase short for *pro bono publico*, meaning "for the public good." Usually refers to those situations in which a lawyer voluntarily performs a legal service without charge. See "lawyer."

proceeding

In law, the whole of the conduct of a court proceeding, from beginning to end, and the steps in between; may also be used to refer to a specific hearing or trial. See "action."

proof

Evidence which establishes or tends to establish the truth of a fact; also, the conclusion of a logical argument. See "evidence" and "premises."

property

Something which can be owned. See "chattels" and "real property."

protection order

An order available under the *Family Law Act* for the protection of a person at risk of family violence. Protection orders include orders restraining someone from harassing, contacting or stalking a person, restraining someone from going to a person's home, place of employment or school. See "application," "ex parte" and "restraining order."

Provincial Court

A court established and staffed by the provincial government, which includes Small Claims Court, Youth Court and Family Court. The Provincial Court is the lowest level of court in British Columbia and is restricted in the sorts of matters it can deal with. Small Claims Court, for example, cannot deal with claims larger than \$25,000, and Family Court cannot deal with the division of family property or matters under the *Divorce Act*. See "judge" and "jurisdiction."

Q

QC

The abbreviation of "Queen's Counsel." A QC is an honor normally granted to lawyers of particular excellence, although they may be granted for other reasons as well, such as service to the legal community or to the public.

quantum meruit

A Latin phrase meaning "the amount deserved." Refers to payment for a service according to the amount deserved for the performance of the service, often calculated by an hourly wage.

quantum valebant

A Latin phrase meaning "the amount worth." Refers to the payment for a service according to the value or benefit of the service received.

quash

To set aside or vacate an order or judgment. See "action," "dismiss" and "order."

question of fact

An issue arising where the parties disagree about a fact relevant to a court proceeding, when only one party can be right. A court's decision about what the facts of a case are called the court's "findings of fact." See "finding of fact."

question of law

An issue about which law should be applied to determine a court proceeding or about or how the law should be applied in a proceeding. A court's decision about how the law or how it should be applied is a "finding of law." See "finding of law."

quid pro quo

A Latin phrase meaning "this for that." Refers to a benefit offered or owing in exchange for a benefit received. See "contract law."

R

real property

A parcel of land and the buildings on that land. See "chattel," "ownership" and "possession."

reapportion

In family law, the unequal division of family property or family debt between spouses. See "apportion," "family debt," and "family property."

rebut

In law, to reply to an argument, a statement of fact or a legal presumption by presenting argument or evidence to the contrary, or evidence which tends to disturb a presumption.

reconciliation

In family law, the resumption of cohabitation between married spouses or unmarried spouses with the intention of salvaging their relationship and making another go of it. See "separation."

registrar

An officer of the court with the power to make certain decisions, including the settlement of a lawyer's bill, a party's costs of a court proceeding and settling the form of an order. An officer of the court charged with the responsibility of reviewing and approving certain documents submitted to the court, such as pleadings. See "jurisdiction" and "pleadings."

registry

A central office, located in each judicial district, at which the court files for each court proceeding in that district are maintained, and at which legal documents can be filed, searched and reviewed; a courthouse.

regulations

A kind of legislation that provides supplemental rules for a particular act. Regulations are created and amended by the government, not by the legislature, and as a result the legislature has no say as to what sort of regulations are imposed or input into the effect of those regulations. See "act."

rehearing

A reconsideration or retrial of a court proceeding or an application, sometimes based on the evidence which was presented at the first hearing or trial, sometimes based on new evidence. See "action," "application," "de novo" and "hearing."

release

In family law, a legal document in which a person gives up a right or a claim, or the entitlement to enforce a right or advance a claim; a waiver. Releases are usually signed following the settlement of a court proceeding or legal

dispute. See "action" and "claim."

relief

In law, an order sought by a party to a court proceeding or application, usually as described in his or her pleadings. Where more than one order or type of order is sought, each order sought is called a "head of relief." See "action," "application" and "pleadings."

reply

In law, an answer or rebuttal to a claim made or a defence raised by the other party to court proceeding or legal dispute. See "action," "claim," "defence" and "rebut."

Reply

A legal document required by the Provincial Court Family Rules to respond to a claim made in an applicant's Application to Obtain an Order. See "applicant," "Application to Obtain an Order," "claim," and "Counterclaim."

representation

In contract law, a promise made by someone about a certain state of affairs, like "the plumbing was replaced last year." See "misrepresentation."

rescind

To terminate or revoke a contract or agreement. See "contract" and "family law agreements."

residence

The geographic place where a person permanently lives. This is different from a person's "domicile" in that a person's residence is more fixed and less changeable in nature. A person's residence can also have an impact on a court's authority to hear and decide a legal action. See "domicile" and "jurisdiction."

res judicata

A Latin phrase meaning "a thing decided." A final order, unlike an interim order, permanently concludes a legal dispute and usually a court proceeding, unless it is appealed; the final order makes the legal issues raised in the proceeding *res judicata*. See "appeal" and "final order."

Response to Family Claim

A legal document required by the Supreme Court Family Rules in which the respondent to a court proceeding sets out his or her reply to the claimant's claim and the grounds for his or her reply. See "action," "claim," "Notice of Family Claim" and "pleadings."

respondent

The person against whom a claim has been brought by Notice of Family Claim. See "application" and "Notice of Family Claim."

restraining order

An order which forbids a party from doing or not doing a thing. In family law, common restraining orders include stopping someone from travelling out of an area with the children, stopping someone from disposing of property, and stopping someone from harassing someone else. See "ex parte," "order" and "protection order."

resulting trust

In family law, the finding by a court that a party holds all or a part of his or her property in trust for someone else as a result of the parties' intention to make a trust; a trust relationship inferred by operation of law. See "constructive trust" and "Trust."

retainer

The act of hiring of lawyer. The money paid by a lawyer to secure his or her services. The terms and extent of a lawyer's services on behalf of a client.

reversal

In law, usually refers to a decision of an appeal court overturning the decision of a lower court on a particular issue. The lower court's decision is said to have been "reversed on appeal." See "appeal" and "common law."

review

In law, the re-examination of a term of an order or agreement, usually to determine whether the term remains fair and appropriate in light of the circumstances prevailing at the time of the review. In family law, particularly the review of an order or agreement provided for the payment of spousal support. See "de novo," "family law agreements," "order" and "spousal support."

right of action

A right to claim relief resulting from a person's behaviour. For example, a spouse's adultery gives a right of action to the other spouse that allows him or her to claim a divorce.

rules of court

The guidelines governing the court process and the conduct of litigation generally. The rules of court are particular to each level of court.

S

sale

An agreement to transfer the ownership of property from one person to another in exchange for the reciprocal transfer of something else, usually money. See "agreement."

self-represented litigant

A party to a court proceeding who is not represented by a lawyer and acts on his or her own behalf; a lay litigant, a *pro se* litigant. See "action," "lawyer" and "litigant."

separation

In family law, the decision of one or both parties to terminate a married or unmarried relationship; the act of one person leaving the family home to live somewhere else with the intention of terminating the relationship. There is no such thing as a "legal separation." In general, one separates by simply moving out, however it is possible to be separated but still live under the same roof. See "divorce, grounds of."

separation agreement

A contract intended to resolve all or some of the issues outstanding following the breakdown of a relationship and intended to guide the parties in their dealings with one another thereafter. A typical separation agreement is signed following a settlement reached through negotiations and deals with issues including guardianship, parenting arrangements, contact, support, the division of property and the division of debt. See "family law agreements."

service, affidavit of

A legal document required by the rules of court in which a person who has personally served someone describes the circumstances in which the person was served. This may be essential to prove personal service, particularly if the serving party intends to seek a default judgment, as is usually the case in a desk order divorce. See "default judgment" and "personal service."

service, substituted

Personal service performed in a way other than required by the rules of court, as may be authorized by the court. If a respondent cannot be served for any reason, such as if he or she is hiding or refusing service, the court may permit a claimant to serve the other party "substitutionally" by means including an ad in the legal notices section of a newspaper's classified ads or posting the document in the court registry. See "personal service."

service *ex juris*

A Latin phrase meaning service "out of the jurisdiction;" refers to service of legal documents on someone living outside of British Columbia as may be permitted by the rules of court. See "personal service."

settlement

A resolution of one or more matters at issue in a court proceeding or legal dispute with the agreement of the parties to the proceeding or dispute, usually recorded in a written agreement or in an order that all parties agree the court should make. A court proceeding can be settled at any time before the trial. See "action," "consent order," "family law agreements" and "offer."

shared custody

A term used by the Child Support Guidelines to describe circumstances when a child's time is shared equally or almost-equally between his or her parents or guardians, often resulting in an amount of support that is different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

sine die

A Latin phrase meaning "without a day." An application adjourned *sine die* has been adjourned without a specific date being set for the hearing, often in the expectation that it will never need to be set for hearing. See "adjournment" and "application."

split custody

A term used by the Child Support Guidelines to describe circumstances when one or more children live most of the time with each parent or guardian, resulting in an amount of support that is different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

spousal support

Money paid by one spouse to another spouse either as a contribution toward the spouse's living expenses or to compensate the spouse for the economic consequences of decisions made by the spouses during their relationship.

Spousal Support Advisory Guidelines

An academic paper released by the Department of Justice that describes a variety of mathematic formulas that can be applied to determine how much spousal support should be paid and how long spousal support should be paid for, once a spouse is found to be entitled to receive support. The Advisory Guidelines is not a law.

spouse

Under the *Divorce Act*, either of two people who are married to one another, whether of the same or opposite genders. Under the *Family Law Act*, married spouses, unmarried parties who have lived together in a marriage-like relationship for at least two years, and, for all purposes of the act other than the division of property or debt, unmarried parties who have lived together for less than two years but have had a child together. See "marriage" and "marriage-like relationship."

stare decisis

A Latin phrase meaning "stand by the thing decided." Refers to the common law principle that courts are obliged to follow the decisions of the courts before them, known as "precedent." See "common law" and "precedent."

status quo

A Latin phrase meaning "the state that was." Refers to whatever circumstances or conditions previously existed, or which presently exist and have existed in the same way for some time.

statute

An act, legislation; a written law made by a government.

statutory declaration

A written statement made on affirmation or oath pursuant to the requirements of a particular piece of legislation. See "act," "affidavit," "affirm" and "oath."

stepparent

The spouse of a person who has children from a previous relationship. A stepparent may qualify as a "parent" for the purposes of issues relating to child support and the care and control of a child under both the *Divorce Act* and the *Family Law Act*. See "parent" and "spouse."

subpoena

A legal document, issued by a court or by a party pursuant to the rules of court, which compels a person to attend court to give evidence as a witness, and, sometimes, to produce a specific document. Failure to obey a subpoena may constitute contempt of court. See "contempt of court," "evidence" and "witness."

substituted service

Personal service performed in a way other than required by the rules of court, as may be authorized by the court. If a respondent cannot be served for any reason, such as if he or she is hiding or refusing service, the court may permit a claimant to serve the other party "substitutionally" by means including an ad in the legal notices section of a newspaper's classified ads or posting the document in the court registry. See "personal service."

suit

In law, a court proceeding, a lawsuit, a legal action, a case; a claimant's claim against a respondent. In fashion, menswear designed to inflict maximum discomfort at maximum cost. See "action."

Supreme Court

Normally referred to as the "Supreme Court of British Columbia," this court hears most court proceedings in this province. The Supreme Court is a court of inherent jurisdiction and is subject to no limits on the sorts of claims it can hear or on the sorts of orders it can make. Decisions of the Provincial Court are appealed to the Supreme Court; decisions of the Supreme Court are appealed to the Court of Appeal. See "Court of Appeal," "jurisdiction," "Provincial Court" and "Supreme Court of Canada."

Supreme Court of Canada

The highest level of court in Canada. This court hears appeals from the decisions of the Federal Court of Appeal and the provincial courts of appeal, including the Court of Appeal for British Columbia. There is no court to appeal to beyond this court. See "Court of Appeal" and "Supreme Court."

T

table amount

The amount of child support payable under the Child Support Guidelines tables. See "Child Support Guidelines."

tenancy in common

A kind of co-ownership of property in which two or more owners have distinct shares in the common property. A tenant in common may choose to sell or mortgage his or her share of the property independently from other owners. See "joint tenancy."

term of art

A phrase that has a particular meaning in law that is usually distinct from the common English meaning of the phrase, like the phrase "term of art."

testator

In estate law, a person who has made a will. The feminine form of this word is "testatrix." See "estate" and "will."

testimony

Evidence given by a witness in court or in an affidavit under witness' oath or affirmation as to the truth of the statement. See "affirm," "evidence," "oath" and "witness."

third party

A person named in a court proceeding or joined to a proceeding who is neither the claimant nor the respondent. A third party may be joined to a proceeding where the respondent believes that the person has or shares some responsibility for the cause of action. See "action," "cause of action" and "party."

time, calculation of

A particular method for counting time for a legal deadline, as required by the rules of court and the *Interpretation Act*. See "business days," "calendar days" and "clear days."

title

In law, a document demonstrating ownership of a thing. See "ownership."

transfer

In law, the act of an owner of a thing giving ownership of that thing to another person, in exchange for money or other property in the case of a sale or in exchange for other rights in the case of a family law agreement. See "family law agreements," "ownership" and "sale."

trial

The testing of the claims at issue in a court proceeding at a formal hearing before a judge with the jurisdiction to hear the proceeding. The parties present their evidence and arguments to the judge, who then makes a determination of the parties' claims against one another that is final and binding the parties unless appealed. See "action," "appeal," "argument," "claim," "evidence" and "jurisdiction."

trust

In law, a form of possession of property in which a "trustee" keeps and manages property for the benefit of another person, the "beneficiary." The trustee holds the property *in trust* for the beneficiary. See "constructive trust," "ownership," "possession" and "resulting trust."

trustee

A person who holds property in trust for the benefit of another person. See "trust."

U

undue hardship

A term used by the Child Support Guidelines to describe circumstances when payment of the table amount of child support would cause financial difficulty for the payor or the recipient, potentially justifying an award of support in an amount different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

unjust enrichment

Money, services or other benefits unfairly received by a person at a corresponding or loss to another person. See "constructive trust."

unlawful

Acts or omissions that are contrary to legislation or the common law. See "lawful."

unmarried spouse

Someone who is a spouse by the operation of a statute. Under the *Family Law Act*, unmarried spouses are people who have lived together in a marriage-like relationship for at least two years, or, for all purposes of the act other than the division of property or debt, who have lived together for less than two years but have had a child together. See "marriage-like relationship," "marriage" and "married spouse."

V

vacate

In law, the decision of a court to set aside or quash an earlier decision or order, sometimes as if the original order had never been made and other times effective only as of the date the order is vacated. See "appeal," "decision" and "quash."

vendor

A seller of a thing. See "sale."

verdict

In law, a judge's conclusions after hearing argument and considering the evidence presented at a trial or an application; a judgment, the judge's reasons. Usually used in a criminal law context to indicate the judge's conclusions as to the guilt or innocence of an accused person. See "decision."

W

waive

In law, to give up a right or entitlement; to give up the opportunity to assert a right or enforce an entitlement. See "release."

waste

In law, intentionally or unintentionally allowing the value of a piece of property to diminish through carelessness, neglect or purposeful harm.

without prejudice

In the context of negotiation or mediation, an arrangement that neither party will be able to use the content of the settlement discussions in a court proceeding. In the context of litigation, an arrangement that consent to a certain order will not affect the legal rights of either party. In the context of a settlement proposal, a stipulation that the

contents of the proposal may not be shown to the court until the court proceeding has concluded. See "consent order," "mediation," "negotiation," "offer to settle" and "settlement."

witness

A person with personal knowledge of things; a person giving oral evidence in court on oath or affirmation as to the truth of the evidence given. See "affirm," "evidence," "oath" and "opinion evidence."

wrongful act

Acts or omissions that are contrary to legislation, the common law or that are immoral or unethical even if not contrary to a legal principle. See "lawful."

WTF

A litigator's mnemonic device for the order of events at trial, short for "Witnesses Testify First." Usually followed by AGL, "Arguments Go Last."

Y

YOLO

In criminal law, an acronym referring to a youth's last offence before turning 18, the age at which the federal *Youth Criminal Justice Act* ceases to apply. Short for "Young Offender's Last Offence."

youth

In law, in British Columbia a person under the age of 19.

yurt

A circular tent of felt or skins used by nomadic tribespeople in Mongolia and Turkey.

✓ The above was last reviewed for legal accuracy by JP Boyd, May 12, 2013.

References

[1] <http://www.bclaws.ca/glossary.html>

[2] <http://www.familylaw.lss.bc.ca/resources/definitions.php>

How Do I?

How Do I Get Married in British Columbia?

Get a marriage licence

First, you have to get a marriage licence. Either you or your future spouse must apply in person to the marriage licence issuer in your neighbourhood. (The Vital Statistics Agency ^[1] offers a convenient search tool to help you find a marriage licence issuer near you.) You'll have to provide government-issued photo identification, pay a fee of about \$100, and supply the following information:

- Your full name, address, date of birth and place of birth.
- Your future spouse's full name, date of birth and place of birth.
- Your present marital status (never married, widowed, divorced).
- Your future spouse's present marital status.

If you or your future spouse were divorced within the last 31 days, you'll also have to provide:

- Proof of your divorce (either the divorce order or a certificate of divorce).

If you or your future spouse are younger than age 19, you'll also have to have the consent of the parent of the minor. The marriage licence issuer will have the forms you'll need. No one under the age of 16 can be married without a court order.

You don't have to be a resident of British Columbia to get married here. Blood tests are not required.

Remember that a marriage licence is only valid for three months from the date of issue. If your marriage ceremony doesn't happen within those three months, you'll have to reapply for another one.

Get married

Next, you need to get married! There are two types of marriage ceremony to choose from, civil and religious. Civil ceremonies are performed by marriage commissioners, officials registered with the Vital Statistics Agency. Religious ceremonies are performed by religious officials such as ministers, rabbis, imams, priests and so forth, however the religious official must be registered with the Vital Statistics Agency for the marriage to be valid.

Whichever sort of marriage ceremony you're planning, your marriage must be witnessed by two people who are at least 19 years of age or older.

If you're planning on a civil ceremony, you'll need to book your marriage commissioner right away. It may be extraordinarily difficult to track someone down who's available at the last minute. The fee your commissioner will charge is \$75, plus other costs for expenses like parking and transportation. The nice folks at the Vital Statistics Agency ^[1] have a search tool to help you find a marriage commissioner.

Register your marriage

The marriage commissioner or religious official who conducts the ceremony will help you complete a Marriage Registration Form. This form must be sent, within 48 hours of the ceremony, to the Vital Statistics Agency for registration. The person who conducts your ceremony will normally take care of this for you.

The Vital Statistics Agency will send you a spectacularly ugly certificate of marriage, which will look something like this:



This isn't something you're going to want to hang on the wall. It is, however, something you should hang onto, in case you need proof of your marriage or want to apply for a divorce.

The person who conducts your ceremony may provide you with a document confirming your marriage. This can be used to prove that you are married before your marriage is registered with the Vital Statistics Agency and you receive your government-issued marriage certificate.

Changing your name

It is not necessary that either you or your spouse change your surnames after marriage, but it is your right to change your surname to your spouse's surname if you wish. There will be no official change of name — or an amendment to your birth certificate, for that matter — but it is perfectly legal to use your spouse's surname without an official name change.

If you want a legal change of name, you must apply to change your name through the Vital Statistics Agency under the *Name Act*. However, as long as you don't legally change your name, you can revert to your old surname whenever you wish.

If you have decided to have a hyphenated surname following your marriage, you must apply for a legal change of name or you will not be able to obtain ID in the new name.

You can find out more about changing your name in the chapter Other Family Law Issues within the section Naming and Changes of Name.

For more information

You can find out more about the laws on marriage in the chapter Family Relationships within the section Marriage & Married Spouses.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://www.vs.gov.bc.ca>

How Do I Prepare for Separation?

It may seem a bit morbid and ghoulish to "prepare" for your separation, but a little bit of planning on your part can help you avoid problems down the road. These tips are intended to help ensure that you know exactly who has what, who owes what, and to whom the debts are owed.

Family property, family debts and excluded property

Take a careful, but not too obvious, tally of what each of you owns. This might be difficult if you and your spouse keep separate bank accounts and maintain your own investments, but make your best efforts. A list of your spouse's RRSPs, stocks, investments, bonds, GICs, cars, motorcycles, boats, ATVs, insurance policies, properties, and bank accounts may prove to be extremely useful.

One less obvious tip is to keep a record of the names of the financial institutions that are sending your spouse mail. You don't even need to open the envelope, just record the name and address. If your family has a safety deposit box, you should go to it and make a list of the contents. Make a list of the more valuable items in the family home.

Next, you should make your best efforts to find out what property you owned and what debts you were responsible for when you and your spouse began to live together or got married, whichever was earlier. The online statements most banks provide don't go back more than two or three years, so you may have to dig into your paper files or think about ordering old statements from your banks and other financial institutions.

New debts

Once you've decided that you're going to separate, stop involving yourself in shared debts. Don't sign any new credit card or loan applications, and especially don't sign any blank documents!

New property

Keep track of the money and property coming into the household. Make sure you know who bought it, why it was bought and with what money it was bought! If you have recently or are about to receive a personal gift, like an inheritance, keep it separate from the family finances.

Personal matters

Open a new bank account, in your own name, at a new bank, preferably a different one than your family uses. It's also a good idea for you to arrange for your personal mail to be sent elsewhere, like to a friend or a post-office box. You can file a notice of change of address with the post office and they will automatically redirect your mail for you. Finally, no matter how stressful your home situation is, don't quit work. You will, in all likelihood, need the income in the near future.

Leaving home

One word: *don't* — at least not just yet. Your situation may be difficult, perhaps even intolerable, but don't leave the family home until you've seen a lawyer, especially if you have children. You might find that living on your own is unmanageable; once you've left the family home it can be very difficult to get back in. Remember that you can be separated from your spouse and still live in the same home.

See a lawyer

Even before you've separated, it's usually a good idea to talk to a lawyer to get an idea of what your rights and duties are. Many lawyers will offer an initial interview at a flat or a lower rate. Use this opportunity to get the lawyer's opinion of your situation and an idea of what your options are.

Saving money for a lawyer

If you're worried about your spouse noticing from your credit card or bank statements that you've seen a lawyer, there's an easy way to save up enough for a small retainer fee or the cost of an initial interview with a lawyer. Each time you take out money to buy groceries or clothing, keep a small amount aside, in cash, and save it in a place your spouse won't easily find. If a store lets you take extra cash when you pay with your debit card, take out as much as you can each time you go to that store. Safeway and most provincial liquor stores will let you take extra cash out when you buy things.

It may take a while to save up enough money this way, but at least your spouse will never find out. Make sure you destroy the receipts from your shopping!

For more information

You can find out more about separation in the chapter Separation & Divorce within the section Separation.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Separate from My Spouse?

Separation isn't rocket science, whether you're married or not. You don't need any court papers or a written agreement to end the relationship, you don't need to see a lawyer or a judge, and there's no such thing as a "legal separation" in British Columbia.

A couple are separated once one or both spouses decides that the relationship is over, announces that decision to the other spouse, and ends the marriage-like aspects of their relationship, such as sleeping together, eating together, doing household chores for each other, and so forth.

You and your spouse do not have to both agree that the relationship is over to separate. That's a decision that only one of you needs to make to end the relationship.

Living together after separation

Most spouses separate when one spouse moves out. Moving out can sometimes be a problem, since living together is so cost-effective. When you're living under the same roof, there's only one mortgage or rent bill to pay, one hydro bill, one grocery bill and one phone bill. When someone moves out, the same pool of income has to cover two rent bills, two hydro bills, two grocery bills and two phone bills.

Because living in different homes can be so expensive, a lot of people decide to separate but remain living under the same roof. From the court's point of view, a married couple can be separated but still live together as long as:

- you're not sleeping together,
- you're not having sex with each other,
- you each do your own chores (cooking your own meals, doing your own laundry and so forth),
- you've closed any joint bank accounts, and
- you've stopped going to social functions together as a couple.

Proof of separation

Generally speaking, the court doesn't conduct an inquiry or look in any depth into whether or not someone says they separated when they say they separated.

However, proving the date of separation can be very important in terms of an entitlement to spousal support and dividing property and debt, and this can sometimes be a challenge. If this is going to be a problem, then the only sure way of proving when separation happened is the date that one spouse moves out. It's hard to argue about that. As an alternative, you might try writing a letter or sending an email announcing the separation to your spouse. Be sure to keep a copy.

Preparing for separation

See [How Do I Prepare for Separation?](#) for more information, including some helpful tips and tricks that could save you some grief down the road.

For more information

You can find out more about separation in the chapter [Separation & Divorce](#) within the section [Separation](#).

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Find Out if I'm Divorced?

If you or your spouse has started a divorce action and you want to know whether or not your divorce order has gone through, just call the family registry of the courthouse that the action was started in. Ask them if your order has been approved yet, and, if not, when you can expect it to be approved.

If you and your spouse have been separated for a long time, and you want to find out whether your spouse ever applied for a divorce, contact the Central Registry of Divorce Proceedings in Ottawa, Ontario. They're the folks who keep track of all Canadian divorce actions.

Family Law Assistance Services
Central Registry of Divorce Proceedings
PO Box 2730, Station D
Ottawa, Ontario
K1P 5W7

You can find out more about divorce in the chapter [Separation & Divorce](#) within the section [Divorce](#).

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Get Divorced

The only way to get divorced in Canada is by a court order, and to get a court order you have to start a court proceeding. (Only married spouses need to get divorced; the relationships of unmarried spouses are over when they separate.)

You must have lived in the province in which you are starting the court proceeding for at least one year before you can get started, and you must start your court proceeding in the Supreme Court.

The court proceeding can include claims beside a divorce order; typically people also ask for orders about the care of children, the payment of child support and spousal support, and the division of property and debt.

However, you'll be in for a fight if you and your spouse don't agree about the orders the court should make. This discussion assumes that the only order anyone is asking for is a divorce order.

Forms involved

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|---------|------------------------|--------------------|------------|---------------------|-------------------|-----------------|
| Form F3 | Notice of Family Claim | PDF ^[1] | DOC | HTML ^[2] | PDF | |

Begin the court proceeding

You will need to file a Notice of Family Claim in Form F3, and attach Schedule 1. Schedule 1 gives the court the information it needs to make the divorce order. (A special Notice of Joint Family Claim in Form F1 is used when a couple is asking for the divorce together.) There is a \$210 filing fee.

You will be required to file an original copy of your marriage certificate with your Notice of Family Claim. This is the ugly brown document you got from the government, not the flowery thing you received from your officiant.

You will also be required to fill out a Registration of Divorce Proceeding form. The court staff will give you a blank form to complete.

Serve your spouse

Next, have your spouse personally served with a copy of the filed Notice of Family Claim. You can't do this yourself; you must get someone to do it for you. Your process server will need to swear an Affidavit of Personal Service in Form F15 to prove that service was done and when it was done. (Couples who are filing the Joint Notice of Family Claim together don't need to have anyone served.)

Wait

Your spouse has 30 days to defend your claim. What you hope is that your spouse won't file a Response to Family Claim or Counterclaim, because if this happens you're going to have to settle your differences or deal with a trial. (Couples who are filing the Joint Notice of Family Claim together don't need to wait.)

Apply for the divorce order

Once the 30 days are up, you will need to pay an \$80 fee and file the following documents:

1. a Requisition in Form F35 asking for the divorce order,
2. a Requisition in Form F17 asking the court staff to search for a Response to Family Claim or Counterclaim,
3. the Affidavit of Personal Service your process server prepared,
4. a special affidavit in Form F38 giving the court the evidence it needs to make the divorce order,
5. if there are children, a Child Support Affidavit in Form F37 giving the court the evidence it needs to conclude that appropriate arrangements have been made for the support of the children,
6. a blank Registrar's Certificate in Form F36, and
7. a draft divorce order in Form F52.

(Couples who are filing the Joint Notice of Family Claim together can file these documents, without the Affidavit of Personal Service, as soon as they've filed their Notice of Family Claim.)

Wait

It can take anywhere from 60 to 120 days for the court staff and a judge to process your divorce application. Start calling the court registry at the 60-day mark to see if your order is ready.

Pick up your divorce order

When your order is ready, head down to the court registry and pick it up. You must then send a copy of the order to your spouse. Congratulations! 31 days from the date the order is made, you'll be divorced.

For more information

A much more detailed description of the divorce process, complete with blank court forms and examples of what they look like when they're filled out properly is available in chapter Separation & Divorce within the section Divorce.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] http://www.ag.gov.bc.ca/courts/forms/sup_family/F3.pdf

[2] <http://bit.ly/SCFRforms#F3>

How Do I Get Out of Paying Child Support?

The answer is pretty simple most of the time: *you don't*.

Biological parents

The law in Canada is that a biological parent must pay child support when the child lives with the other parent most of the time. End of story.

Since child support is the right of the child, not the right of the parent, neither parent has the right or ability to bargain away child support in exchange for giving up, for example, the right to seek custody of or access to the child. Agreements like that are never upheld by the courts.

The duty to pay child support stems from the simple fact that both parents contributed some of their genes to make a baby, and that's something you just can't get out of. It's a biological fact that has nothing to do with the ages of the parents, their marital status, or whether both parents have maintained or want to maintain a relationship with the child.

The only two ways to get out of an obligation to pay child support are to:

- have the child with you for the majority of the time, in which case the other parent will be required to pay child support to you, or
- give the child up for adoption, in which case, following the adoption, you will cease to have any obligations at all toward the child.

Stepparents

The *Divorce Act* and the *Family Law Act* both say that stepparents can be required to pay child support.

Under the *Divorce Act*, this means someone who married a parent.

Under the *Family Law Act*, this means the guardian of a child and a person who was the married spouse or unmarried spouse of a parent and contributed to the support of the parent's child for at least one year.

The nice thing about being a stepparent is that the other biological parent's obligation to pay child support can be taken into account when the amount of the stepparent's child support payments is being figured out, which usually means that support will be paid in an amount less than what the Child Support Guidelines require.

You can find out more about the obligations of stepparents to pay child support in the chapter Child Support.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Get Out of Paying Spousal Support?

Unlike an obligation to support a child, there is no guaranteed obligation that one spouse must support the other. However, if you were in a relationship that qualifies as a spousal relationship, you must face the possibility that you might have to pay support when your relationship ends.

The *Family Law Act* defines as spouse as including:

- married spouses,
- people who lived in a marriage-like relationship for at least two years, and
- people who lived in a marriage-like relationship for less than two years and have had a child together.

If you really want to get out of paying spousal support, the time to start planning is at the beginning of your relationship:

- Sign a cohabitation agreement (if you're not planning on getting married) or a marriage agreement (if you're getting married) that requires each of you gives up the right to make a claim for spousal support in the event that your relationship ends. Remember, this agreement must not only be fair at the time it is executed, it must also be fair at the time it comes into effect.
- Make sure that your spouse never leaves the paid work force. If you have a child, make sure that you're the one who stays home to care for the baby or make sure that your spouse returns to work as soon as is humanly possible.
- Make sure that your spouse or partner never sacrifices a job opportunity to care for the family, such as passing up a promotion, going to part-time work, or leaving work altogether.

Spousal support may be payable whenever one spouse leaves a relationship at a financial disadvantage compared to the other spouse. As long as there is a difference in the parties' financial situations, there is a possibility that support will be paid.

There's a lot more information about the sorts of things the court will take into account in assessing a duty to pay support in the chapter Spousal Support.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Get Out of Sharing My Assets?

Married spouses and unmarried spouses

Married spouses and unmarried couples who have lived together for at least two years are presumed to have a one-half interest in all property either or both of them acquired after the date the couple married or began to live together, whichever came first. Certain property is excluded from the family property the spouses are expected to divide, including:

- the value of the property owned by each spouse on the date the couple married or began to live together, whichever came first,
- property bought with the property owned by each spouse on the date the couple married or began to live together,
- inheritances and gifts received during the relationship,
- court awards and insurance proceeds received during the relationship, and
- trusts to which the spouse did not contribute and does not control.

If you want to do better than this, you'll have to sign a marriage agreement or a cohabitation agreement at some point before or shortly after you marry or begin to live together.

If you don't want to spend the money getting an agreement drawn up, here are some other things that can help:

- When you begin to live together, take copies of the statements from all of your bank, investment, retirement, credit and loan accounts, copies of your BC Assessments for all real property, staple them together and put them in a safety deposit box. This will help you to establish the value of the property you brought into the relationship.
- During your relationship, keep a careful record of what you buy with the property you brought into the relationship.
- During your relationship, keep records of the dates and values of any inheritances, gifts, insurance proceeds or court award that you receive.
- Keep an eye on the debts your spouse incurs during the relationship.

You can find out more about how married spouses and unmarried spouses divide property in the chapter Property & Debt in Family Law Matters.

Unmarried couples who aren't spouses

For unmarried couples who don't qualify as spouses, the only property that is presumed to be shared is property that is jointly owned. Even if one person contributed virtually nothing to the purchase or upkeep of an asset, the simple fact that his or her name is on the title of the property or on the owner's registration means that he or she is presumed to have an ownership interest in the property. The property might not be shared equally between the parties, but in most cases each partner will get something.

There are no such presumptions about property that only one person owns. When one partner wants to make a claim to share in an asset owned only by the other partner, the claim must be brought under the law of trusts and the law of equity. These are difficult claims to make, and almost always result in an award that is far less than the what the person would get if the couple had been spouses.

If you want to try to protect property from a claim brought by your partner, here are the best ways to do it:

- Make sure that you only buy things in your own name, and that when you buy something your partner doesn't contribute to the purchase price, or to paying any loans or mortgages associated with that property.
- Keep separate bank accounts and avoid joint purchases whenever possible.

- Make sure your partner maintains his or her financial situation independently of you and doesn't drop out of the workforce to become a homemaker or stay at home parent.
- Pay your partner for any work he or she does for you, like renovating a room or working in your business.

You can find out more about how unmarried couples who aren't spouses may decide to divide property in the chapter Property & Debt in Family Law Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Start Negotiations with My Spouse?

Pick the right moment

It's easiest to start negotiations when everyone's emotions are relatively calm.

For negotiation to work, both people must be able to listen and talk to one another with respect. Negotiations will not succeed if the wounds from the end of the relationship are still fresh. There are a few reasons for this:

- people who are angry aren't likely to be too accommodating and generally can't see reason even when it's staring them in the face,
- people who are upset and sad are likely to accept a bad deal, sometimes out of remorse and sometimes out of guilt, and
- people who are too stressed out are likely to accept a bad deal just to get everything over with.

When you've got the right moment, starting the process of negotiation can be as simple as calling your ex up and inviting him or her out for a cup of coffee at the local Tim Hortons:

"Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, but we really need to make a few decisions."

Say whatever you want really, there's no perfect rule that will apply to every couple. Only you know how best to approach your ex. It might help to reassure your ex that you mean no harm:

"I don't want to stop you from being a great mother/father, and I want to make sure you're there for the kids. We just need some ground rules about when we're each with the kids."

"I'm not out to screw you over. I don't want your car or your grandmother's china collection, but we really need to talk about how we can fairly split our things up."

"I want to help you and the kids get by, I know that your job doesn't pay enough. We have to discuss how I can pay for my place and my bills and how much you need. I've had a look at the Child Support Guidelines, and they say I should pay support at \$325 per month. I'll give you \$350."

"This really isn't about you and it's not about me. It's about what will work best for the kids. We may not be partners anymore, but we're always going to be parents."

Sometimes nothing seems to work. In cases like that, often all that helps is the passage of time. Some people need time to grieve and get their emotions under control before they can really sit down and talk. As long as things are relatively stable and you can wait, do so. Call your ex in another four months and see if he or she is ready.

Starting the dialogue

When you and your ex are ready to start talking, start talking! Try to make the process as cooperative as possible, which usually means not preparing a stack of calculations to hand to your ex the moment he or she sits down. No one likes to be bombarded by a bunch of documents as if there was a done deal. Make a list of the things you need to talk about together. Usually this includes:

1. where the children will live for most of the time,
2. how decisions about the children will be made,
3. how much child support should be paid,
4. whether someone is in need of spousal support, and how much should be paid, and
5. how the family assets will be divided.

Other lists will be useful as the negotiations continue:

1. which assets are the family property that needs to be divided,
2. how much that property is worth.
3. what are the family debts and how much is owing,
4. when will each parent be with the children,
5. how will holidays and other special days be shared, and
6. what additional information each of you needs to collect.

Most importantly, keep a separate piece of paper to write down the things that you agree on as you agree on them. This will help to keep a record of the issues that have been decided, and give each of you a sense of commitment to those decisions.

As discussions go on, you might realize that you and your ex have different ideas about what the law says about an issue. This is the perfect time to take a break and arrange to meet a week later. You can tell your ex about this website and encourage him or her to read it to get the basic background information.

If you need more help, each of you could also meet with a lawyer to talk about things. If you decide to do this, it is important that the lawyers understand that you and your ex are negotiating these issues, not fighting about them.

Using lawyers

If you find that you're getting stuck on one or more points, or if your ex is refusing to talk to you at all, it's probably time to hire a lawyer.

Hiring a lawyer doesn't mean that you're headed to court and eventually to trial. It means that you're serious about these issues, and you want to move things to the next level. Most lawyers will write a letter to your ex explaining that they've been hired by you to start or continue negotiations with an eye to reaching settlement. (Of course, the lawyer will be there if nothing works and you do have to start a court proceeding.)

Lawyers often negotiate directly with the lawyer for the other person, through letters and telephone calls. Sometimes lawyers will have a meeting where everyone's there: you, your lawyer, your ex and your ex's lawyer. These are called four-way meetings, and they can be very helpful to move discussions along.

Using mediators

As an alternative to each of you hiring your own lawyer, you should also seriously consider hiring a professional mediator. The mediator's job is to help two people reach an agreement of their own; the mediator may direct the discussion, but the mediator isn't your ally or your ex's ally. The mediator is completely neutral.

Mediation can be very effective, and can often bring people to a settlement, even where their positions seem to be very far apart.

Before hiring a mediator, make sure you've looked into his or her background to make sure that the mediator has had special training as a mediator. Lawyers who have training and are accredited to mediate by the Law Society are called family law mediators, and will usually advertise themselves as such.

For more information

You can find out more about using alternatives to court in the chapter Resolving Family Law Problems out of Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Start Mediation with My Spouse?

Pick the right moment

You can't force your ex to go to mediation with you, you can only do it with his or her agreement. Your ex isn't likely to agree to go and see a mediator if he or she is still pissed off about a recent argument or is still resentful about the end of the relationship.

When you've got the right moment, suggesting mediation can be as simple as calling your ex up and inviting him or her out for a cup of coffee at the local Tim Hortons:

"Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, but we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Sally what happened with her and Frank, and she said that they used a mediator."

At this point, it's all about getting your ex to try mediation, and it's your job to sell the idea. Here are some reasons why mediation is a really, really good idea:

- mediation is much cheaper than hiring lawyers and going to court,
- the mediator helps you and your ex make a decision together, a decision that you are both as happy with as possible,
- the decision a judge might make may be one that neither of you are happy with at all,
- mediation is much cheaper than hiring lawyers and going to court,
- settlements reached through mediation tend to last a lot longer and people tend to respect their agreements a lot more,
- mediation will leave you feeling less angry with each other than fighting about things in court,
- mediation is much cheaper than hiring lawyers and going to court,
- mediation can be over and done with in a fraction of the time that it takes to go to court, and
- if I haven't mentioned this, mediation is much cheaper than hiring lawyers and going to court.

Going to trial will cost a minimum of \$15,000 in lawyer's fees for a two- or three-day trial. Most family law trials are one or two weeks long, and this figure ignores the costs of all the other things that have to happen before you walk into the

courtroom on day one!

If this doesn't get your ex to agree to see a mediator, tell him or her to ask separated friends, family members and co-workers how much it cost for their court proceedings and how long it took to go from start to finish.

Hire a mediator

Now that your ex has agreed to see a mediator with you, strike while the iron is hot: find a mediator and book an appointment immediately.

Before hiring a mediator, make sure you've looked into his or her background to make sure that the mediator has had special training as a mediator. Lawyers who have training and are accredited to mediate by the Law Society are called family law mediators, and they will usually advertise themselves as such.

When picking a mediator, first ask around. Have any of your friends used a mediator, and what did they think of the mediator? If that doesn't work, call a family law lawyer. Most family law lawyers keep a short list of the mediators they prefer to use, and will be happy to give you their names and phone numbers.

For more information

You can find out more about using mediation in the chapter Resolving Family Law Problems out of Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Start a Collaborative Settlement Process with My Spouse?

Pick the right moment

You can't force your ex to start a collaborative settlement process with you, you can only do it with his or her agreement. Your ex isn't likely to agree to try a collaborative approach to settlement if he or she is still pissed off about a recent argument or is still resentful about the end of the relationship.

When you've got the right moment, suggesting a collaborative settlement process can be as simple as calling your ex up and inviting him or her out for a cup of coffee at the local Tim Hortons:

"Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, but we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Harkamal what happened with her and Baljinder, and she said that they used a collaborative settlement process."

At this point, it's all about getting your ex to try a collaborative settlement process, and it's your job to sell the idea. Here are some reasons why a collaborative approach is a really, really good idea:

- a collaborative process will give you and your ex the best chance of leaving your relationship on good terms,
- you can both participate in making the important decisions about your kids, your money and your property,
- other helping professionals, like registered clinical counsellors and financial experts, can be brought into the process whenever extra help is necessary,
- every is committed to finding a settlement without going to court, including the lawyers,

- you can create the solution that is best for you and your family,
- settlements reached through negotiation tend to last longer than decisions imposed by a judge after a trial,
- a collaborative approach is much cheaper than going to court, and
- you'll be done in a fraction of the time that you would have spent in court.

Going to trial will cost a minimum of \$15,000 in lawyer's fees for a two- or three-day trial. Most family law trials are one or two weeks long, and this figure ignores the costs of all the other things that have to happen before you walk into the courtroom on day one!

If this doesn't get your ex to agree to try a collaborative approach, tell him or her to ask separated friends, family members and co-workers how much it cost for their court proceedings and how long it took to go from start to finish.

Hire collaborative lawyers

Now that your ex has agreed to a collaborative settlement process, you each need to hire a lawyer trained in collaborative practices and get the process underway.

Lawyers who work in a collaborative practice model will say as much in their advertising. You can also do an internet search for "collaborative lawyer bc" that will give you a list of collaborative lawyers and, even better, collaborative practice groups in your neighbourhood.

Collaborative practice groups will have lists of their members who are lawyers, mental health professionals and financial specialists, and the odds are pretty good that if you find a collaborative lawyer who you think you'll work well with, the lawyer will be able to recommend a handful of other lawyers from the same practice group for your ex.

Before you hire your lawyer, first ask around. Have any of your friends used a collaborative lawyer, and what did they think of him or her? If that doesn't work, call a family law lawyer. Most family law lawyers, even family law lawyers who aren't trained in collaborative processes, will be able to recommend you to someone they think highly of.

For more information

You can find out more about collaborative processes in the chapter Resolving Family Law Problems out of Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Start Arbitration with My Spouse?

Pick the right moment

You can't force your ex to go to arbitration with you, you can only do it with his or her agreement. Your ex isn't likely to agree to arbitration if he or she is still pissed off about a recent argument or is still resentful about the end of the relationship.

When you've got the right moment, suggesting arbitration can be as simple as calling your ex up and inviting him or her out for a cup of coffee at the local Tim Hortons:

"Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, but we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Simeng what happened with her and Robert, and she said that they resolved everything through arbitration."

At this point, it's all about getting your ex to try arbitration, and it's your job to sell the idea. Here are some reasons why arbitration is a really, really good idea:

- arbitration is private, there is no court file and the hearing is not open to the public,
- you can arbitrate with the help of lawyers or on your own,
- you can pick an arbitrator who's an expert in the issues that are the most challenging for your family,
- you can get the help of professionals like child psychologists, business valuers, and tax planners,
- with input of the arbitrator, you can design the rules that will apply to your hearing,
- with input of the arbitrator, you can decide on the amount of disclosure that will be needed for your hearing,
- the arbitrator's decision is just as final and just as binding as a court award,
- you can schedule the hearing date as soon as you want, where you want, and
- with faster hearings and more efficient process to get there, arbitration is cheaper than litigation.

Going to trial will cost a minimum of \$15,000 in lawyer's fees for a two- or three-day trial. Most family law trials are one or two weeks long, and this figure ignores the costs of all the other things that have to happen before you walk into the courtroom on day one!

If this doesn't get your ex to agree to try arbitration, tell him or her to ask separated friends, family members and co-workers how much it cost for their court proceedings and how long it took to go from start to finish.

Hire an arbitrator

Now that your ex has agreed to try arbitration, strike while the iron is hot: find an arbitrator and book a pre-arbitration meeting immediately.

Before hiring an arbitrator, make sure you've looked into his or her background to find out if they have special training in arbitration.

Lawyers who have training and are accredited to arbitrate by the Law Society are called family law arbitrators, and they will usually advertise themselves as such.

When picking an arbitrator, go to the website of a professional association like the Family Law Arbitrators Group. Associations like this will have a list of their members, the training and experience they require for membership and a short biography of each member.

If that doesn't work, call a family law lawyer. Most family law lawyers will know one or two arbitrators they can recommend, and will be happy to give you the arbitrators' names and phone numbers.

For more information

You can find more information about arbitration in the chapter Resolving Family Law Problems out of Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Hire a Parenting Coordinator?

Who should hire a parenting coordinator?

Parenting coordinators aren't for everyone. The vast majority of separating parents have no need of a parenting coordinator.

Parenting coordinators are for those few couples who found themselves fighting before litigation started, fighting as the litigation wound to trial, fighting during the trial, and fighting long after the trial. For these parents, no conflict is too small to argue about and the conflicts seem endless. These are the parents who would benefit most from parenting coordination.

When should you hire a parenting coordinator?

At present, parenting coordinators trained through the BC Parenting Coordinators Roster Society are only available when there is a final parenting arrangement in place as a result of a final order or a separation agreement.

Parenting coordinators do not make fundamental changes to a parenting arrangement. While they can and will adjust an access schedule from time to time, they can't decide that a child will live with a different parent and they usually won't make long-lasting changes to a schedule of parenting time or contact. Parenting coordinators need a framework to work with, whether the framework is provided by a court order or an agreement.

Parenting coordinators will make minor adjustments to a parenting schedule as may be required from time to time. They can help resolve problems about parenting disputes, and they will help the parents to communicate with each other more effectively.

How do you pick a parenting coordinator?

The website of the BC Parenting Coordinators Roster Society ^[1] has a list of their members, sorted alphabetically but with the members identified by the location of their practice and by their profession, whether lawyer, psychologist, registered clinical counsellor, social worker, or mediator, and usually with a link to the member's webpage or website.

When you've found one or two parenting coordinators with a good location and a background you like, give them each a call and maybe arrange to meet each of them. You aren't obliged to hire the first person you meet; wait until you've spoken to someone you feel comfortable with and who you think your ex will listen to.

Whatever you do, don't forget to ask the parenting coordinator about his or her current workload and when the parenting coordinator will be available to help.

How do you hire a parenting coordinator?

Picking a parenting coordinator you like is the easy part. The hard parts are:

- getting your ex to agree to try parenting coordination, and
- finding a parenting coordinator your ex can agree to.

As far as the first problem goes, parenting coordinators must be appointed by the parents' agreement or by a court order.

For the second problem, you may simply have to do some more shopping around. It may help to shift some of the burden to your ex. After suggesting your own list of two or three people, ask your ex for his or her list.

For more information

You can find more information about parenting coordination in the chapter Resolving Family Law Problems out of Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://www.bcparentingcoordinators.com>

How Do I Execute a Family Law Agreement?

The most common family law agreements are:

- *cohabitation agreements*, used when a couple plan on living together but don't plan on marrying,
- *marriage agreements*, used when a couple plan to marry, and
- *separation agreements*, used when married spouses or unmarried spouses have separated.

Other agreements might include *interim agreements*, made after negotiations have started but before a final settlement, *parenting agreements*, *trust agreements*, *confidentiality agreements* and so on.

Execution

All family law agreements are executed in the same way: the person making the agreement signs it in the presence of someone else, while that person watches. That's it!

Witnesses

The person who witnesses the signature can be anybody, with just a few exceptions. Witnesses must be 19 years of age or older, they must be sane, and they shouldn't be another party to the agreement or someone who stands to benefit from the agreement. *It is not necessary to pay to have a lawyer or notary public serve as witness.*

The role of the witness is to simply say that the witness knew the person signing the agreement and saw him or her sign the agreement: "I saw Frank sign the agreement, and I knew it was Frank because Frank has been my neighbour for the last six years" or "I saw Ming sign the agreement, and I knew it was Ming because I saw her driver's licence and the picture matched Ming's appearance and the name on the licence matched the name on the agreement."

Signing the agreement does not make the witness a party to the agreement or put the witness under any obligation at all to either party.

Signing the agreement

Family law agreements are executed by having each of the parties sign their names, using their normal signatures, in a spot on the last page of the agreement that looks like this:

IN WITNESS WHEREOF, Yitzhak has hereto set his hand and seal at the City of Salmon Arm in the Province of British Columbia, this the 20th day of April, 2013.

| | |
|------------------------|-------------------|
| SIGNED, SEALED AND) | |
| DELIVERED by Yitzhak) | |
| in the presence of:) | |
|) | |
| _____) | _____ |
| Signature) | YITZHAK BERNSTEIN |
|) | |
| _____) | |
| Name) | |
|) | |
| _____) | |
| Occupation) | |
|) | |
| _____) | |
| Address) | |
|) | |
| _____) | |

The party to this agreement, Yitzhak in this case, signs his normal signature above the line on the right. The witness signs above the top line on the left and fills out the extra information about the witness' address and occupation.

An agreement that has been executed by both parties is called a *perfected agreement*.

For more information

You can find more information about making and executing a family law agreement in the chapter Family Law Agreements.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Change a Family Law Agreement?

The most common family law agreements are:

- *cohabitation agreements*, used when a couple plan on living together but don't plan on marrying,
- *marriage agreements*, used when a couple plan to marry, and
- *separation agreements*, used when married spouses or unmarried spouses have separated.

All of these agreements can be changed once they've been executed, as long as the parties to the agreement agree that the agreement should be changed.

What can be changed

Normally, people only want to change one or two parts of an agreement while keeping the rest of the agreement intact. If you want a brand new agreement altogether, be careful. If the other party won't agree to throw out the old agreement, he or she will be entitled to go to court to enforce the old agreement, whether you're still happy with that agreement or not. This is, after all, why people execute contracts in the first place: they expect them to be permanent and they expect that the courts will hold people to the agreements they have made.

Making the new agreement

Since, in most cases, the original agreement is being kept, changes to that agreement are made in new agreements called "amending agreements", "addendum agreements," or some other language to that effect. The new agreement is a separate contract that says in what ways the original contract is being changed. The new agreement will:

- state, in the recitals, the name and the date of the agreement that is being changed,
- briefly, also in the recitals, explain why the change is necessary, and
- state, for each change, the paragraph affected in the old agreement and how that paragraph is to be changed.

You might handle the first and second points by saying something like this: "this agreement amends the Separation Agreement executed by the parties on 1 April 2010," and "following the execution of the Separation Agreement, the schedule of the parties' parenting time has become unworkable as a result of certain changes in their hours of employment." The individual changes might be handled like this:

4. Paragraph 12 of the Separation Agreement will be cancelled and is replaced with the following:

"Sally will return the children to Harry's care at 7:00pm or at the end of the evening shift, whichever is earlier. Sally will give Harry 24 hours notice in the event she is scheduled to work the evening shift on the days she is to return the children to Harry's care."

5. Paragraph 36 of the Separation Agreement will be replaced with the following:

"Sally will pay child support to Harry in the amount of \$425 per month for as long as the children remain children of the marriage as defined by the *Divorce Act*."

The key points here are that you must specifically identify the parts that are to be changed and how they are being changed, and the new language must be as clear and unambiguous as the language of the original agreement.

Executing the new agreement

The new agreement must be executed in front of witnesses in the same manner as the original agreement was executed. The witnesses to the new agreement do not need to be the same people who witnessed the original agreement.

For more information

You can find more information about changing a family law agreement in the chapter Family Law Agreements.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I File an Agreement in Court?

Written agreements about most family law issues can be filed in the Provincial Court or the Supreme Court under the *Family Law Act* and the rules of court:

- agreements on parental responsibilities and parenting time can be filed under s. 44(3) of the *Family Law Act*,
- agreements on contact can be filed under s. 58(3),
- agreements on child support can be filed under s. 148(2), and
- agreements on spousal support can be filed under s. 163(3).

Agreements that are filed in court can be enforced as if they were orders of the court in which they are filed.

Among other things, this means that the Family Maintenance Enforcement Program can enforce an agreement for support exactly as it would enforce an order for support. Enforcement by FMEP is the usual reason why agreements are filed in court.

When there is an existing court proceeding

If a court proceeding has already been started, an agreement will normally be filed in the same court at same court registry where the proceeding was started. This helps to keep the whole court file together and prevents confusion about the status of the agreement and the status of the litigation.

If the action is in the Provincial Court, take one original copy of the agreement to the family law counter along with the file number of court proceeding. The court staff will help you with any paperwork. You don't need to see a judge or appear in court.

If the action is in the Supreme Court, take one original copy of the agreement to the family law counter along with something showing the style of cause of the court proceeding (the file number, the court registry, the name of the claimant and the name of the respondent). The court staff will give you a blank Requisition to fill out. You don't need to see a judge or appear in court.

When a court action hasn't been started

If there is no existing court action, it's up to you to decide where you'd like to file your agreement. Since FMEP will enforce an agreement whether it's filed in the Provincial Court or the Supreme Court, it's usually easiest just to go the courthouse nearest you.

All you need to take to the courthouse is one original copy of the agreement. The court staff will open a court file for the agreement and help you with any paperwork.

Finding out if your agreement has been filed

It can be a bit tricky to find out if an agreement has been filed in court or not, since there's no requirement that agreements be filed or that agreements that are filed be filed in the same court registry as any court proceedings between the parties to the agreement.

If there is an existing court action, go the court registry where the litigation began and ask to see the court file. Because family law files are sealed from the general public you'll need to bring some photo ID.

If there isn't an existing court action, you'll need to make at least two stops:

1. First, go to the local Provincial Court to ask the staff to do a province-wide search to see if a Provincial Court file has been opened in your name and the name of the other party.
2. Second, go to the closest Supreme Court to do the same search of Supreme Court files. You can also do the Supreme Court search using Court Services Online, but you won't be able to get any details of the court file other than that one exists.

For more information

You can find more information about family law agreements in the chapter Family Law Agreements.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Find My Ex?

In general, people need to find their ex for two reasons:

1. because they want to start a court proceeding and need to find their ex to serve him or her with the papers that begin the proceeding, or
2. to begin enforcing an order relating to child support or spousal support.

Private services

The fastest but most expensive way to find someone is to hire a *skip tracer*. Skip tracers are people that are usually hired by creditors to find someone who's left town to avoid a debt, but they'll also take private contracts to find someone. Private investigators can also provide this sort of service, but generally PIs have more practice at finding information rather than people.

Public services

The Ministry of Justice has a search service that can help you to find someone when you need to enforce a court order or a separation agreement that has been filed in court that deals with:

- child support,
- spousal support,
- guardianship of a child,
- parental responsibilities and parenting time in respect of a child, or
- contact with a child.

The Ministry of Justice's service may be slow, but it has some fairly long arms. In addition to searching provincial records, they can also search federal data banks. To use their service, contact your local Provincial Court and ask them to submit a search request for you.

Internet

The explosive growth of the internet has resulted in a heck of a lot of information being readily available, sometimes in ways people don't think of. If you're looking for someone on the net, try an internet search using the person's first and last names, in quotes, like this:

"John Doe"

or

"J Doe"

The quote marks force the search engine to look for that exact phrase, which increases the likelihood that you'll find the person you're looking for. If you have an idea of where the person might be, add that to your search phrase, but put it outside the quotes, like this:

"John Doe" Kamloops

or

"John Doe" "British Columbia"

You could also try one of these services:

- [Google.ca](http://www.google.ca) ^[1], one of the best search engines around,
- [Canada411.ca](http://www.canada411.ca) ^[2], a Canada-wide phone book, or
- [411.com](http://www.411.com) ^[3], which allows you to find a person by looking up their phone number or address.

Avoid pay services operated out of the United States, especially those that want you to enter your credit card number on their website. They may not be able to search within Canada.

For more information

You can find more information about starting an action in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter, and about enforcing orders within the section Enforcing Orders in Family Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://www.google.ca>

[2] <http://www.canada411.ca>

[3] <http://www.411.com>

How Do I Start a Family Law Action in the Provincial Court?

Starting a court proceeding in the Provincial Court is fairly straightforward. Essentially, you have to fill out a document called an Application to Obtain an Order and file it in the registry of the court closest to you.

There are no filing fees, and the court will tell you how to go about serving the other side.

You can get a copy of the Application to Obtain an Order from the court registry for free. The forms are also available online; see the Provincial Court Forms section. The version of the form that you can get from the court registry includes lots of information about how to fill it out.

If you are making a claim for *spousal support* or *child support*, you'll also have to fill out a form called a Financial Statement. The court registry will provide you with this form. Again, the form is fairly easy to fill out. However, there are certain documents that you must gather and attach to the form, including your last three years' worth of tax returns, your most recent paystub, and so forth.

If you are making a claim for *guardianship* of a child, you will also have to fill out a special affidavit in Form 34, and provide copies of recent police and Ministry of Children and Family Development records checks.

When to use the Provincial Court

The authority of the Provincial Court is limited and it can only deal with certain issues. You should use the Provincial Court when the things you need to deal with involve any of the following:

- guardianship of children,
- parenting arrangements for children,
- contact with a child,
- child support,
- spousal support, and
- protection orders.

When not to use the Provincial Court

The Provincial Court cannot deal with issues involving property or debts. The Provincial Court cannot make orders under the *Divorce Act*, including divorce orders. If you need orders about property, debt or divorce, you might think about starting your court proceeding in the Supreme Court which can deal with all of these issues and all of the issues that the Provincial Court can deal with.

What happens next?

Once you've filed your Application to Obtain an Order, you'll have to have it served on the other person and get your process server to complete an Affidavit of Service. Once the other person has been served, he or she will have 30 days to file a form called a Reply, and, if either of you are making a claim for spousal support or child support, his or her Financial Statement as well. The court will mail you a copy of these documents.

When the court receives the other person's Reply, the court will normally set up an appointment for you to meet with a family justice counsellor or schedule a date for an initial meeting with the court, called a first appearance. The family justice counsellor's job is to see whether any of your issues can be resolved, to give you information about the law and other dispute resolutions and to try, if you're interested, to mediate your dispute. The family justice counsellor can also prepare consent orders, that is, an order that you and the other person both agree the court should make.

If you are unable to reach an agreement after seeing the family justice counsellor, you can ask to be referred to a judge for a hearing of the issues. The court registry will book a time for the hearing and send a notice of the hearing to you and the other side.

For more information

You can find more information about this in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Start a Family Law Action in the Supreme Court?

The court forms to start your claim

Most of the time you'll need to fill out a form called a Notice of Family Claim, Form F3.

In certain, relatively uncommon circumstances a family law proceeding is started with a Petition, Form F73. (Petitions are used when someone is asking for the return of a child under the Hague Convention on child abduction, and other orders that can be dealt with in a single hearing.)

Form F3 is available online. See the Supreme Court Forms section. The court will not provide you with a guide to filling this form out, so you must be as precise and accurate as possible.

There are a lot of free online resources that can help you complete these forms, but if you have any questions, you should really see a lawyer.

The Notice of Family Claim sets out the basic information about who you are, who the other side is, and describes the sorts of claims you are making.

You have to attach additional schedules to your Notice of Family Claim depending on the orders you are asking for. The schedules require you to provide more detailed information about your marriage, your children, your property and debts, and so forth.

Other forms you might need

If you are married and you are asking that the court make an order for your divorce, you must file the original copy of your marriage certificate. (This is the government document, not the certificate you received from the person who married you.)

If your claim involves the family home or other property, you may also want to prepare a certificate of pending litigation (called a CPL). (More information about CPLs is available in the section on Certificates of pending litigation under the Land Title Act in the chapter Protecting Property & Debt in Family Law Matters.)

If your claim involves support, property or debt, you'll also wind up filling out a Financial Statement in Form F8. This isn't due until later on in the court proceeding but you can get started now.

If your claim involves guardianship of a child and you are not already a guardian, you'll need to fill out a special affidavit in Form F101. You don't have to file this form right away when you're starting a court proceeding, but the form can take some time to fill out and you will need to order records checks from the police and the Ministry of Children and Family Development. You might as well get on this now.

Filing your materials

When you've finished filling out your Notice of Family Claim, make three complete copies and take everything, including your marriage certificate and your CPL (if needed) to the courthouse.

You will have to fill out yet another form when you file your materials, a Registration of Divorce Proceeding. The court will provide this to you.

It will cost \$210 for you to file your Notice of Family Claim plus another fee to file your CPL, if you need one.

The court will give your action a file number, and stamp all four copies of your materials with the seal of the court, a date stamp and the file number of your action. If you have filed a CPL, the court will stamp that too. Note that you must also file your CPL at the Land Title and Survey Authority for it to take effect; they will charge you another fee.

What happens next?

Once you've filed your Notice of Family Claim, you must arrange to have it served on the other side. You cannot serve the other person yourself, you must get someone else to do that for you, whether that person is a professional process server or a helpful friend.

After the other person has been served, he or she will have 30 days to file a Response to Family Claim. The other side may also file a form called a Counterclaim. If this happens, the other side is making a claim of his or her own against you.

When you have received the other person's Response to Family Claim, you will have to set up a judicial case conference (JCC). You can do this with a special form of Requisition that the registry will have on hand.

A JCC is an informal hearing before a judge or master intended to review the issues between the parties, and see what issues can be agreed on and what can't be. The judge or master will also canvass different ways of settling the action.

It can be very important to have a JCC as soon as possible, as most applications for interim orders can't be made until a JCC happens. There are some exceptions to this rule:

- if you are making an application for a financial restraining order against your spouse,
- if the other side consents to the order you want, or
- if there is an emergency and you have to make your application without notice to the other side.

More information about JCCs and the rules that govern them is available in the section Case Conferences in a Family Law Matter in the chapter Resolving Family Law Problems in Court.

More information

You can find more information about starting a family law action in Supreme Court in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Apply for Indigent Status in the Supreme Court?

"Indigent" means being broke, *flat* broke.

The Supreme Court registry charges certain fees for a whole host of common court activities, such as for filing court forms and making applications to a judge. Some of these fees can be quite high and become a barrier to someone seeking access to the justice system. These fees are set out in Appendix C of the Supreme Court Family Rules.

Rule 20-5 allows the court to waive all or some of these fees for all or part of a court proceeding if the court is satisfied that you are indigent. You must make application for a finding that you are indigent.

Making the application

Most people apply for indigent status at the same time that they're filing their Notice of Family Claim, or a Response to Family Claim or Counterclaim. The point, of course, is to avoid the fees that you'd normally pay to file these documents. You can also apply for indigent status in the middle of a court proceeding if need to.

The court registry will have blanks of the forms you need to fill out. The forms are also available online; see the Supreme Court Forms section. You'll need a Requisition in Form F17 and an Affidavit in Form F86. The Affidavit will require you to describe the amount and sources of your income, your monthly expenses, your job skills and your education.

If you file your materials before 10:00am, the registry will likely send you before a judge that morning, otherwise you may have to wait for the next day chambers is held. You do not have to give notice to the other side of your intention to make this application, and no fees are charged to apply for indigent status.

When your application is called, you'll have to explain to the master or judge why it is that you can't afford the court fees. Living on welfare, Employment Insurance, Old Age Security or CPP benefits is usually enough. It will be helpful if you can provide copies of your welfare statements, EI statements or other evidence to prove your income.

If the court allows your application, you can then go back to the registry and file your pleadings — and all future materials — free of charge. If the court doesn't allow your application, well, you'll have to pay and that's that.

Exceptions to the rule

It is important to know that the court has an unlimited discretion to grant or refuse applications for indigent status. More importantly, even if you are broke, Rule 20-5(1) sets out three specific grounds for the court to refuse your application:

1. if your claim is unreasonable, or if your defence to the claimant's claim is unreasonable,
2. if your claim is "scandalous, frivolous or vexatious," or
3. if your claim or your defence is, for any other reason, an "abuse of the process of the court."

In other words, if you're one of those people who sues the Queen, the Prime Minister, the Premier and the Attorney General every time they sue their neighbour for playing their music too loudly, you can expect that your application for indigent status will be turfed. If your claim is legitimate and well-founded, and you meet the general criteria for indigency, you should expect to be awarded indigent status.

For more information

You can find more information about Supreme Court procedure and filing fees in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Personally Serve Someone with Legal Documents?

In general, the only documents that have to be *personally served* on someone in the course of a Supreme Court proceeding are:

1. the claimant's Notice of Family Claim,
2. the application materials when an application is made to change a final order, and
3. the application materials when an application is being made for a finding that someone is in contempt of court.

Personal service is required when starting a court proceeding. Once the other side files his or her Response to Family Claim, almost all legal documents after that can simply be delivered to each side by *ordinary service*, at their respective addresses for service.

The easiest way to ensure personal service is properly done is to hire a process server, but you can arrange for someone else to do it for you.

What's the difference between personal service and ordinary service?

Personal service, also called *service of process* is the formal delivery of a document to someone in a manner that can be proven in court and which complies with the Supreme Court Family Rules about service. In a nutshell, personal service means personally giving someone a document, usually by handing it to them.

Ordinary service means simply sending a document to someone by mail, fax or sometimes email. A document is served by ordinary service by sending the document to the address for service set out by the claimant in the Notice of Family Claim and by the respondent in the Response to Family Claim.

Personal service

The requirements for valid personal service are set out in Rule 6-3 of the Supreme Court Family Rules. The Notice of Family Claim must be physically handed to the respondent; dropping it through the mail slot won't do.

Since the court will require proof that the respondent was properly served, the person who did the service should prepare an Affidavit of Personal Service in Form F15. For this reason, the person doing the service usually must:

- be provided with a photograph of the respondent, so that he or she can confirm that the person served looked like the person in the photograph,
- ask the respondent to confirm that he or she is the person named in the Notice of Family Claim, or
- ask the respondent to produce his or her driver's licence (or other official government photo identification) and confirm that the name on the licence matches the name in the Notice of Family Claim and that the person served looks like the photograph on the licence.

The claimant in a family law proceeding cannot serve the respondent personally. You must get someone else to do it for you! That person can be anyone who is age 19 or older and sane.

Substituted service

Of course, not everyone is willing to be nice about things and cooperate with service. When the respondent is avoiding service, you can get an order that he or she be served in some other way than the usual, proper way. This is called *substituted service*.

You will have to prove that you can't serve the respondent in the normal manner before you will be allowed to serve them substitutionally, so you'll have to provide the court with an affidavit from your process server describing how the respondent is avoiding service, or your own affidavit stating that you don't know where the respondent is and that he or she can't be found.

The court has a fairly wide latitude when it comes to making orders for substituted service. The court can order that the respondent be served by:

- posting a copy of the documents to the door of his or her home or office,
- running ads in the legal notices section of a newspaper distributed where the respondent lives,
- leaving a copy of the Notice of Family Claim with an adult living where the respondent is thought to live,
- mailing it to the respondent by registered mail, or
- posting a copy of the documents in the court registry.

The court will likely impose conditions on the substitutional order, like extending the time for the respondent to reply. Once those conditions are met, service will be considered to have been effected. You will have to prepare an affidavit proving that you have met the conditions the court has set.

See [How Do I Substitutionally Serve Someone with Legal Documents?](#)

Contempt applications

You must personally serve a party when you are making an application that he or she be found in contempt of court. Rule 21-7 requires that the other side be personally served with the Notice of Application asking that the party be found in contempt of court plus copies of the affidavits that will be used in support of your application.

More information

You can find more information about the Supreme Court procedure for serving documents in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Substitutionally Serve Someone with Legal Documents?

The Supreme Court Family Rules require that a person being sued be notified about the court proceeding and be given copies of the Notice of Family Claim starting the proceeding in a certain formal manner. This is called *personal service*.

Personal service is normally accomplished by physically handing a copy of the Notice of Family Claim to the respondent; really, the documents only need to touch the respondent's body. This is not always possible. If you do not know where the person you want to sue lives, or if that person is avoiding being served, you may have to apply to court for an order that you have permission to personally serve the respondent in a way other than the way set out in the rules. This is called substituted service.

Applying for an order for substituted service

You must get the court's permission before the court will accept any other means of service than that set out in Rule 6-3.

Once you have filed your Notice of Family Claim you must apply for an order that you be allowed to serve the respondent substitutionally. You will have to prepare a Notice of Application describing the order that you want the court to make and your affidavit in support of your application.

Your affidavit should set out the reasons why personal service is impossible. If it's because you don't know where the respondent is, you should say so. You should also say that you have no means of contacting the respondent, for example, through family or friends. If you can't serve the respondent because he or she is avoiding service, you should describe how you've tried to serve the respondent and how often you've tried.

Because the respondent hasn't been served you can make your application right away, without having to follow the usual rules that give the respondent time to reply to your application. You can file your application and have your application heard the same day. Apart from this, the remainder of your application will be just like the normal application process that is described in *How Do I Make an Interim Application in a Family Law Matter in the Supreme Court?* in the *How Do I?* section on *Interim Applications*.

Options for substituted service

Posting in the registry

If you have no idea at all where the respondent might be, you can ask the judge to allow you to serve the respondent by posting a copy of your Notice of Family Claim in the court registry for a certain period of time, usually no less than 30 days. This is the cheapest means of alternative service, and you really have to show that you've got no idea where the respondent is, no relatives or friends to contact him or her through, and no idea where the respondent works.

If the court grants this order, the court will specify how long the Notice of Family Claim must remain posted. Your job will be to take the judge's order and a copy of your Notice of Family Claim to the court registrar. The registrar will arrange for the posting, take note when it was put up, and take note when it was taken down.

Notices in the classified ads

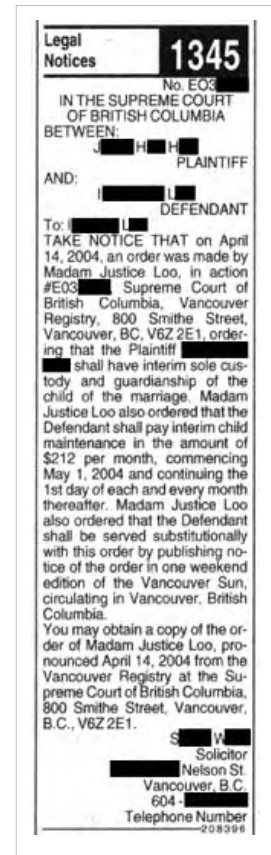
If you have a general idea of where the respondent might be (in Vernon, in the Peace District, in the Lower Mainland, for example) you can ask the court for an order that you serve the respondent by posting an ad in the legal notices section of the area's local paper. The judge will usually specify the newspaper and for the number of issues the ad must be run in.

An example of this means of substituted service under the old Rules of Court appears at right. In this ad, the plaintiff (claimant) J.H.H. is suing the defendant (respondent) I.L. for orders involving the care and control of a child, child support, and probably other relief. (Note that in the course of making the order for substituted service in this example, the judge hearing the application also made other orders relating to child support, and custody and guardianship of the child. This is a bit unusual. Normally the courts will not make those sorts of orders without notice to the other party, even if that party's whereabouts are unknown.) You can see how this ad:

1. advises the defendant of the fact of the lawsuit, and provides important information about the style of cause, the court registry and the court file number,
2. states the terms of the order for substitutional service (posting in one issue of the weekend newspaper),
3. tells him or her how to get a copy of the plaintiff's materials, and
4. gives the name and contact information for the lawyer representing the plaintiff.

Under Rule 6-4(3), newspaper ads must be in Form F11. This form looks a bit different than the example given here.

Be wary of pursuing this means of substituted service: the costs can be quite high, as newspapers sometimes charge special rates for legal notices. The example on the right, which came from an old issue of the *Vancouver Sun* probably cost between \$400 and \$550.



Service through friends, relatives and employers

You may know another way by which the court proceeding can be brought to the respondent's attention with a fair degree of certainty. The court may allow service to occur through a third party, providing that there is reason to believe that the respondent has a fair amount of contact with the third party and that the third party can be relied on to bring the proceeding to the respondent's attention. Typical examples are:

- through the respondent's work (co-workers or employers, who will probably be in contact with the respondent on a reliable basis),
- through family (a relative that you know the respondent keeps in touch with),
- through friends (friends who see the respondent on a pretty regular basis), and
- through the respondent's residence (a landlord or other people sharing the respondent's apartment).

If you are certain that leaving your materials with one of these people will ensure that your court proceeding is brought to the respondent's attention, the judge may give you an order to that effect. The order will usually say something to the effect of:

service upon the Respondent may be effected by delivering a copy of the Notice of Family Claim with any adult resident at Apartment 123 at 456 Main Street in Anytown, British Columbia

or

service upon the Respondent may be effected by delivering a copy of the Notice of Family Claim to his employer, John Doe, of John Doe's Autobody, whose place of business is at Unit 123 at 456 Main Street in Anytown, British Columbia

This means of service is usually reserved for respondents who are or appear to be avoiding service.

Other means of service

The court really does have a wide latitude when it comes to making orders for substituted service. Among other things, the court can order that the respondent be served by:

- posting a copy of the documents to the door of his or her home or office,
- posting a copy of the documents in the local post office, or
- mailing it to the respondent by registered mail.

The particular method the court considers appropriate will always depend on the circumstances and what is reasonable in those circumstances.

The effect of substituted service

The goal of serving someone substitutionally is to try to alert that person to the fact of the court proceeding and tell him or her how to get more information about the proceeding.

The effect of an order for substituted service is that a person will be deemed to have been served once all the terms of the order for substituted service are met.

Whether the respondent is actually alerted to the proceeding is another story. The point here is that the court will consider the respondent to have been properly served. This will allow you to go on with your court proceeding in the normal manner once you've met the terms of your substituted service order, whether the respondent has found out about your claim or not.

The most important thing to know about substituted service, is that the time before you can do anything else in your court proceeding — such as applying for a default judgment, or making an application for temporary relief — doesn't start ticking until after the terms of the order of substituted service have been fulfilled. In other words, it isn't until the terms of the order are done that you can start counting the time until your next application to court.

For example, say the order allows you to serve someone by posting a copy of your pleadings in the court registry for 45 days. It isn't until the forty-sixth day that you can start counting time. Since the respondent has 30 days to file a Response to Family Claim, you will have to wait 76 days (46 plus 30) from the date you got the order and the order was posted before you can ask for a default judgment or make any other application to the court.

More information

You can find more information about the Supreme Court procedure for serving documents in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Change Something in My Notice of Family Claim?

The pleadings

Pleadings are the documents that start a court proceeding or reply to a court proceeding.

For the person who starts an proceeding, the *claimant*, this is:

1. Notice of Family Claim,

and sometimes also:

1. Response to Counterclaim.

For the person who is replying to a court proceeding, the *respondent*, these documents are usually:

1. Response to Family Claim
2. Counterclaim

Sometimes a party's pleadings need to be changed, or *amended*. Usually, a change is required because a fact is wrong, like a date or a name. At other times, a change is required to raise a new defence or to make a new claim.

For example, say a claimant had a job when an action started and then lost it halfway through the case. If the claimant now needs spousal support but didn't make that claim in his or her Notice of Family Claim, the claimant would need to amend his or her pleadings to include the new claim.

The rules

Pleadings are important because they describe the basic nuts and bolts of a party's claim or defence, and the facts that are said to support the claim or defence. They are the foundation of the court proceeding and the basis upon which each party will prepare for trial. As a result, there are special rules about amending pleadings. These are set out in Rule 8-1 of the Supreme Court Family Rules.

Firstly, you can't just amend your pleadings when you feel like it:

- under Rule 8-1(1)(a), you can make one set of changes, however major or minor, at any time before the Notice of Trial has been filed,
- under Rule 8-1(1)(b), you can make another set of changes with the written consent of the other party, and
- to make changes in any other circumstances, you'll first need to get the court's permission.

Secondly, you must mark all of your amendments. All of the changes are to be underlined in red ink to make it obvious exactly what's been changed. When a lot of text has been changed, say the size of a whole paragraph or more, the lines can be made to run up the left and right sides of the amended text instead of under each and every line of text.

Next, the title of the changed document always starts with the word *Amended*, such as the Amended Notice of Family Claim or the Amended Counterclaim, to distinguish the new, changed document from the original. When an amended document is amended again, the title of the new document begins with the phrase *Further Amended*, as in the Further Amended Notice of Family Claim.

You'll also need to change add some information to the top of the first page to indicate why you were able to change your pleadings, and when the original document was filed. For example, for a change made before delivery of the Notice of Trial, you would write:

"Amended pursuant to Rule 8-1(1)(a).
Original filed on 25 October 2012."

Finally, you must file the amended documents in the court registry where the action was started. You must then serve the new pleadings on the other side by ordinary service within seven days.

More information

You can find more information about the Supreme Court documents you will need in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Stop a Family Law Action in the Supreme Court?

Only the claimant to a Supreme Court proceeding can stop the court proceeding without the proceeding going to trial or being settled.

No one can stop a court proceeding for the claimant or force the claimant to stop a proceeding.

While it often happens that a proceeding is abandoned, typically when no one does anything in the action for a long time, that doesn't stop the court proceeding altogether or cancel any orders that have already been made.

To bring everything to a halt, the claimant must file a Notice of Discontinuance in Form F39, and deliver a copy of the filed notice to everyone else named in the proceeding. If the claimant does this too late, after a court proceeding has already been set for trial, the claimant can only stop everything with the consent of the other parties or a court order.

While there is no fee charged to file a Notice of Discontinuance, Rule 11-4(4) says that the respondent may be entitled to claim his or her court costs of the proceeding up to the date it is discontinued.

More information

You can find more information about Supreme Court procedure in the chapter Resolving Family Law Problems in Court within the section Starting a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Respond to a Family Law Action in the Provincial Court?

Once you have been served with the applicant's Application to Obtain an Order, you have 30 days to file a form called a Reply. The Reply is available at the provincial court registry or online (see the Provincial Court Forms section), although a copy may have been delivered with the Application to Obtain an Order.

You must file your Reply at the same court registry the Application to Obtain an Order was filed, and you can tell which registry this is by looking at the box at the upper right-hand corner of the form. There are no fees charged to file your Reply.

You have 30 days to file your Reply from the date *you were served*, not 30 days from the date the Application to Obtain an Order was *filed in court*.

When you fill out your Reply, you will be asked to say which parts of the Application to Obtain an Order you agree with and which you disagree with. The form can also be used to make a claim of your own against the applicant. You don't need to file an Application to Obtain an Order of your own.

After you have filed your Reply, the court may schedule a date for you to meet with a family justice counsellor and you may be required to attend a Parenting After Separation course, depending on which registry the application was filed. The registry will take care of scheduling your meeting with the family justice counsellor, but it's up to you to arrange for the Parenting After Separation course.

If the applicant is making a claim for child support or spousal support, you will also have to fill out and file a Financial Statement. If such a claim is being made, you will normally be given a blank Financial Statement at the same time you are served with the Application to Obtain an Order.

For more information

You can find a lot more information about this in the chapter Resolving Family Law Problems in Court within the section Replying to a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Respond to a Family Law Action in the Supreme Court?

Once you have been served with the claimant's Notice of Family Claim, you have a choice:

- you can do nothing, indicating that you either agree with the claimants' claim or don't object to it,
- you can defend the claimant's claim — that is, you can oppose it, or
- you can defend the claimant's claim and make your own claim against the claimant.

If you decide to respond to the claimant's claim, you'll need to fill out and file a Response to Family Claim. If you decide to make a claim of your own against the claimant, you'll also need to fill out and file a Counterclaim. The forms are available online; see the Supreme Court Forms section.

You must file your Response to Family Claim and Counterclaim within 30 days of being served with the Notice of Family Claim. This deadline runs from the date you were served, not the date the Notice of Family Claim was filed in court. You must file your forms at the court registry where the claimant filed the Notice of Family Claim. The court registry is indicated at the upper right-hand corner of the first page of the Notice of Family Claim.

The forms

Your Response to Family Claim is your reply to the claimant's Notice of Family Claim. In this form, you will say which of the facts set out by the claimant you agree with and disagree with, and which of the claimant's claims you agree with and disagree with.

Your Counterclaim is a mirror of the form used by the claimant in the Notice of Family Claim. You must fill out each section of the form and attach all the schedules that relate to the claims you wish to make. While you can use the claimant's Notice of Family Claim as a guide, be careful to include all of the relief you are seeking and use the actual court form to check that you haven't missed anything, since the claimant may not be asking for all of the same orders that you are.

What happens next?

Once you've filed your Response to Family Claim and, if you want, your Counterclaim, you and the other side must attend at a judicial case conference (JCC) before anything else can happen. In the chapter Resolving Family Law Problems in Court, read the section Case Conferences in a Family Law Matter. It provides more information about JCCs and the exceptions to the requirement that a JCC be held.

If either of you is making a claim for child support, spousal support, or the division of property and debt, you will also have to complete a Financial Statement. Your Financial Statement will be due before the JCC.

More information

You can find more information about replying to a family law action in Supreme Court in the chapter Resolving Family Law Problems in Court within the section Replying to a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Change Something in My Response to Family Claim or Counterclaim?

The pleadings

Pleadings are the documents that start a court proceeding or reply to a court proceeding. For the person who starts a family law proceeding, the *claimant*, this is:

1. Notice of Family Claim,

and sometimes also:

1. Response to Counterclaim.

For the person who is replying to a court proceeding, the *respondent*, these documents are usually:

1. Response to Family Claim

2. Counterclaim

Sometimes a party's pleadings need to be changed, or *amended*. Usually, a change is required because a fact is wrong, like a date or a name. At other times, a change is required to raise a new defence or to make a new claim.

For example, say a claimant had a job when an action started and then lost it halfway through the case. If the claimant now needs spousal support but didn't make that claim in his or her Notice of Family Claim, the claimant would need to amend his or her pleadings to include the new claim.

The rules

Pleadings are important because they describe the basic nuts and bolts of a party's claim or defence, and the facts that are said to support the claim or defence. They are the foundation of the court proceeding and the basis upon which each party will prepare for trial. As a result, there are special rules about amending pleadings. These are set out in Rule 8-1 of the Supreme Court Family Rules.

Firstly, you can't just amend your pleadings when you feel like it:

- under Rule 8-1(1)(a), you can make one set of changes, however major or minor, at any time before the Notice of Trial has been filed,
- under Rule 8-1(1)(b), you can make another set of changes with the written consent of the other party, and
- to make changes in any other circumstances, you'll first need to get the court's permission.

Secondly, you must mark all of your amendments. All of the changes are to be underlined in red ink to make it obvious exactly what's been changed. When a lot of text has been changed, say the size of a whole paragraph or more, the lines can be made to run up the left and right sides of the amended text instead of under each and every line of text.

Next, the title of the changed document always starts with the word *Amended*, such as the Amended Notice of Family Claim or the Amended Counterclaim, to distinguish the new, changed document from the original. When an amended document is amended again, the title of the new document begins with the phrase *Further Amended*, as in the Further Amended Notice of Family Claim.

You'll also need to change add some information to the top of the first page to indicate why you were able to change your pleadings, and when the original document was filed. For example, for a change made before delivery of the Notice of Trial, you would write:

"Amended pursuant to Rule 8-1(1)(a).
Original filed on 25 October 2012."

Finally, you must file the amended documents in the court registry where the action was started. You must then serve the new pleadings on the other side by ordinary service within seven days.

For more information

You can find more information about Supreme Court procedure in the chapter Resolving Family Law Problems in Court within the section Replying to a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Stop Defending a Family Law Action in the Supreme Court?

If you are a respondent, you may want to end your defence to a court proceeding. If you have filed a Counterclaim, you may want to stop that claim as well.

This often happens where a settlement has been reached.

To stop defending a court proceeding, you must file a Notice of Withdrawal in Form F40, and deliver a copy of the filed form to everyone else named in the action. This will allow the claimant to proceed as if no Response to Family Claim had ever been filed, and possibly apply for a default judgment.

To stop a claim against a claimant and completely abandon an action, you must file a Notice of Discontinuance in Form F39, and deliver a copy of the filed form to everyone else named in the action.

The forms are available online. See the Supreme Court Forms section.

While there is no fee charged to file a Notice of Discontinuance or Notice of Withdrawal, Rule 11-4(4) says that the claimant may be entitled to claim his or her court costs of the action up to the date of withdrawal or discontinuance.

For more information

You can find more information about Supreme Court procedure in the chapter Resolving Family Law Problems in Court within the section Replying to a Court Proceeding in a Family Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Make an Interim Application in a Family Law Matter in the Provincial Court?

When to make an application

You can make an application any time after an Application to Obtain an Order has been filed.

If the registry the action is filed in is a Family Justice Registry, you may have to meet with a family justice counsellor before you can make your application.

Where there is a genuine emergency, however, you can make your application without having to first see the family justice counsellor, and without having to give notice or very much notice to the other side.

How to make an application

The only court form you will need is a Notice of Motion (Form 16). The form is available online. See the Provincial Court Forms section. Your Notice of Motion tells the court the orders that you want the court to make.

You must file your Notice of Motion in the court registry where the Application to Obtain an Order was filed. The court registry staff may book a date for the hearing of your application right there or they may want you to go to a first appearance hearing with the other side before booking the date. The hearing date will be written on your Notice of Motion.

You must serve the filed Notice of Motion on the other side at least seven days before the date set for the hearing, along with a copy of any documents you intend to use at the hearing.

The rules

- Rule 12: How to make an interim application
- Rule 13: The rule about affidavits
- Rule 5: The Family Justice Registry rule

For more information

You can find a more complete discussion of the interim application process and the different timelines and deadlines in the chapter Resolving Family Law Problems in Court within the section Interim Applications in Family Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Make an Interim Application in a Family Law Matter in the Supreme Court?

When to make an application

In a genuine emergency, you can make an application any time after a Notice of Family Claim has been filed, with no notice or very little notice given to the other side.

In most other cases, you will have to wait until a judicial case conference (JCC) has been heard, although Rule 7-1 has a list of exceptions to this general rule.

Once there a JCC has been held, however, applications can be brought at any time.

How to start the application process

The first court forms you'll need are:

1. a Notice of Application (Form F31), and
2. an Affidavit (Form F30).

The forms are available online. See the Supreme Court Forms section.

The Notice of Application tells the court and the other side:

- when you want the application heard,
- the orders that you want the court to make,
- the basic facts supporting your application,
- a summary of your argument in support of your application,
- the rules, acts or regulations that you say allow the court to make the orders you're asking for, and
- the affidavits you'll be relying on when you argue the application.

The affidavit explains who you are, the orders you want the court to make, and why you want the court to make those orders. Your affidavit contains the evidence you will be relying on in support of your application.

When you're ready to go, you must file your Notice of Application and affidavit in court and serve a copy of the filed documents on the other side, the *application respondent*, by ordinary service. Ordinary service is accomplished by mailing the documents to the other side's address for service, by faxing them to a fax number for service, or by emailing them to an email address for service.

You must serve your materials on the application respondent at least eight business days before the hearing date.

The application respondent's reply

In most cases, the application respondent will have five business days to reply to your application by filing an Application Response in Form F32 and any affidavits that the application respondent intends to use. An Application Response tells the court and the applicant:

- the orders that the application respondent agrees to,
- the orders that the application respondent intends to oppose,
- the orders that the application respondent might agree to if certain conditions are met,
- the basic facts against the application,
- a summary of the application respondent's argument against the application, and
- the affidavits the application respondent will be relying on when the application is argued.

Although Rule 10-6, the rule that explains how interim applications are brought, says that someone who doesn't file an Application Response isn't entitled to notice of when the application will be heard, do not expect that the court will simply let your application go ahead in default of an Application Response. The court will want to give the other side every chance to defend your application.

Your reply to the application respondent's reply

If you wish to reply to something the application respondent has said in his or her affidavit, you can make a new affidavit of your own. You must deliver this affidavit to the application respondent by 4:00pm on the business day that is one full business day before the hearing.

Application records

You must prepare an Application Record for the hearing of your application. An Application Record is a three-ring binder that contains all of the application materials, with an index and separated by tabs. The Application Record is for the benefit of the judge or master hearing your application, so prepare it as neatly and carefully as you can; the judge will appreciate the effort.

Application Records will usually contain the following documents in the following order:

1. an index,
2. your Notice of Application,
3. the Application Response,
4. your affidavits,
5. the application respondent's affidavits, and
6. any new affidavit you have prepared in reply to the application respondent's affidavits.

You must file your Application Record by 4:00pm on the business day that is one full business day before the hearing. Make sure you provide a copy of your index to the application respondent at the same time.

The rules

- Rule 6-2: How to serve documents by ordinary service
- Rule 7-1: The JCC rules
- Rule 10-4: The rule about affidavits
- Rule 10-5: Directions for bringing interim applications
- Rule 10-6: The usual application procedure

For more information

You can find a more complete discussion of the interim application process and the different timelines and deadlines in the chapter Resolving Family Law Problems in Court within the section Interim Applications in Family Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Reply to an Interim Application in a Family Law Matter in the Provincial Court?

Replying to the application

The person making an interim application, the *applicant*, must serve you with his or her Notice of Motion in Form 16 at least seven days before the date of the hearing, along with any other documents he or she will be using at the hearing. The hearing date will usually have been fixed by the court registry, not by the applicant.

There is no document that you must file to reply to the application, although it is possible to respond using the Reply form used to respond to Applications to Obtain an Order. The Reply form is available online. See the Provincial Court Forms section.

Whether you file a Reply or not, you must show up on the date set for the hearing or the court may make the order sought by the applicant. Make sure that you bring any important documents with you that will help at the hearing of the application.

The rules

- Rule 12: How to make an interim application
- Rule 13: The rule about affidavits
- Rule 5: The Family Justice Registry rule

For more information

You can find a more complete discussion of the interim application process and the different timelines and deadlines in the chapter Resolving Family Law Problems in Court within the section Interim Applications in Family Matters.

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How Do I Reply to an Interim Application in a Family Law Matter in the Supreme Court?

Notice of the application

You will be entitled to notice of almost every application the other side, the *applicant*, intends to bring to court. The most common exceptions to this general rule are when:

- the applicant makes an application without notice to you when the application is urgent (called an *ex parte* or *without notice application*),
- the applicant is applying for permission to compress the usual timelines for the hearing of his or her application (called a *short leave application*),
- the applicant is asking to be exempted from the requirement that a judicial case conference be held before the first interim application, or
- you are the respondent and you haven't filed your defence to the applicant's Notice of Family Claim.

When the applicant is required to give you notice of his or her application, the applicant will send you a copy of his or her Notice of Application and any new affidavits the applicant will rely on at the hearing. These documents are to be sent to your address for service, which may include your fax number for service or your email address for service if you've given one, at least eight business days before the date of the hearing.

The Notice of Application will tell you:

- the orders that the applicant will be asking the court to make,
- the facts the applicant says support the application,
- a summary of the applicant's argument in favour of the application,
- the rules, acts or regulations the applicant will be relying on, and
- the affidavits the applicant will be using to argue the application.

The affidavit ought to tell you why the applicant wants the court to make the orders he or she is asking for and state the facts that support the making of those orders.

Replying to the application

In most cases, to reply to an application you will prepare and file an Application Response in Form F32 and at least one new affidavit. The forms are online. See the Supreme Court Forms section.

Your Application Response tells the applicant and the court:

- the orders that you agree to the court making,
- the orders that you intend to oppose,
- the orders that you might agree to if certain conditions are met,
- your understanding of the facts that relate to the application,
- a summary of your argument against the application,
- the rules, acts or regulations you'll be relying on, and
- the affidavits that you will be relying on at the hearing of the application.

You should do two things in any new affidavit you prepare in replying to an application:

1. you should respond to any important statements in the applicant's affidavit that you disagree with or think are inaccurate, and
2. you should tell the court about the facts that support your position on the application.

You must send two copies of your filed materials to the applicant at least five business days after you were served with the application materials.

The applicant's reply

The applicant may decide to prepare a new affidavit to reply to something you've said in your affidavit. The applicant must give you a copy of any new affidavits by 4:00pm on the business day that is one full business day before the hearing.

You do not have an automatic right to serve an affidavit of your own in reply to this new affidavit. You can prepare another affidavit if you want, but be prepared for the judge or master hearing the application to refuse to admit your affidavit.

Application records

The Application Record is a three-ring binder that contains all of the application materials, with an index and separated by tabs, that is assembled by the applicant. The Application Record is prepared for the benefit of the judge or master hearing the application.

The applicant will give you his or her index to the Application Record by 4:00pm on the business day that is one full business day before the hearing. Make up your own Application Record using the applicant's index. This will make sure that you, the applicant and the judge are all on the same page when you're referring to the materials in the Application Record.

The rules

- Rule 6-2: How to serve documents by ordinary service
- Rule 7-1: The JCC rules
- Rule 10-4: The rule about affidavits
- Rule 10-5: Directions for bringing interim applications
- Rule 10-6: The usual application procedure

For more information

You can find a more complete discussion of the interim application process and the different timelines and deadlines in the chapter Resolving Family Law Problems in Court within the section Interim Applications in Family Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Prepare an Affidavit?

An affidavit is a written statement, made on oath or affirmation, about facts that are personally known to the person making the affidavit, the *deponent*. Because an affidavit is sworn to be true or is affirmed to be true, it is evidence of the facts that it sets out, just as if the facts were given in oral evidence at a trial. Affidavits are formal legal documents.

- **Supreme Court:** If your family law action is in the Supreme Court, the form you must usually use is Form F30 and the rules about affidavits are set out in Rule 10-4 of the Supreme Court Family Rules.
- **Provincial Court:** If your family law action is in the Provincial Court, the form you must usually use is Form 17 and the rules about affidavits are set out in Rule 13 of the Provincial Court Family Rules. The form is available online. See the Provincial Court Forms section.

Formal requirements

The text of an affidavit is set out in numbered paragraphs. It's a good idea to state who you are and how you have personal knowledge of the facts that you are describing in the first paragraph of your affidavit (this is taken care of in the form required by the Provincial Court), and to say why you are swearing the affidavit in the second paragraph. For example, in the first paragraph you must say something like:

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.

In the second paragraph you might say:

2. I make this my affidavit in support of my application by Notice of Application dated 1 April 2013.

If you are having a friend or relative make the affidavit, the first paragraph might read:

1. I am the sister of the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.

Every page of your affidavit must be numbered, including each page of any exhibits you might have attached. An *exhibit* is a document, including a picture, that is included in an affidavit to support to the facts described in the affidavit.

In the Supreme Court, you must put, in the upper-right hand corner of the first page, the name of the person swearing the affidavit, the sequential number of the affidavit in the affidavits sworn by that person so far, and the date the affidavit was sworn on. For example, if you are Jane Alice Doe, and this is your third affidavit, you would put this:

This is the 3rd affidavit
of J.A. Doe in this case
and was made on 1 April 2013

Once your affidavit is done, you must have it *notarized*. Affidavits can be notarized by lawyers, notaries public and certain court clerks, or anyone else who is authorized to take oaths in British Columbia.

The lawyer or notary public will ask you whether you understand the contents of your affidavit and then ask you to swear an oath or affirm that the contents are true.

If you say yes, the lawyer or notary will ask you to sign your name to the affidavit and will watch as you sign the document.

The lawyer or notary will then sign his or her name and provide certain additional information about where the affidavit was notarized, and the date and so forth. The lawyer or notary will ask you to produce government-issued photo identification, like a driver's licence, to prove that you are who you say you are.

After you've had your affidavit notarized, make at least four copies. The original is filed in court and another copy or two, depending on the circumstances, must be sent to the other side. Make sure you keep an extra copy for yourself!

Telling your story

Following the introductory paragraph, tell your story in an orderly manner. Remember to keep things as simple as possible and avoid irrelevant information. The easiest way to do this is to ask yourself if a stranger would understand what you've written. If you don't think a stranger would understand what you're talking about, you should probably rewrite your affidavit!

Your goal is also to explain things in an easy-to-understand way for the judge. The judge will not know who "Phil" is unless you've introduced Phil somewhere else in your affidavit. Nor will the judge understand what "the other car" means, unless you've already described which cars you have and who owns them. You must not assume that the judge knows everything about you. The judge won't. Again, ask yourself if a stranger would understand your story.

In order to make things as simple as possible, I usually break my affidavits down into four basic sections following the initial introductory paragraph:

- **Application:** State what you're asking the court for. If you're responding to an application, tell the court your position on each of the claims the applicant is making.
- **Background:** Describe who you are, who the other side is, when your relationship started and stopped, who your children are and how old they are, when the court proceeding started, and any significant orders that have been made since litigation started.
- **Circumstances:** Describe the immediate circumstances that triggered the application to court and anything significant that's happened since. This should be the part where you provide the facts in favour of your application or in opposition to the applicant's application.
- **Summary:** If necessary summarize your position and perhaps describe the order that you want the court to make.

Affidavits drafted by me often look something like this:

1. I am the Claimant in this matter and as such have personal knowledge of the facts hereinafter deposed to.

Application

2. In my application, by Notice of Application dated 15 January 2010, I seek an order that the Respondent be restrained from removing the children, Sally Ann Doe, born on 1 January 2008, and John Fred Doe, born on 1 January 2009, from Kelowna, British Columbia, and an order that the Respondent pay support to me for the benefit of the children.

3. In the Respondent's application, by Notice of Application dated 1 January 2010, he seeks an order that I pay spousal support to him. I oppose the Respondent's application because he works full-time and is self-sufficient.

Background

4. I am 32 years old and am presently employed as an accountant by the firm Smith Smith and Smith. I earn approximately \$42,000 per year.

5. The Respondent is 34 years old and works full-time as a bricklayer with ABC Contracting. He earns about \$38,000 per year.

6. The Respondent and I met in the summer of 1996, and moved in together on 1 January 1997. We lived together in a unmarried relationship until 1 January 2012, when the Respondent left our home.
7. The Respondent and I have two children, Sally Ann Doe, who is 5 years old and in Grade 1 at Foggy Bottom Elementary, and John Fred Doe, who is 4 years old and in pre-school at ABC Community Centre.
8. I started this action on 1 July 2012, when I filed my Notice of Family Claim. I am asking for an order that the Respondent and I share parental responsibility for the children, that the children live mostly with me and that the Respondent have parenting time with the children every other weekend and overnight every Wednesday. I also seek an order that the Respondent pay child support to me for the benefit of the children.
9. On 1 September 2012, Master Smith made an order that the Respondent and I share parental responsibility for our children. The Master did not make an order for parenting time or child support, but the Respondent has been seeing the children on weekends and has been paying \$200 per month to me as child support.

...and so on. Once I'm done introducing the basic background of the parties, I'll describe the events that led the applicant to be making the specific application before the court.

Circumstances of application

21. On 25 December 2012, the Respondent had Sally and John from noon until 7:00pm. We had agreed that he would return the children to my home at that time.
22. The Respondent did not return the children as we agreed. I phoned him to find out what was wrong at 8:00pm. He told me that he was keeping the children until 27 December 2012 because his family wanted to see them on Boxing Day. He also said that he and the children would be moving to Calgary, Alberta.
23. The Respondent has family in Calgary. I am afraid that he intends to remove the children from Kelowna, where they have spent all of their lives and where they have family and friends.

...and so on. If necessary, usually when an affidavit is particularly long or the facts are particularly complicated, I may summarize the orders I'm asking for and why I'm asking for them.

Summary

45. As a result of the Respondent's conduct I believe that the Respondent may decide to take the children to Calgary. I seek an order that the Respondent be restrained from removing our children from Kelowna without my express permission or the further order of this Honourable Court.

Remember to tell your story in the first person. It is *you* who is telling your story, and you are me, myself or I, not "the Claimant" or "the Respondent."

Rules about content

Only certain kinds of information are permitted in an affidavit. If your affidavit is written for use at a trial, you cannot describe things you believe are true or have heard from someone else. You can only set out information that you have actual, personal knowledge of. If you are writing your affidavit for the purposes of an interim application, however, you may include both things you believe to be true as well as hearsay.

Hearsay

Hearsay means saying anything you don't know yourself but have learned from someone else. It also includes repeating someone else's statements in your own affidavit. It's hearsay, for example, to say "Sally told me that she went to the park at noon on Saturday." It is not hearsay to say "I saw Sally in the park at noon on Saturday" or "Sally and I went to the park at noon on Saturday."

Hearsay is permitted in affidavits used for interim applications. However double hearsay is not, nor is anonymous hearsay.

Double hearsay is saying something like "Frida told me that Sally said she was in the park at noon on Saturday." In other words, double hearsay is stating as a fact what someone told someone else.

Anonymous hearsay is saying what someone told you but without identifying the person who told you, like "Someone told me that Sally was in the park at noon on Saturday", or "I have been advised that Sally was in the park at noon on Saturday, but I cannot identify the person who told me that she was in the park".

Opinions

The other thing that is generally not permitted in an affidavit is *opinion evidence*. Only people with special, recognized skills, like doctors or engineers or psychologists are allowed to write about their opinions in affidavits. Again, some opinion evidence is permitted in affidavits used for interim applications, however it is never permitted in affidavits prepared for trial.

The easy way to spot opinion evidence is by sentences that start with "I think..." or "I believe that..." For example, saying "I believe that Sally is not a good mother because she spends too much time in the park" is really your opinion about Sally's parenting skills; it is not a statement of fact and is not allowed in your affidavit.

Expressions of emotion

A lot of people want to put everything in their affidavits, including how they feel about things or how they reacted to something. Don't do this. The court won't pay much attention to it, and you risk the court having a bad impression of you rather than of your ex. Good lawyers will carefully winnow out statements like "I was shocked and appalled that Bob would actually do such a thing." You should get rid of that sort of thing as well.

The court does not care how something made you feel; the court is interested in *facts*. Overblown and hysterical statements will undermine the credibility the court is prepared to extend to you. Statements like "I was disgusted to see Sally in the park on Saturday," "I could see the anger in her eyes as she came at me" or "I couldn't believe what a rotten person Sally was" will not go over well in court.

"Never" and "always"

Avoid using the words "never" and "always," or any other absolute statement of frequency, as it is rarely the case that something *always* happened or *never* happened. Saying "Bob never helped with the children" is an invitation to the court to discount what you're saying. Even if you did 99% of the work with the children, Bob is certain to have done something with them, and that means that "never" and "always" aren't true.

Just as over-the-top statements of emotion will undermine your credibility, so will using statements that are as absolute as "always" and "never." Instead of words like those, just say "I did virtually all of..." or "Sally rarely helped with..."

Exhibits

Exhibits are documents that you attach to your affidavit, usually to support some point you're making in your affidavit. If, for example, you say that your income is \$42,000 per year, you might want to attach your most recent T4 slip or your most recent income tax return to show that your income is in fact \$42,000 per year.

Exhibits can be almost anything: a receipt, a printout of your child's school's website, a letter, a doctor's note, a company search result, a report card, a speeding ticket, a photograph, an appraisal, a bank statement, a Valentine's Day card... pretty much anything. If something can be reduced to paper, it can be an exhibit.

When you attach an exhibit, you have to introduce it in your affidavit. You can't just attach reams of documents to the back. You have to explain what the document is in your affidavit and say that the document you are attaching is a "true copy" of the original. Each exhibit is identified sequentially by a letter, "A," "B," "C," and so forth. For example:

16. I have a lovely home on two acres of land. There are three bedrooms, a sauna, an outdoor swimming pool and a private petting zoo for when Michael comes over. Attached to this my Affidavit as EXHIBIT "G" are true copies of photographs of my home.
17. My home is worth about \$350,000. Attached to this my Affidavit as EXHIBIT "H" is a true copy of the 2013 BC Assessment for my home.

Each separate exhibit is marked as an exhibit and shows which exhibit it is. Lawyers and notaries public will have a stamp that they use to give the basic information. The stamp says something like this:

This is Exhibit "___" in the Affidavit of _____, sworn before me at _____, British Columbia, this ___ day of _____, 20____.

The stamp also provides a space for the lawyer or notary's signature, and the phrase "A Commissioner for the taking of Oaths for the Province of British Columbia". Filled out, the stamp will read like this:

This is Exhibit "D" in the Affidavit of **Jane Alice Doe**, sworn before me at **Nanaimo**, British Columbia, this **20th** day of **March**, 20**13**.

The important thing about exhibits is that they are *hearsay*. Just because you've attached something as an exhibit doesn't make the statements made in the exhibit true. While business information like a bank statement or a receipt will be taken as true, subjective information — like the contents of a letter from your mother, brother, friend or co-worker — won't be automatically accepted by the court.

This is important to understand, because lots of people want to attach testimonials and other sorts of information to their affidavits to make them look as good as possible, or to make their ex look as bad as possible. For example, "Sally is the best mother I have ever seen; she obviously treasures her children and they mean the world to her" or "Bob is a terrible parent who used to throw rocks at the children when they were infants to see if they'd flinch." What will the court get out of such obviously biased information? Not a lot.

The letter from your mother is hearsay, just as if you'd said what your mother told you in your affidavit. The court will accept as true the fact that your mother wrote the letter, but it won't necessarily accept what your mother says in the letter as true. If what your mom has to say is so important, get her to prepare an affidavit of her own. That is something that the court will pay attention to.

Summary

Be calm, be cool, be collected. Tell your story in a logical, orderly manner so that a judge who doesn't know you from a hole in the ground will understand what the heck you're talking about, what you want, and why you want it.

Avoid inappropriate expressions of emotion and stick to those facts that you have personal knowledge of when you can. You want to come across as a sane, reasoning human being, not a hysterical jumble of raw emotion.

If you have any documents that support the statements you're making, attach them to your affidavit as exhibits. Use documents that are neutral and unbiased, like a bank statement or an appraiser's report, but avoid inflammatory and subjective documents like letters from friends and relatives.

Above all, when you're done, ask yourself this: would a complete stranger know what I'm talking about? If you can't answer that question, give your affidavit to a complete stranger, your next-door neighbour for example, and find out!

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Prepare a Supplemental Affidavit?

In many family law court proceedings, it is not uncommon to have three, four or even fifteen affidavits prepared in the course of things. In most cases, the first affidavit describes the background facts about who the couple are, when they met, when they separated, who their children are and so forth. Affidavits after that usually update the court about events occurring since the previous affidavit was sworn.

New affidavits don't *replace* any of the previous affidavits, they just add to the written evidence in the court file. Each affidavit stands on its own.

To make a new affidavit after the first affidavit, follow all the steps described in How Do I Prepare an Affidavit? and make sure that you change the number of the affidavit given in the top right-hand corner of the first page. Instead of:

This is the 1st affidavit
of J.A. Doe in this case
and was made on 1 April 2013

...the second affidavit might read:

This is the 2nd affidavit
of J.A. Doe in this case
and was made on 15 April 2013

Apart from this minor change, affidavits prepared after the first affidavit are prepared in exactly the same way as the first affidavit was prepared.

Note that you can refer to previous affidavits in your new affidavit. Just be sure to identify the affidavit by the date the affidavit was made and by the person who made it. If you're going to be referring to specific parts of that affidavit, mention the paragraph numbers as well.

13. In my third affidavit, sworn on 10 August 2012, I state at paragraph 42 that I was the parent who was primarily responsible for taking the children to their medical appointments. I was also the parent primarily responsible for attending to the children's dental, counselling and therapeutic appointments. I was also the parent who attended the children's parent-teacher meetings.
14. The Respondent alleges, at paragraph 17 of his second affidavit, sworn on 1 August 2012, that he was the parent who booked and paid for the children's ballet and hockey lessons. The truth of the matter is that while he did pay for two or three of the children's hockey lessons, I was the parent who spoke to their coaches and instructors, arranged for their enrollment, and paid for the majority of the cost of these lessons.

For more information, see [How Do I Prepare an Affidavit?](#) and [How Do I Fix an Error in an Affidavit or Add to an Affidavit?](#).

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Fix an Error in an Affidavit or Add to an Affidavit?

Once you've sworn your affidavit, it's done. With one exception, the only way you can fix a mistake in that affidavit or add additional information to it is to make a new affidavit.

It's not uncommon to have three, four or even fifteen affidavits prepared in the course of a court proceeding in a family law dispute. These affidavits are mostly made to update the court on events occurring since the previous affidavit was sworn.

Note that new affidavits don't replace any of the previous affidavits, they just add to the written evidence already in the court file. Every affidavit stands on its own.

Adding new information

If you have to add new information or documents that should have been in the previous affidavit, you'll have to do up a new affidavit. In the beginning of the affidavit, just state that you're making the affidavit to give the court new information, and then set out the additional information you need to give the court.

In the example below, paragraph 1 is the standard beginning paragraph of an affidavit. Paragraph 2 explains that the affidavit is filed to give additional information. The other paragraphs add a new document and give some new information.

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.
2. I make this my affidavit to supplement the evidence given in my second affidavit, sworn in this matter on 1 April 2012 (the "Second Affidavit").
3. At paragraph 32 of the Second Affidavit, I describe how the Respondent and I bought our 1978 Chevy Pinto. I have now found the sales receipt for that purchase, which shows that I paid all of the down payment. Attached to this my Affidavit as EXHIBIT "A" is a true copy of the sales receipt, dated 1 April 2002.
4. At paragraph 44 of the Second Affidavit, I discuss how the Respondent and I bought the green filing cabinet. I have had the chance to give further thought to this purchase, and I now recall that it had four drawers. I accidentally omitted this fact in the Second Affidavit.

...and so on.

Fixing less important information

If you've made a typo in an affidavit that's already been sworn, you don't have to prepare a whole new affidavit. This is what you do:

1. Take the sworn affidavit to a lawyer or notary public, preferably the lawyer or notary who executed the affidavit.
2. When you're in front of the lawyer or notary, correct the mistakes on the affidavit in pen (cross out the incorrect information and write the correct information about it).
3. Write your initials in the margin of the page beside the line you have corrected. The lawyer or notary will put his or her initials there too. Repeat until you have corrected all errors.
4. The notary or lawyer will then have to re-swear your affidavit, which just means that you'll have to give your oath that the corrected affidavit is true and sign the affidavit again, below your old signature, and the lawyer or notary will sign the affidavit again.

This will not be appropriate for all mistakes. You can fix a number, change an "I did" to an "I did not," fix a misspelling, or even delete a whole paragraph. It is not appropriate to fix major mistakes about important facts and claims. To fix those, you really should prepare a new affidavit to explain yourself.

Fixing important information

If you've made a major error in an affidavit that's already been sworn, you must prepare a whole new affidavit to explain why you've changed your evidence and what your mistake was.

In this example, the first two paragraphs introduce the new affidavit and explain why it is being made. Paragraphs 3, 4 and 5 show how different types of mistake could be corrected. The last paragraph confirms that, with the exception of the corrected information, the balance of the earlier affidavit is true.

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.
2. I make this my affidavit to correct certain evidence given in my second affidavit, sworn in this matter on 1 April 2012 (the "Second Affidavit").
3. At paragraph 12 of the Second Affidavit, I discuss how the Respondent and I bought the green filing cabinet. I have had the chance to give further thought to this purchase, and I now recall that it was a black filing cabinet and that it had four drawers not three. I was mistaken with respect to these two facts in the Second Affidavit.
4. At paragraph 15 of the Second Affidavit, I state that the Respondent was late in picking the children up from school on 1 April 2005. Since I made the Second Affidavit, I have had the chance to review my calendar and refresh my memory, and I realize that the Defendant was not late in picking the children up that day.
5. At paragraph 18 of the Second Affidavit, I state that the Respondent has two cars. I have read the Respondent's third affidavit, sworn in this matter on 12 April 2012, and I admit that the Respondent is correct when he says that he has but one car. The evidence I gave in the Second Affidavit on this point was incorrect. I had forgotten that the Defendant sold the Chevy Pinto in 2002.

...and so on. Finish with this:

13. In all other respects the evidence given by me in the Second Affidavit is true and accurate.

You must be careful about correcting major mistakes, especially those that are important to a claim you or your former spouse are making. Too many corrections may make you look sloppy and careless, and could possibly undermine your credibility. The best way to avoid problems like this is to ensure that each affidavit you make is accurate as possible before you swear it.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Address the Judge?

How you address the judge depends on which court you are in. Each court has a particular honorific that should be used when addressing the judge, and the judge is properly addressed by that honorific, not as "sir," "ma'am," or something else.

Judges of the Court of Appeal and Supreme Court are addressed as *My Lord*, or *My Lady*, or *Your Lordship*, or *Your Ladyship*, depending on the grammatical context.

Masters and registrars of the Supreme Court are addressed as *Your Honour*. Provincial Court judges are also called *Your Honour*.

It used to be the case that justices of the peace were properly referred to as *Your Worship*, but this practice is fading somewhat, and it is now acceptable to refer to them as *Your Honour*.

You can find information about what to expect in court in *How Do I Conduct Myself in Court at an Application?* You can find information about court processes in the chapter *Resolving Your Legal Problem in Court*.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Address the Lawyer When I'm Representing Myself?

When you're in court, you'll see the lawyers on opposing sides address each other as *my friend* or, in the case of lawyers who are Queen's Counsel, as *my learned friend*. You shouldn't do this, unless you're a lawyer too. (Besides, I doubt very much that you're going to be inclined to call the lawyer representing your ex "my friend.")

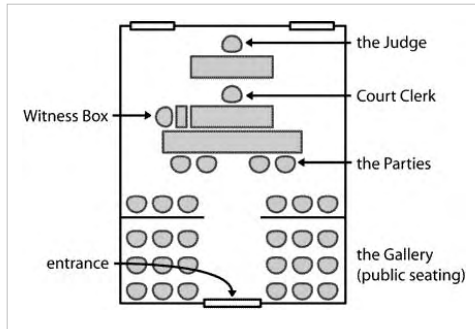
If you're representing yourself, just refer to the lawyer acting for your spouse by the lawyer's last name, as "Mr. _____" or "Ms. _____."

You can find information about what to expect in court in *How Do I Conduct Myself in Court at an Application?* You can find information about court processes in the chapter *Resolving Your Legal Problem in Court*.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Conduct Myself in Court at an Application?

The courtroom



The drawing here shows how most courtrooms are laid out. In some courtrooms the witness box will be on the right rather than the left. Other courtrooms may have seating for a jury; others may have a separate entrance and seating for criminally accused; others may have a very small or a very large area for the gallery.

Checking in

Get to the courthouse about 20 minutes ahead of the time shown on your Notice of Application or Notice of Hearing. In the Provincial Court, hearings generally start at 9:30. In the Supreme Court, the court day starts at 10:00.

Somewhere around the entrance to the courthouse there will be a bulletin board with lists of all the hearings that are going on that day and which courtroom each hearing is in. Find your courtroom, and get there early.

The clerk will open the courtroom about 10 or 15 minutes before the court day starts. Enter the courtroom and walk to where the clerk sits. Tell the clerk who you are. The clerk will find your file on the day's list and will ask you how long you expect the hearing to take.

After you've checked in, take a seat in the gallery. Lawyers will sit in the row of chairs just beyond the gallery, past the bar, although in some busy courtrooms like the chambers courtrooms in Vancouver and New Westminster, all of the seating is considered past the bar. In a case like that, where there is no obvious gallery, sit wherever you find a seat.

The start of the court day

The court day starts when the judge enters the courtroom. The clerk will make an announcement when the judge is entering the room. Stand up when the judge enters the room, and sit down only when the judge sits down.

The clerk will then start calling the day's cases, one by one. In the Supreme Court, the clerk calls the cases in order from the shortest cases to the longest cases. In the Provincial Court, the clerk will call the cases where one or both parties are represented by lawyers before moving on to the cases where neither party has a lawyer.

When your case is called

Walk up to the long table in front of the clerk, and take a position to the right or left. It usually doesn't matter which side you choose.

While you're doing this, the judge will probably be taking some notes. Remain standing until the judge looks up from his or her notes. The person who is making the application, the *applicant*, should introduce him- or herself first, followed by the other person, the *respondent*, introducing him- or herself:

Applicant: "Good morning, my name is Jane Doe and this is my application."

Respondent: "I am John Doe."

Once that's done, the respondent can sit down. Usually, the applicant will then move to the little lectern at the centre of the table and make his or her pitch about why the judge should make the orders he or she is asking for. When the applicant is done, the applicant sits down and it's the respondent's turn to stand up, move to the lectern, and say why the application is a bad idea.

Etiquette

The judge, the court clerk and the other party are deserving of your respect and courtesy. Plus, you really want the judge to think well of you. Here are some general guides.

Dress

For women, something along the line of business casual will do. It doesn't matter whether you're wearing a dress, skirt or slacks. Avoid excessively casual clothing like jogging suits, sweatshirts, runners and such. If you feel driven to wear make-up, remember that you're going to a formal event, not a night out at the Roxy.

Men should also think business casual. If you have a sport jacket, wear that along with a clean pair of pants. Ties and proper suits are nice but not necessary at all. Your shirt should be of the button-up variety and not have a beer logo on it. Don't wear a hat in court.

The general goal is to look respectable and respectful, not like you just rolled out of bed or are gearing up for a night out on the town. Do your best to make it look like it matters to you that you're in court.

Addressing the judge

In the Provincial Court, the judge should be addressed as *Your Honour*. Masters of the Supreme Court are also addressed as *Your Honour*. Justices of the Supreme Court are addressed as *My Lord* or *My Lady*. Do not call the judge or master "sir," "ma'am," or "dude," or anything else for that matter.

Addressing the other side

If the other side is a lawyer, "Mr. Smith" or "Ms. Smith" will do. Ignore how the lawyers address each other in front of the judge.

If the other side doesn't have a lawyer, it's usually all right to use first names, but it's better to address each other formally as "Mr. _____" and "Ms. _____".

Standing up and sitting down

Always stand when the judge is speaking to you or when you're speaking to the judge, unless of course you are unable to stand. Sit down at all other times.

General rules

- Always be early. Simply being on time is your last resort.
- Don't interrupt, no matter how much you want to. Interrupting is rude and makes the transcript impossible to read, if it needs to be read. Above all, never interrupt the judge.
- Don't use foul language. Be polite and courteous at all times.
- Never say that the other side is "lying" or is a "liar." There's usually a better way of getting your point across, without using harsh, judgmental language like that. Say, "my understanding of events is that..." or "perhaps Mr. Smith

misremembers what happened, I recall that..."

- Stay calm at all times. No outbursts!
- By the same token, don't make faces or grunt when the other person is talking. You will have your chance to reply; rolling your eyes is not going to convince the judge that you're right.
- If you have an objection to make, do your best to save it until the other side is done. If you simply cannot wait, stand up, wait until the judge recognizes you and explain what your concern is.
- Try your best to speak slowly. The judge will be taking notes of what everyone is saying, and it can be very difficult to keep up with someone who's talking a mile a minute.
- If the judge chastizes you for something, take what the judge is saying to heart — especially if it concerns your conduct in court — and take it like an adult. No pouting.
- If there's something you don't understand, ask for an explanation. Stand and wait until the judge recognizes you, and ask for clarification.

When your case is done

After the judge delivers his or her judgment, stand up and thank the court, whether you won or lost, and leave the courtroom.

It is extremely poor form to gloat over a victory, or, otherwise, to sulk and rage about a loss. Take it like a grownup and leave the courtroom. Save your boasting or complaining for your friends.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Appeal a Provincial Court Decision?

Under s. 233(1) of the *Family Law Act*, only final decisions of the Provincial Court can be appealed. Appeals of final decisions of that court are made to the Supreme Court. Interim decisions of the Provincial Court can only be challenged by a judicial review under the aptly named *Judicial Review Procedure Act*. This information is about appeals to the Supreme Court.

Forms involved

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|----------|------------------|--------------------|------------|---------------------|-------------------|-----------------|
| Form F80 | Notice of Appeal | PDF ^[1] | | HTML ^[2] | | |

Making an appeal to the Supreme Court

To appeal a decision, you must file a form called a Notice of Appeal in Form F80 within 40 days of the decision. Appeals from the Provincial Court are governed by Rule 18-3 of the Supreme Court Family Rules. This form is a lot more complex than the forms you've used in the Provincial Court. In the form you must say:

1. when the order you are appealing was made,
2. the name of the judge who made the order,
3. that you are bringing your appeal pursuant to s. 233 of the *Family Law Act*, and
4. the reason or reasons why you are bringing the appeal.

Once you've filled out your Notice of Appeal, you must file it in the registry of the Supreme Court. The Supreme Court will charge you a fee to do this. The registry will stamp your Notice of Appeal with the seal of the court, a date stamp, and the file number of your new court proceeding. You must then serve the notice on the other person by personal service, and file another copy of the notice in the Provincial Court registry where the order was made

Reasons for appealing a decision

When a judge makes a decision following a hearing, the judge does three things. First, the judge makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the judge decides what the law applicable to the case is. Third, the judge applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it. You must have a proper legal reason for bringing the appeal and show that the judge made an error in his or her findings of fact or an error in his or her findings of law.

In most cases, you will not be able to appeal a decision because of a mistake in the judge's findings of fact. Because appeal courts do not hear the evidence all over again, unless the trial judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the trial judge found them to be.

Most often, appeals are based on errors in the judge's conclusions about the applicable law or how the judge applied the law to the facts, called an *error of law*. In appeals like these, the argument is based on a claim that the judge didn't apply the correct legal test or failed to properly apply the legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing a judge's decision, you should seriously consider hiring a lawyer.

Deadlines and procedures

After the other side has been served with your Notice of Appeal, he or she will have seven days to file a Notice of Interest in Form F77. This form is used to acknowledge your appeal.

Normally you would have to apply to the court for some directions about how your appeal will be conducted. However, because your appeal is about a family law problem, the directions for your appeal are set out in the standard set of directions in Supreme Court Family Practice Direction 10^[3], which is available on the court's website and at the court registry.

According to the Practice Direction, you must order a transcript of the Provincial Court hearing that resulted in the decision you are appealing. Within 30 days after filing your Notice of Appeal, you must provide proof that you have ordered these transcripts.

The cost of appeals

There are two fees that you'll have to pay to have your appeal heard. First, you'll have to pay a fee to file your Notice of Appeal. Second, and more expensively, you'll have to pay for the transcript of the Provincial Court hearing.

Transcripts are produced by private companies. A court reporter employed by the company retrieves the tape of the hearing from the court and painstakingly transcribes each and every word. JC Word, for example, a Vancouver firm, charges about \$200 to \$300 to transcribe a half-day hearing. On top of that, you'll have to provide complete copies of your transcripts to the other side and the court.

Be warned! Appeals can be expensive.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] http://www.ag.gov.bc.ca/courts/forms/sup_family/F80.pdf

[2] <http://bit.ly/SCFRforms#F80>

[3] [http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/family/FPD%20-%2010%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Family%20Law%20Act%20\(website\).pdf](http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/family/FPD%20-%2010%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Family%20Law%20Act%20(website).pdf)

How Do I Appeal an Interim Supreme Court Decision?

An *interim order* is any order that is made before a final order. Interim orders are made in the Supreme Court by a master or judge in chambers. Final orders are made by a judge following trial or with the agreement of the parties. The rules about appealing interim orders change, depending on whether the order was made by a judge or a master.

Master's orders

Interim orders made by masters in family law matters can be appealed as of right to a judge of the Supreme Court.

Forms involved

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|----------|---|--------------------|------------|---------------------|-------------------|-----------------|
| Form F98 | Notice of Appeal from Master Registrar or Special Referee | PDF ^[1] | | HTML ^[2] | | |

Steps

Under Rule 22-7, an appeal is brought by filing a Notice of Appeal in Form F98 within 14 days of the date the order was made. This deadline applies to orders made under the Supreme Court Family Rules or the *Family Law Act*. The appeals of orders made under the *Divorce Act* are governed by that act, and s. 21(3) says that an appeal must be made within 30 days.

The date the appeal will be heard is written on the Notice of Appeal. It is a good idea to leave this part of the form blank until you've had a chance to talk to the court registry staff. Depending on how long your appeal will take to be heard and the court's schedule, they may want to select the date of the hearing for you.

It's important to know that filing a Notice of Appeal does not, on its own, operate to cancel the order pending the appeal. You can, if you want, apply to the master who made the order for an order that the order will be *suspended* until the appeal is heard.

Judge's orders

Interim orders made by judges can only be appealed to the Court of Appeal. Unlike interim orders made by masters, only orders made under the *Divorce Act* can be appealed as of right. Orders made under the Supreme Court Family Rules or the *Family Law Act* can only be appealed with the permission of the Court of Appeal.

Appeals of *Divorce Act* orders must be made within 30 days by filing a Notice of Appeal from the Court of Appeal forms. Appeals of orders made under the Supreme Court Family Rules or the *Family Law Act* must be made within 30 days by filing a Notice of Application for Leave to Appeal from the Court of Appeal forms.

The requirements for the remainder of the appeal process are set out in the Court of Appeal Rules and are fairly complicated, and you should seriously consider hiring a lawyer to help you with your appeal.

It's important to know that filing a Notice of Appeal does not, on its own, operate to cancel the order pending the appeal. You can, if you want, apply to the judge who made the order for an order that the order will be *suspended* until the appeal is heard.

Reasons for appealing a decision

When a master or judge makes a decision following a hearing, he or she does three things. First, the court makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the court decides what the law applicable to the case is. Third, the court applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it. You must have a proper legal reason for bringing the appeal.

In many cases, you will not be able to appeal a decision because of a mistake in the court's findings of fact. Because an appeal court does not hear the evidence all over again, unless the master or judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the court found them to be.

Most often, appeals are based on errors in the court's conclusions about the applicable law or how the judge applied the law to the facts, called an *error of law*. In appeals like these, the argument is based on a claim that the court didn't apply the correct legal test or failed to properly apply the legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing an interim decision, you should seriously consider hiring a lawyer.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] http://www.ag.gov.bc.ca/courts/forms/sup_family/F98.pdf

[2] <http://bit.ly/SCFRforms#F98>

How Do I Appeal a Final Supreme Court Decision?

A final decision of the Supreme Court is made by a judge following trial or by the agreement of the parties without a trial. Orders made by the agreement of the parties are called *consent orders*.

A judge's final decision is appealed to the Court of Appeal. Because consent orders are made with everyone's agreement, they are almost impossible to appeal. Nevertheless, if an appeal can be made, it will be made to the Court of Appeal, just like a judge's final order.

You should think twice before you decide that you want to appeal a decision, as appeals can be surprisingly expensive. They're usually not as expensive as trials are, but the cost is still substantial. As well, it isn't always necessary to appeal a decision. Orders, even final orders, which deal with children and spousal support can often be varied following the decision. Of course to vary an order, there must have been significant change in circumstances since the decision was made.

The person bringing an appeal is called the *appellant*. The other party is called the *respondent*. The trial court, the Supreme Court, is called the *lower court* or *the court below*, and the judge who heard the trial is called the *trial judge*.

Appeals to the Court of Appeal are governed by two things, the *Court of Appeal Act* ^[1] and the Court of Appeal Rules ^[2]. You should be familiar with both the act and the Rules because both contain guidelines and deadlines for the conduct of an appeal. Reading the Rules is not enough!

Making your appeal

To appeal a decision, you must file a Notice of Appeal, in Form 7 of the Court of Appeal forms, in the registry of the Court of Appeal and serve it on the other side. The Notice of Appeal is a set form that you must fill out. In it you will have to say:

1. when the order was made,
2. which judge made the order,
3. that you are making an appeal from a trial decision,
4. whether the appeal is from a decision involving the *Divorce Act* and/or the *Family Law Act*,
5. whether the appeal is from a decision involving the care of child and/or support,
6. what order you want the Court of Appeal to make, and
7. how long the trial took.

Once you've filled out your Notice of Appeal, you must file it in the registry of the Court of Appeal. They will charge you a fee for this, and you'll notice that all of the fees charged by the Court of Appeal are higher than those of the Supreme Court. The registry will stamp your Notice of Appeal with the seal of the court, a date stamp, and the file number of your action. You must then serve the Notice of Appeal on the other side.

Be aware that you have 30 days from the day after the decision was made to file your Notice of Appeal. Once the 30 days have run out you will not be able to make your appeal unless you make a special application to the court for an extension of time. In general, the Court of Appeal is very strict and will demand that you obey the deadlines and rules exactly.

Reasons for appealing a decision

When a judge makes a decision following a hearing, the judge does three things. First, the judge makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the judge decides what the law applicable to the case is. Third, the judge applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it. You must have a proper legal reason for bringing the appeal.

In most cases, you will not be able to appeal a decision because of a mistake in the judge's findings of fact, called an *error of fact*. As the appeal court does not hear the evidence all over again, unless the trial judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the trial judge found them to be.

Most often, appeals are based on errors in the judge's conclusions about the applicable law or how the judge applied the law to the facts, called an *error of law*. In appeals like these, the argument is based on a claim that the judge didn't apply the correct legal test or failed to properly apply the correct legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing a judge's decision, you should seriously consider hiring a lawyer.

Deadlines and procedures

Notice of Appeal

You have 30 days from the day after the order was made (not the date the order is formally written up and entered in the court registry, but the date the order is issued by the judge) to file your Notice of Appeal and serve it on the other side. It is a good idea at this point to find out when your appeal can be heard. At the court registry's direction, you will have to arrange a date for the hearing and ensure that the respondent is available on that date.

Notice of Appearance

After the respondent has been served with your Notice of Appeal, he or she will have 10 days to file a Notice of Appearance and serve it on you, acknowledging your appeal. At this point, the respondent may choose to serve a Notice of Cross Appeal against you. This is the respondent's own separate appeal from the trial decision.

Preparing the Appeal Book and transcripts

This is where things start to get expensive. Within 60 days of filing your Notice of Appeal, you must obtain a transcript of the testimony in the court appealed from, file the transcript with the court, and serve a copy on the respondent.

The transcript you must obtain is a transcript of all the oral evidence given at trial. You will have to contact a court reporting company (they're in the Yellow Pages) and make arrangements for them to transcribe the tapes that were made of the court proceedings.

Also within 60 days after bringing an appeal, you must prepare an Appeal Record in Form 9 of the Court of Appeal forms, file it with the court, and serve a copy on the respondent.

Within 30 days after filing the Appeal Record, you must prepare an Appeal Book in Form 12, file it with the court, and serve a copy on the respondent. The Appeal Book contains:

1. the pleadings that were filed in the original court proceeding (the Notice of Family Claim, the Response to Family Claim, and the Counterclaim) plus all of the interim orders that may have been made in that proceeding,
2. the documentary exhibits that were entered at the trial, and
3. copies of the order you are appealing from, together with the trial judge's reasons for judgment.

You must prove to the registrar that you have taken whatever steps are necessary to obtain these materials and prepare your Appeal Book. When preparing your Appeal Book, you must pay close attention to the rules and the form provided in the Court of Appeal Rules. There are a couple of companies that will prepare your Appeal Book for you; they are listed in the Yellow Pages.

You will need a total of six copies of each of these documents — the transcript, the Appeal Record, and the Appeal Book — since the court gets four, you'll need one, and the respondent gets one as well.

Since transcripts can often run to several hundred pages, as can Appeal Books, the cost of this step can be quite high.

Settling the Appeal Book and transcripts

After you've got your Appeal Book together and received the transcripts, you must deliver a copy to the respondent for his or her approval. If the respondent does not approve, you will have to arrange a hearing before the court registrar to settle the content of the Appeal Book or transcript. To apply to settle the content, you must file an Appointment in Form 29 and serve one filed copy on the respondent at least five days before the date of the hearing.

Filing your factum

You have 30 days from the time you filed your Appeal Record to file your factum. A factum, which is to be prepared in Form 10 of the Court of Appeal forms, is your written argument as to why the appeal court should make the order you want.

Factums contain five parts:

1. **Statement of facts:** A statement of the facts of the appeal, as the trial judge found them to be.
2. **Errors in judgment:** A statement as to how you think the trial judge erred in law.
3. **Argument:** Your formal argument, about the law, how the judge applied the law to the facts, and how the judge should have applied the law.
4. **Nature of order sought:** A statement of the order you'd like the Court of Appeal to make.
5. **List of authorities:** A list of the case law you rely on in your argument.

Again, factums are extremely formal, and there are all sorts of rules you must follow in preparing your factum, among which are the following:

- there is a limit on how many pages long your factum can be,
- the cover of your factum must be in a buff or beige colour (the respondent's must be green),
- all pages in your factum except for the index have to be printed on the back side of the page (so that when your factum is open, the text appears on the left page and the right page is blank),
- each line of your factum must be numbered, and
- each page must be numbered.

Like I said, factums are extremely formal.

Make a total of six copies of your factum and file them in court. The court will keep four copies, you will keep one, and you must serve the sixth on the respondent.

The respondent's factum

The respondent has 30 days from his or her receipt of your factum to file and serve you with his or her own factum. The respondent's factum is his or her argument against your position, and will also contain any additional arguments the respondent wants to make in support of his or her cross appeal.

Filing the certificate of readiness

When an appeal is ready for hearing, you must file a certificate of readiness in Form 14 of the Court of Appeal forms. An appeal is ready for hearing:

- when the Appeal Record and your factum and Appeal Book are filed, or
- if an order has been made dispensing with the need for your factum, when your Appeal Book is filed.

Your certificate is a statement that the appeal is ready to be heard and provides a time estimate of how long the hearing will take.

Preparing your book of authorities

The day of your hearing is at hand. At this point, you must prepare a book of authorities. This is a binder containing all of the case law and statutes that you are relying on in the argument you've set out in your factum. You should arrange the cases in the order that you set them out in the list of authorities in your factum. Make five copies. One copy is for you, another is for the respondent, and the court will get the remaining three. You will give the court their copies on the day of the hearing of your appeal.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/84h4>

[2] <http://canlii.ca/t/85bg>

How Do I Appeal a Court of Appeal Decision?

A decision of the Court of Appeal is appealed to the Supreme Court of Canada, the highest court in Canada, and the court from which there is no other avenue of appeal.

Unlike appeals to the Court of Appeal, there is no automatic right to appeal family law decisions to the Supreme Court of Canada, and you must first apply for leave to appeal. If you are successful, then and only then you will be allowed to proceed with your appeal.

The court does not hear evidence or have a formal hearing on leave applications, and only rarely issues reasons explaining why it granted or denied leave in a particular case. In family law cases, leave is denied much more often than it's allowed.

In general, the court is more likely to grant leave where a case raises an issue that should be decided for the benefit of everyone, not just the couple involved in the Court of Appeal decision.

Appeals to the Supreme Court of Canada are far more complicated than appeals to the Court of Appeal, not least because of the requirement of applying for permission to bring the appeal. As a result, it is critical that you hire a lawyer to bring an appeal to that court, and this wikibook won't say much more about the matter than that. *Hire a lawyer.*

The website of the Supreme Court of Canada ^[1] will give you a very thorough overview of the court's role, the rules of court, and the court's special forms. It has a helpful FAQ section ^[2], including a whole section on applying for leave to appeal.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://www.scc-csc.gc.ca>

[2] <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp>

How Do I Schedule a Family Case Conference for Hearing?

A family case conference (FCC) is a special type of hearing in the Provincial Court involving the parties, their lawyers and a judge, that is intended to explore the issues in a court proceeding with the hope of finding a way to settle all or part of the proceeding. FCCs are private and held off the record.

FCCs can be very helpful, especially if the judge is prepared to be pushy with the parties and their lawyers. It's fairly common for proceedings to settle at FCCs, and where a settlement is reached the judge will make a consent order on the spot, at the end of the hearing.

If you think a FCC will help, you can:

- ask that a FCC be scheduled at your first appearance, or
- if you've already had your first appearance, ask the judicial case manager to set a FCC for hearing.

If, for some reason, you have trouble scheduling a FCC, you can apply for an order that a FCC be scheduled under Rule 7(1).

There is more information about family case conferences in the chapter, Resolving Family Law Problems in Court within the section Case Conferences in a Family Law Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Schedule a Judicial Case Conference for Hearing?

A judicial case conference (JCC) is a special type of hearing in the Supreme Court, involving the parties, their lawyers and a judge or master, that is intended to explore the issues in a court proceeding in the hope of finding a way to settle all or part of the proceeding. JCCs are private and held off the record, and while a recording is made of the proceedings, you'll need the judge's permission to listen to the recording at a later date.

JCCs are governed by Rule 7-1 of the Supreme Court Family Rules ^[1]. You should read this rule before your JCC, especially the list of the court's powers that appears at Rule 7-1(15).

JCCs can be very helpful, especially if the judge or master is prepared to be pushy with the parties and their lawyers. It is fairly common for proceedings to settle at JCCs. Where a settlement is reached the judge will make a consent order on the spot, at the end of the hearing.

If you are married and it seems likely that you'll be able to get the court proceeding wrapped up at the JCC, if you file a court form called a registrar's certificate a couple of days before the JCC you may be able to get divorced at the JCC too.

Unlike family case conferences in the Provincial Court, JCCs are mandatory whenever a family law court proceeding has started. Except for a few limited circumstances, a JCC must be heard before the first application is heard. However, you are not limited to this first JCC. You can schedule additional JCCs as you like, within reason.

JCCs are scheduled through the trial coordinator, who will give you a list of dates to choose from. When you have a date that works for everyone, the date is reserved using a special Requisition form that the trial coordinator will supply. You must send a copy of the filed Requisition to the other side.

There is more information about judicial case conferences in the chapter, Resolving Family Law Problems in Court within the section Case Conferences in a Family Law Matter.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://canlii.ca/t/5203n>

How Do I Get a Needs of the Child Assessment?

Needs of the child assessments

Under s. 37(1) of the *Family Law Act*, when the court or the parties are making orders and agreements about guardianship, parenting arrangements, or contact with a child, the parties and the court must consider the best interests of the child only. Under s. 211, the court can appoint a person to assess one or more of:

- the needs of a child in relation to a family law dispute,
- the views of a child in relation to a family law dispute, or
- the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

These reports, called *needs of the child assessments*, were formerly known as "section fifteen reports" or "custody and access reports" under the old *Family Relations Act*. They can be very helpful in resolving a dispute about the care of children and the court will usually give a great deal of weight to the assessor's opinion.

Picking the assessor

Needs of the child assessments are routinely prepared by family justice counsellors, social workers, registered clinical counsellors, psychologists and psychiatrists.

Family justice counsellors are employees of the Ministry of Justice based in registries of the Provincial Court. Their reports are free, but because there is such a high demand for these reports and there are so few family justice counsellors who are trained to prepare them, the delay from requesting a report to getting it done might be anywhere from eight to 14 months.

In general, private reports prepared by social workers and mental health professionals can be done faster, but they come at a cost. The reports prepared by psychologists typically cost between \$6,000 and \$10,000.

Arranging for the assessment

The parties can agree that a needs of the child assessment will be prepared, but if they can't agree, an application can be made to court for an order that an assessment be prepared. The order will usually specify exactly who is being retained to prepare the report and can also specify how the report will be paid for.

Once the assessment is ordered or agreed upon, either party can get in touch with the person who will be performing the assessment. The assessor will tell you what happens next, when the interviewing process will begin, and when the completed assessment will likely be ready.

You can find more information about needs of the child assessments in the chapter Children in Family Law Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Get a Views of the Child Report?

Views of the child reports

Under s. 37(1) of the *Family Law Act*, when the court or the parties are making orders and agreements about guardianship, parenting arrangements, or contact with a child, the parties and the court must consider the best interests of the child only. Under s. 37(2)(b), the child's views are to be taken into account when assessing the child's best interests.

There are two main ways to get the views of a child before the court:

1. through a *views of the child report* prepared by an expert, like a social worker, registered clinical counsellor, psychologist or psychiatrist, or
2. through a lay views of the child report prepared by someone who isn't a trained mental health professional but does have training in interviewing children, like a family justice counsellor or a lawyer.

Other ways of getting the child's views before the court include the child writing a letter to the judge, having an independent lawyer prepare an affidavit for the child, or asking the judge to interview the child in his or her office.

Evaluative reports

Section 211(1)(b) of the *Family Law Act* allows the court to appoint someone to assess the views of a child in relation to a family law dispute, and to make orders about how the report will be paid for.

When a mental health professional is asked to *assess* the child's views, the process is more than an interview because the assessor is being asked to give the court an opinion. The assessor may want to meet with the child for two or more interviews; the assessor may speak with the child's parents or other important people in the child's life; and, the assessor may administer one or more tests to the child.

The finished report will present the child's views to the court along with the assessor's evaluation of the strength and consistency of the child's views and the extent to which what the child has said really reflects the child's actual preferences.

Evaluative reports like this are cheaper to get than needs of the child assessments, but will still cost somewhere between \$2,500 and \$5,000. They can usually be completed in two to three months.

Non-evaluative reports

Non-evaluative views of the child reports, also called *hear the child reports* or *views of the child letters*, can be ordered under ss. 37(2)(b) and 202 of the *Family Law Act* and are prepared by family justice counsellors, lawyers with special training, and mental health professionals.

These reports are different than evaluative reports because they don't *evaluate* anything; they merely report what the child has told the reporter with no analysis, opinion or commentary. They simply say "I spoke to Brandon and Brandon said..." without any editorializing.

The reports of family justice counsellors are free, but because there is such a demand for these reports and so few family justice counsellors trained to prepare them, there can be a delay of up to six months before the report is available.

The reports of lawyers and mental health professionals can be prepared as quickly as the reporter's calendar allows, sometimes the same day but more typically within a week. The cost of these reports can range from \$500 to \$3,000, depending on the number of children involved and the reporter's rate. The website of the BC Hear the Child Society ^[1] lists the society's roster of trained lawyers and mental health professionals and where they practise.

Arranging for the report

The parties can agree that a views of the child report will be prepared, but if they can't agree, an application can be made to court for an order that a report be prepared. The order will usually specify exactly who is being retained to prepare the report and can also specify how the report will be paid for.

Once the report is ordered or agreed upon, either party can get in touch with the person who will be preparing the report. The reporter will tell you what happens next, when the interviewing process will begin, and when the completed report will likely be ready. The reporter can also give you some tips on how to explain the interview to your children.

You can find more information about views of the child reports in the chapter Children in Family Law Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://hearthechild.ca>

How Do I Find an Order or Another Court Document?

This information is for people who have already been to court and need to find a copy of a document prepared in that court proceeding, such as a court order or an affidavit.

There is no central registry for court records and documents. To get a copy of a court document you must go to the particular court that dealt with your proceeding, since that's the court registry that will have your file.

Family law files are sealed from the general public, except for lawyers and the parties to the proceeding. Make sure you bring some photo ID.

If you no longer live near the court that dealt with your proceeding, it may be possible to have someone who lives there pick it up for you. That person will need, at a minimum, a letter from you authorizing him or her to search your court file. Check with the court registry to find out exactly what they'll need to see to before they release your file to someone other than you.

There are a few other things that are good to know:

- the court will not let you take your file out of the courthouse,
- the court will not let you take a document from your file, but you can get photocopies made (be warned, copying is \$1 per page in the Supreme Court),
- the court will only have files that are less than three or so years old available at hand,
- files that are three to seven years old may be in on-site storage, and there will be a delay of a few hours before the court can get the file for you, and

- files older than seven or so years are usually stored off-site, and there will be a delay of a few days while the file is retrieved.

You can find more information about orders and other court documents in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Fix an Error in an Order?

If you've found a mistake in an order that has been entered in court, whether an order of the Provincial Court or of the Supreme Court, you must apply to court to correct the order. Applications like these are limited to clerical errors or omissions; applying to correct an order is not a short cut to an appeal of the order!

Applications to correct orders are usually limited to things such as misspellings, incorrect dates or bits of the oral order that were left out of the written order.

Provincial Court

Forms involved

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|---------|------------------|--------------------|------------|------------|-------------------|-----------------|
| Form 16 | Notice of Motion | PDF ^[1] | DOC | | PDF | |

Steps

You will have to prepare a Notice of Motion to bring an application to correct an order in the Provincial Court. The notice will simply say that you're applying to correct the order of judge so-and-so, made on such-and-such a date.

The application will be made under Rule 18(8) of the Provincial Court (Family) Rules, which gives a judge the authority to correct "a clerical mistake or omission in an order."

Supreme Court

Forms involved

| Number | Name | Blank PDF | Blank Word | Blank HTML | Completed Example | Other Resources |
|----------|-----------------------|-----------|------------|------------|-------------------|-----------------|
| Form F31 | Notice of Application | PDF [2] | DOC | HTML [3] | PDF | |
| Form F30 | Affidavit | PDF [4] | | HTML [5] | PDF | |

Steps

You will have to prepare a Notice of Application and Affidavit to correct an order in the Supreme Court. The notice will simply say that you're applying to correct the order of judge or master so-and-so, made on such-and-such a date. The affidavit will simply discuss the problem in the order and provide some proof about what the order ought to say, such as the court clerk's notes from the original hearing.

In the Supreme Court, the application will be made under Rule 15-1(18) of the Supreme Court Family Rules, also called the *slip rule*, which gives the court the authority to correct a "clerical mistake" in an order resulting from "an accidental slip or omission." This rule also allows the court to amend an order to decide an issue that should have been decided but wasn't. The scope of the Supreme Court rule is a bit broader than the Provincial Court rule.

More information

You can find more information about orders in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

- [1] <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa048a.pdf>
- [2] http://www.ag.gov.bc.ca/courts/forms/sup_family/F31.pdf
- [3] <http://bit.ly/SCFRforms#F31>
- [4] http://www.ag.gov.bc.ca/courts/forms/sup_family/F30.pdf
- [5] <http://bit.ly/SCFRforms#F30>

How Do I Tell Everyone That I'm Representing Myself?

It often happens that someone who was represented by a lawyer winds up representing him- or herself. When this happens, you must notify the other parties and the court of the change.

In cases before the Provincial Court, all you have to do is fill out a Notice of Change of Address in Form 11, file it in court and serve copies on the other parties. You don't have to personally serve the other parties; you can mail the form to their addresses for service. It will be obvious from the change in your address that your lawyer no longer represents you.

In cases before the Supreme Court, you have to fill out a Notice of Intention to Act in Person in Form F88, file it in court, and serve copies on the other parties by ordinary service, either by mail to their addresses for service, or by fax to their fax number for service, or by email to their email address for service, if they have one.

You can find more information about serving documents in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Change My Address for Service?

An *address for service* is the address at which a party to a court proceeding agrees to receive correspondence in connection with the proceeding.

This address is very important, because the other parties are able to officially deliver or serve most documents on you just by popping them in the mail to that address. If you move and don't change your address for service, you risk not finding out about important events in your case.

In the Supreme Court, addresses for service are established by the claimant in his or her Notice of Family Claim and by the respondent in his or her Response to Family Claim. To change this address later, you must fill out a Notice of Address for Service in Form F10, file it in court, and send copies to the other parties at their addresses for service.

In cases before the Provincial Court, almost every court form allows you to specify your address for service, and the most recent address for service will be considered your proper address for service. If you need to change your address for service but don't have a new court form to file, you can change your address for service by filling out a Notice of Change of Address in Form 11, filing it in court and serving copies on the other parties. You don't have to personally serve the other parties; you can mail the form to their addresses for service.

Addresses for service in both the Provincial Court and the Supreme Court can include a fax number for service and an email address for service, although these extra addresses aren't required by the rules. Remember to send out a notice if these addresses change or if you need to cancel a fax number for service or an email address for service.

You can find more information about serving documents in the chapter Resolving Family Law Problems in Court.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Prepare for My First Meeting with a Lawyer?

Information

The lawyer will need to know certain basic facts about you and your relationship, particularly if there is a chance the lawyer will be starting a court proceeding on your behalf. So make sure you either have this information at the tips of your fingers or have it written down.

Basic information

The lawyer will need to know this basic information:

- your address, occupation, annual income and date of birth,
- your spouse's full name, address, occupation, annual income and date of birth,
- the date each of you began living in British Columbia,
- the date the two of you started to live together,
- if you're married, the date of your marriage and the name of the city or town where you got married,
- the date of your separation, if you're separated,
- the full names and birthdates of any children,
- the care arrangements that are presently in place for the children,
- your surname at birth and your surname before you got married, if you are married,
- your spouse's surname at birth and his or her surname before you got married, if you are married,
- whether you were unmarried, divorced or widowed when you married, if you are married, and
- whether your spouse was unmarried, divorced or widowed when you married, if you are married.

Financial information

The lawyer will need to know this financial information:

- the approximate balance of all financial accounts, including savings, RRSP and investment accounts, and the names of the financial institutions holding the accounts,
- approximate credit card balances, and the names of the credit card companies,
- the balances of any loans and lines of credit,
- the full details about any personal and family debts,
- basic information about any stock or bond portfolios,
- whether either of you has a pension and, if so, the name of the pension plan,
- the addresses of any real estate either of you might own and information about how those properties are owned,
- the approximate market value of any real estate and the amount of any mortgages, and
- the full details about any assets or property that either of you own that is located outside British Columbia.

Concerns and risks

The lawyer will also need to know:

- any health concerns about you, your spouse and the children,
- any pending financial risks, like bankruptcy or a loss of employment,
- any pending personal risks, such as risk of abuse or the abduction of the children, and
- the basic reasons why your relationship came to an end.

Don't worry if you don't have all this information available right away. There is almost always time to collect this information afterwards, and the lawyer you meet will most likely have a list of other information that you'll have to gather in any event.

Documents

You really only need to worry about documents if you're already in the middle of a court proceeding or negotiations between you and your ex have started.

If litigation is under way, the lawyer will want to see all the legal documents (also called "pleadings") that have been produced thus far. If you can't truck the whole file down to the lawyer's office, at least make sure you bring:

Supreme Court

1. the Notice of Family Claim,
2. the Response to Family Claim,
3. the Counterclaim, if any,
4. any Financial Statements that may have been prepared,
5. a copy of all orders made so far, and
6. if you're seeing the lawyer about an interim application, a copy of the Notice of Application and the supporting affidavits.

Provincial Court

1. the Application to Obtain an Order or the Application to Change an Order,
2. the Reply,
3. any Financial Statements that may have been prepared,
4. a copy of all orders made so far, and
5. if you're seeing the lawyer about an interim application, a copy of the Notice of Motion.

If you're in the midst of negotiations, you will want to bring:

1. a copy of any offers made so far, and
2. any Financial Statements that may have been prepared.

If you're planning on starting a divorce proceeding, you'll definitely need to bring:

1. your original certificate of marriage (the ugly brown government document, not the flowery document you might have received from whomever performed the marriage), and
2. a photograph of your spouse.

Payment

Before you even darken the lawyer's door, make sure you know whether or not the lawyer is going to be charging for your first appointment.

Some lawyers offer an initial consultation for free; if so, they will usually advertise that first meetings are free. Other lawyers will offer an initial consultation for a reduced fee.

Most lawyers charge for initial meetings at their usual hourly rate. Do not assume that there will be no charge for your initial appointment. If you must make an assumption, assume that the lawyer will be charging you at the lawyer's normal hourly rate.

If the lawyer is going to be charging for your first visit, he or she will usually expect payment once the meeting is done. All lawyers will take cash and cheques, and many will also take credit cards. Make sure you are able to pay for your first meeting when you book it.

For more information

You can find more information about choosing a lawyer in the chapter Introduction to the Legal System for Family Matters within the section Lawyers & the Law Society.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Become a Lawyer?

In a nutshell, to become a lawyer you must graduate law school, complete a kind of year-long apprenticeship called articles, and be called to the bar to practice as a lawyer.

Getting into law school

There are two things you need to get into law school: some post-secondary schooling and the LSAT.

Previous schooling

Academically, you normally need an undergraduate university degree in something. It doesn't matter what the focus of your undergrad was, or whether it was a B.Comm. a B.Sc. or a B.A., you just have to have a degree. Some universities will also accept into law school students with a minimum of two years of an undergraduate program; however, this will depend on the university you're applying to, how many applicants they have and, of course, your marks.

The LSAT

LSAT stands for Law School Admission Test. All North American law schools require that you write this test before you apply for admission. The LSAT is run by a private testing company, not by any particular school, and tests are offered on a quarterly basis in cities across the continent. If I recall correctly, the same exact test is written by thousands of people across Canada and the US on the same weekend. Your score is not a percentage, it's a weighted score. In other words, the result you get is a statement of how you ranked compared to the thousands of other people who wrote the test. If you ranked in the 50th percentile, for example, you did as well as half the people that wrote the test. If you ranked in the 80th percentile, you did better than 80% of the people that wrote the test.

At this point you're probably wondering what the LSAT is. Put simply, the LSAT tests your vocabulary, language skills, and inductive and deductive reasoning. There are fill-in-the-blank questions, questions testing your understanding of a brief essay, and logical reasoning tests. There's also an unscored essay section.

At least one company that I'm aware of sells study guides and actual past LSAT exams that you can test yourself on; you can find these sorts of study guides at places like Chapters and your local university book store.

The LSAT, your grades and law school admissions

Do your undergraduate marks count? Yes. Some universities look at a combination of your marks and your life experience; others look at just your marks and don't give a damn about whatever else you've been up to in your life. The sort of marks you'll need depends very much on the university you're applying to. Some have a lot of demand and, as a result, their mark expectations are higher; others have less demand to get into law school and have lesser grade expectations. In general, you should have an undergraduate average of no less than say 75% before you even think of applying to law school.

Of course, your LSAT ranking is important too. Some universities look at your undergraduate grades and your LSAT score independently, and factor in your life experience. Some, like UBC, apply the numbers strictly and look only at a mathematical combination of the two.

Law school

Law school in Canada is three years long. At the end of it, if you've graduated, you get an LL.B., a "Bachelor of Laws," or a J.D., a "Juris Doctor" or doctor of laws. First year is generally the toughest, since that's when you realize that law school is entirely unlike any other schooling you've ever had and the curriculum is standardized, with little room for personal choice.

Law schools are generally fairly uptight about how they process their students. In your undergrad you probably asked for or knew someone who asked for academic exemptions and leaves of absence and things like that. In law school you are expected to be career-focused and have your mental and personal house in order before you start, and, as a result, this sort of academic leeway is rarely and parsimoniously dispensed.

Is law school fun? No. Is it as hard as you've heard? No, not at all. Once you've figured out how law school works, it'll be smooth sailing for you, as long as you know how to apply yourself and have halfway decent work habits. Remember, the study of a thing is a lot different than the practice of a thing.

One last point about law school. Give your first year a good go. Try your best but don't be devastated by the difference between your undergrad marks and your law school marks. Do your best to apply what you learned in first year to your studies in second year. Your second year marks are critical, for the reasons that follow. In general, you can relax a bit in your third year.

Articling

Articling is the second-last hurdle you have to pass before you become a lawyer. Articles are a kind of year-long apprenticeship, just the way masons, fabric dyers and carpenters apprenticed to master crafters in the middle ages. The point of articles is to give you a hands-on introduction to the practice of law under the tutelage of a senior lawyer, your *principal*. As an articulated student, you are insured by your principal and are permitted to practise law in a certain limited capacity. You are also subject to certain restrictions and requirements of the provincial law society and its rules of conduct and practice.

The law school doesn't hand out articles, however. You have to find them yourself. Articling is a job; an articulated student is an employee of his or her principal, and you've got to apply for the position.

The vast majority of law students apply for articles at the end of their second year of law school, after the marks have been released. The articles will start almost immediately after third year ends, so people usually spend the summer after second year scrounging for employment. As a result, your second year marks are critical to your ability to obtain articles. For the same reason, your third year marks are a lot less important, since you have, hopefully, already found articles.

No matter what, you must have articulated before you can become a lawyer. As a result, it is critical that you find an articling position if you want to practise law.

PLTC: The bar admission course

All provincial law societies require law school graduates to complete both their articles and a bar admission course before allowing you to practise law. In British Columbia, the bar admission course is a three-month course called PLTC, the *Professional Legal Training Course*, and it's completed during the year in which you article. Sometimes your principal will pay for the cost of the course; some articles don't provide for this and you'll have to pay the course tuition yourself.

PLTC is an academic introduction to the basics of actually practising law in the real world, from client interview techniques to professional ethics to common trust account errors. PLTC is not fun; it is boring, tedious and unpleasant. Nevertheless it is a critical course that you must complete with near-perfection if you want to work as a lawyer. When I did PLTC, you had to have a minimum combined exam and exercise score of 11 out of 12 points, or 91.66%, to pass.

Admission to the bar

When you've completed PLTC and your articles are almost complete, your principal will have to furnish the law society with a sworn declaration stating that you are ready and competent to practise as a lawyer. You must ensure the law society gets your principal's declaration or you will not be *called to the bar*, which is a term for the formal ceremony admitting you as a lawyer. PLTC will forward your marks to the law society for you.

Summary

Here's what you need to do to become a lawyer in the order you need to do it:

1. complete all or most of one undergraduate university degree,
2. write the LSAT,
3. send your undergraduate transcripts plus your LSAT test scores to the law schools you'd like to go to,
4. complete first year law school without having a breakdown or dropping out,
5. once you've finished second year, look for and obtain your articles,
6. complete third year without doing too much damage to your liver,
7. start your articles and, at some point during that year, complete PLTC,
8. apply for admission to the bar with your articling report (PLTC will forward your grades to the law society on its own), and
9. be called and sworn in to the bar; the law society will provide you with a schedule of call ceremonies.

Good luck! Give me a call if you'd like.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

How Do I Divide Our CPP Pensions after We're Divorced?

Properly speaking, Canada Pension Plans are *equalized*, not divided, and what's being equalized are the spouses' *pensionable credits*.

CPP credits accumulate from the mandatory CPP payroll deductions taken from almost everyone's employment income. These credits build up over the years and are used by the CPP people in Ottawa to calculate the amount of the monthly CPP benefit payments each person will begin to receive when they reach the age of 65, or earlier, if they elect to take their pensions earlier, or later, if they elect to take them later.

Divorced married spouses and separated unmarried spouses may apply to equalize their CPP credits. British Columbia is one of the few provinces that allow couples to *not* equalize their CPP credits. However, if you decide not to equalize your CPP credits you must have either a court order or a separation agreement that expressly states that the credits won't be equalized. If there's no documentation of an agreement not to equalize CPP credits, either former spouse can apply for an equalization without the consent of the other spouse. It's automatic.

The amount of the CPP credits that will be equalized is the amount each spouse accumulated during their relationship after CPP has performed certain adjustments to account for things like periods out of the workforce on parental leave. The total amount of these credits is divided between each spouse. For people who have had a lower income than their former spouse, the equalization of CPP credits will increase the amount of the CPP pension they will eventually receive.

To apply for the equalization of your CPP credits, apply to Human Resources Development Canada. You can reach HRDC at:

1-800-277-9914

www.hrsdc.gc.ca ^[1]

For further information about the division of property when spouses break up, you may wish to review the chapter Property & Debt in Family Law Matters.

✓ The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.

References

[1] <http://www.hrsdc.gc.ca/>

From the Author

JP Boyd on Family Law Editorial Manifesto

by John-Paul Boyd, May 2013

When Courthouse Libraries and I first started talking about this wiki project, there were some core values that I wanted the wiki to maintain. I'd never thought about these things before, but when we started talking about how the wiki would look and be run, I realized that there were in fact certain qualities of my old website that I wanted to preserve. From this came a set of guiding principles for the editorial tone of what is now called *JP Boyd on Family Law*. My hope is that this resource will continue to be:

1. **Free**

The information should be available for free, to anyone, without restriction and without expectation of reward.

2. **Plain language**

Information should be as accessible as possible and couched in colloquial language to the extent possible, without being inaccurate. It should avoid lawyer's jargon to the extent possible, and may use humour, when humour is appropriate and relatively inoffensive.

3. **Up-to-date and accurate**

The information should be timely and accurate, within reason and practicality.

4. **Recommendatory of subject matter**

The information should not solely be about describing the options, but be prescriptive and recommendatory, when being prescriptive and recommendatory is appropriate. To some extent this will be an expression of policy and preference.

5. **Promoting of good behaviour in the justice system**

The information should promote the overall functioning of the justice system by promoting behaviours that are helpful and facilitate resolution and discouraging those which do not and, in particular, behaviours that degrade the efficiency of court registry services, chambers applications and trial processes.

6. **For sharing and redistribution**

The information should be broadly shared, and sharing and redistribution should be encouraged on the conditions that the source of the information be identified and that any subsequent reuse not be for a commercial purpose.

7. **Helpful**

Above all, the information should be helpful. It should be practical and pragmatic and the wiki should provide other resources, like court forms, charts and checklists, where they would serve a practical purpose.

The bit about this resource being prescriptive and recommendatory needs a bit of an explanation. Writing as an individual I have always felt free to express my views on things through my website, although I took care to ensure that my employers wouldn't be tarred with my opinions. As a result, rather than trying to provide a legally complete, politically neutered website that in trying to say all things for all people wound up saying nothing, I have felt free to use the forbidden terms "should" and "shouldn't;" I have said that parenting coordination can be expensive (it can), that grandparents will have a hard time getting parenting time over the objections of a parent (they will) and that the cost of

resolving a legal dispute through trial can be prohibitively expensive (it is). There is value, I think, in being able to say “yes you can make an application for an order restraining the children from having their hair cut on Wednesdays, but you shouldn’t because it’s not worth the time, the money, the conflict or the anxiety.”

Finally, I was reading the 2012 report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters ^[1], and gained further insight into the purposes behind my website. In discussion about court-provided information programs, the working group commented that:

“Beyond the obvious value of orienting and helping to organize the parties, these programs are premised on two ideas. The first is that information is essential to a fair resolution. The second is that information is a dispute resolution tool, or put in the negative, misinformation can generate and prolong disputes. ... Early information has been demonstrated to be sufficiently effective in reducing conflict and expediting resolution that many provinces have elected to make it mandatory.”

I took two principles from this. First, that accurate legal information is essential to the fair resolution of family law disputes. Second, that accurate legal information is itself a tool for the resolution of family law disputes. That was kind of what I had always had in mind for my website.

References

- [1] <http://www.cfcj-fcj.org/sites/default/files/docs/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>