

# An Overview of the *Family Law Act*

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## I. INTRODUCTION

### A. FAMILY LAW REFORM IN BRITISH COLUMBIA

The most immediate roots of the *Family Law Act*<sup>1</sup> are found in the work of the Justice Review Task Force, a group struck by the Attorney General in 2002 with representation from government, bench and bar, to examine means of reforming the civil justice system in British Columbia. The Task Force established the more narrowly-focused Family Justice Reform Working Group a year later, and the Working Group released its first major report, *A New Justice System for Children and Families*,<sup>2</sup> in 2005.

*A New Justice System* called for sweeping reforms to the justice system for family law matters, and, among other things, recommended that out-of-court resolution processes be the preferred tools for dealing with family law disputes, with litigation employed only as a last resort, and that court hearings be simplified, with judges more actively managing court processes and the litigants making use of them.

In 2006 the Attorney General announced a review of the *Family Relations Act*,<sup>3</sup> the bedrock legislation on the law of domestic relations in British Columbia, and fourteen discussion papers were released for public comment over the course of 2007. The review culminated in the 2010 release of a discussion paper of surpassing scope and magnitude, *White Paper on Family Relations Act Reform: A Proposal for a New Family Law Act*.<sup>4</sup> The white paper surveyed the major areas of reform government sought to address, and included draft legislation as well as commentary on the proposed legislation.

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<sup>1</sup> *Family Law Act*, SBC 2011, c. 25. The portions of the act presently in force are available on the website of the Queen's Printer at [www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_11025\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_11025_01); the act as passed on third reading is available on the website of the Legislative Assembly at [www.leg.bc.ca/39th4th/3rd\\_read/gov16-3.htm](http://www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm).

<sup>2</sup> *A New Justice System* is available on the Task Force's website at [www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf) and remains worthwhile reading.

<sup>3</sup> *Family Relations Act*, RSBC 1996, c. 128.

<sup>4</sup> The white paper is available from the website of the Ministry of Justice at [www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf](http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf). The commentary contained in the white paper will likely be of some assistance in interpreting the *Family Law Act*, as will "The Family Law Act Explained," published by the Ministry of Justice in May 2012 and available at [www.ag.gov.bc.ca/legislation/family-law/pdf/notes-binder.pdf](http://www.ag.gov.bc.ca/legislation/family-law/pdf/notes-binder.pdf).

The *Family Law Act* was tabled in the Legislative Assembly as Bill 16 on 14 November 2011, passed third reading on 23 November 2011 and received Royal Assent the very next day. The new act looks very much like the legislation described by the white paper and resonates with the major themes of *A New Justice System*. It continues the remarkable reforms implemented over the past few years with the introduction of mandatory case conferencing, family justice service hubs in Nanaimo and Vancouver, mandatory mediation regulations and new Supreme Court rules for family law matters, and soon new Provincial Court family law rules as well.

The *Family Law Act* will come into force, and the *Family Relations Act* will be repealed, on 18 March 2012.<sup>5</sup> The shock to the system will be sharp but abbreviated; the act's transitional provisions are exceedingly brief and largely concern the interpretation of agreements and orders about children made under the old act and the continuing effect of the *Family Relations Act* on litigation commenced and agreements made under that act.

## B. A NEW APPROACH TO FAMILY LAW

The *Family Law Act* is wholly new to British Columbia law. Although some aspects of the new legislation are a modest update of the *Family Relations Act*, such as the act's treatment of child support and the jurisdictional overlap between the Supreme Court and Provincial Court, the *Family Law Act* establishes new legislative schemes for a number of traditional family law subjects, such as the care of children and the division of property, provides for matters new to the legislation on family law, such as the division of debt and parenting coordination, and repeals some subjects of long standing in the *Family Relations Act*, such as parental support and the act's statutory offences. No assumptions should be made that any particular provision has been carried forward from the *Family Relations Act*.

Although the reforms imposed by the *Family Law Act* touch every area of the law on domestic relations in this province, three major themes emerge from the new legislation: an emphasis on and better support for out-of-court dispute resolution processes; where court is necessary to resolve a dispute, enhanced provisions for the court's control of its process and the litigants before it; and, where a dispute involves children, a refocusing of rights and priorities from the parties to their children.

### 1. An Expanded Approach to Dispute Resolution

Under Part 2 of the new act, the resolution of family law disputes out of court is encouraged. "Family dispute resolution," a term meant to capture all out of court processes, is defined as including "mediation, arbitration, collaborative family law and other processes." In support of these processes, s. 5 imposes a general duty to make "full and true" disclosure when resolving a family law dispute and privileges

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<sup>5</sup> *Family Law Act*, s. 259.

the information disclosed, and the court may, under s. 89, make interim orders for the distribution of property to fund family dispute resolution processes.

Pursuant to s. 9, parties must comply with any requirements to attend family dispute resolution as may be prescribed by regulation. The court may also compel attendance at family dispute resolution by conduct order or when a party has refused to exercise or been denied a right to time with a child.

Sections 6, 7 and 214 bolster family law agreements by: making such agreements binding on the parties, with or without consideration and whether filed in court or not; deeming the parts of agreement subsequently replaced by a court order or another agreement to have been severed; and, where an order is drawn from part of an agreement, continuing the effect of the remainder of the agreement. The court may no longer “vary” agreements, but instead may set all or part of them aside and make orders in place of the portions set aside.

## 2. Enhanced Case Management

Section 199 provides the court with a set of guiding principles:

- (1) A court must ensure that a proceeding under this Act is conducted
  - (a) with as little delay and formality as possible, and
  - (b) in a manner that strives to
    - (i) minimize conflict between, and if appropriate, promote cooperation by, the parties, and
    - (ii) protect children and parties from family violence.
- (2) If a child may be affected by a proceeding under this Act, a court must
  - (a) consider the impact of the proceeding on the child, and
  - (b) encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict between the parties.

The *Family Law Act* makes a number of provisions that substantially enhance the capacity of the court to manage the proceedings before it; most significantly, these provisions apply equally to matters before the Supreme Court and the Provincial Court:

- (a) under ss. 212 and 213, the court may make and enforce disclosure orders at any stage of a proceeding;
- (b) under s. 221, the court may make an order barring a party from making further applications or continuing a proceeding without leave where the party has made a trivial application or otherwise misused court processes; and,

- (c) under ss. 222 to 228, the court may make “conduct orders” to manage parties and court processes where necessary to facilitate settlement, manage behaviour frustrating the resolution of a proceeding, prevent misuse of court processes, and “facilitate arrangements” pending the final resolution of a proceeding.

The *Family Law Act* gives both courts significant new enforcement powers. Where a particular matter lacks a specific enforcement mechanism, the general enforcement provisions of s. 230 allow the court to require a party post security, pay the expenses of the other party occasioned by the breach, or pay up to \$5,000 for the benefit of another person or as a fine. The extraordinary enforcement provisions of s. 231 allow the court to jail a party for up to 30 days where no other means will secure the party’s compliance. Again, lest it not be overlooked, these provisions apply to proceedings before the Provincial Court as well as the Supreme Court.

### 3. A Child-Centred Approach to Children

The new legislation shifts the focus of the “right” involved in the care and control of children from parents to children themselves, and, in an obvious effort to buttress innovation from the entropic effect of custom, creates a new terminology to describe the new regime.

Under s. 40, the persons responsible for making decisions on behalf of a child are “guardians.” Guardians are charged with exercising “parental responsibilities” in the best interests of the child and must presumptively do so in consultation with other guardians. The best interests of a child is no longer the paramount consideration the court and parents must take into account but the only consideration.

Under s. 37, to determine the best interests of a child, all of the child’s “needs and circumstances” must be considered, including:

- (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.

The subject matter parental responsibilities are concerned with is extensive and is set out non-exhaustively at s. 41. Parental responsibilities covers every aspect of parenting a child, from determining mode of health care and place of residence, to giving consent and applying for passports.

The time a guardian has with a child is “parenting time.” Pursuant to s. 42, during parenting time, a guardian has the parental responsibility of “making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.” The phrase “parenting time” in particular demonstrates the refocusing of rights onto the child from the parent; “parenting time” has the flavour of an obligation or a task to be performed, the beneficiary of which is the child rather than the parent.

The provisions in an order or agreement for parental responsibilities and parenting time are known as “parenting arrangements.”

The time someone who is not guardian has with a child, including the time of a parent who is not a guardian, is “contact.” A person with contact has no parental responsibilities during his or her time with the child, and contact is not included in the meaning of “parenting arrangements.”

## II. JURISDICTIONAL ISSUES

### A. SCOPE OF ACT

The *Family Law Act* applies to everyone in a domestic or parenting relationship in British Columbia. As a result of the operation of the doctrine of paramountcy the *Family Law Act* is, like the *Family Relations Act* before it, subordinate legislation to the *Divorce Act*.<sup>6</sup> Married spouses and formerly married spouses are able to avail themselves of relief under both acts; all other persons are limited to the *Family Law Act* where orders are required on the care of children, the payment of support, the division of assets and the allocation of debts.

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<sup>6</sup> *Divorce Act*, RSC 1985, c. 3 (2nd Supp.).

## B. COURT JURISDICTION

The Supreme Court has jurisdiction over all matters under the *Family Law Act*, subject to the *Divorce Act*. The inherent jurisdiction of the Supreme Court, including its *parens patriae* jurisdiction to act on behalf of persons under a legal disability, is not limited by the *Family Law Act*.

The jurisdiction of the Provincial Court is restricted to matters concerning the care of children, child support, spousal support and protection orders, and to matters ancillary to its processes, such as conduct orders and the enforcement of orders.

The jurisdictional overlap between the Supreme Court and Provincial Court is codified by s. 194 of the *Family Law Act* somewhat more thoroughly than ss. 7 and 8 of the *Family Relations Act*, and establishes these general rules:

- (a) the commencement of an action in one court does not bar the commencement of an action in the other court unless the relief applied for has been granted or dismissed by the first court;
- (b) if actions are commenced in both courts, the making of an order by one court does not bar an application for relief in the other court unless the relief sought has been granted or dismissed by the first court;
- (c) if actions are commenced in both courts, a court may hear a matter or decline to hear a matter, decline to hear a matter until the other court has heard a matter, or consolidate the action before it with the action commenced in the other court; and,
- (d) the Supreme Court may vary Provincial Court orders as necessary to accommodate the making of its own orders, but may not otherwise interfere with Provincial Court orders except on appeal.

## C. TERRITORIAL JURISDICTION

The *Family Law Act* is limited in application to persons present in British Columbia and those attorning to the courts of British Columbia, and to matters with a real and substantial connection to British Columbia.

### 1. Children

Foreign declarations of parentage may be recognized under ss. 35 and 36 of the act, and upon recognition have the same effect as domestic declarations of parentage.

Foreign orders similar in nature to orders for guardianship, parenting arrangements or contact may be recognized under s. 75. Once recognized, foreign orders have the same effect as domestic orders for guardianship, parenting arrangements or contact,

and the local courts may make such orders under the *Family Law Act* as are necessary to give effect to foreign orders. Foreign orders may, in limited circumstances, be superseded by a domestic order if the child would otherwise suffer serious harm or there has been a change in circumstances affecting the child's best interests.

The *Hague Convention on the Civil Aspects of International Child Abduction*<sup>7</sup> continues to have the force of law in British Columbia.

## 2. Child Support and Spousal Support

Foreign orders for child support and spousal support are exclusively addressed by British Columbia legislation through the *Interjurisdictional Support Orders Act*.<sup>8</sup> Where a proposed payor is ordinarily resident in foreign jurisdiction and no support order has been made by the courts of a reciprocating jurisdiction, an order *de novo* may be obtained on application under the *Family Law Act*.

## 3. Property and Debt

Where the courts of more than one jurisdiction may make orders for the division of property between the parties, pursuant to s. 106 the court may only proceed to divide property if: an application to divide property under the *Family Law Act* is brought as a counterclaim; the parties submit to the jurisdiction of the domestic court; either party was habitually resident in the province when the proceeding commenced; or, there is a real and substantial connection between the province and the facts on which the claim for the division of property is based. Where the Supreme Court accepts jurisdiction under s. 106, s. 108 sets out a test to determine the law which must be applied to determine the division of property; the applicable law may be the *Family Law Act* or the law of another jurisdiction.

The Supreme Court may, in limited circumstances, make orders in relation to extraprovincial movable and immovable property under s. 109, including orders for the preservation, ownership and possession of the property.

## 4. Protection Orders

Pursuant to s. 191, the *Enforcement of Canadian Judgments and Decrees Act*<sup>9</sup> applies to foreign orders similar in nature to protection orders made under the *Family Law Act*.

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<sup>7</sup> Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII.

<sup>8</sup> *Interjurisdictional Support Orders Act*, SBC 2002, c. 29; Part 8 of the *Family Relations Act* was repealed by the operation of s. 55.

<sup>9</sup> *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c. 29.

## D. STANDING

### 1. Children

Any person may apply for a declaration as to whether a person is the parent of a child. Notice must be given to each guardian of the child, all adults who care for the child and with whom the child resides, each person who is, claims or is alleged to be a parent of the child, and to the child if 16 years old or older. A party to an action may apply for an order that tissue or blood samples be taken for the purpose of testing to determine biological parenthood.

The guardians of a child are presumed to be the child's parents, except for a parent who did not cohabit with the child and does not regularly care for the child. Any person, including a parent, may apply to be appointed as the guardian of a child. When an application is made for guardianship of a treaty first nations child, including a Nisga'a child, the first nations government must be served with notice of the application and has standing in the proceeding.

A guardian may apply for an order respecting the allocation or sharing of parental responsibilities or the allocation of parenting time. A guardian may apply for directions on an issue concerning a child.

A person who is not a guardian may apply for an order for contact with a child, or may have contact by the agreement of the child's guardians.

Any person, including a guardian, may apply for an order that a person, including a guardian, be appointed as trustee of the property of a child.

### 2. Child Support and Spousal Support

A parent, guardian, child or someone on behalf of a child may apply for an order that a person pay child support to a designated person. The persons liable to pay child support are parents, guardians, guardians who are not parents, and stepparents. Applications against a stepparent must be brought within one year of the stepparent's last contribution to the support of the child.

A spouse or someone on behalf of a spouse may apply for an order that a spouse pay spousal support to a designated person. For the purposes of such applications, "spouse" includes married spouses, persons cohabiting in marriage-like relationships for at least two years, and persons cohabiting in marriage-like relationships for less than two years who have had children together. Applications for spousal support must be brought within two years of divorce or annulment for married spouses, or within two years of separation for unmarried spouses.



### 3. Property and Debt

A spouse may apply for the division of family property and excluded property and allocation of family debt. For the purposes of such applications, “spouse” includes married spouses and persons cohabiting in marriage-like relationships for at least two years. Such applications must be brought within two years of divorce or annulment for married spouses, or within two years of separation in the case of unmarried spouses.

Where a treaty first nation may alienate treaty lands, a spouse is a member of the first nation and a claim is made in respect of treaty lands, the first nation may participate in the proceeding and the court must consider any laws of the first nation restricting the alienation of treaty lands.

### 4. Protection Orders

A person whose safety and security are at risk, or someone on that person’s behalf, may apply for a protection order. Such applications may be brought independent of other proceedings under the *Family Law Act*.

## III. SUBJECT MATTER

### A. CHILDREN

#### 1. Parentage

Part 3 of the *Family Law Act* sets out a scheme for the determination of parentage for all purposes of the law in British Columbia except under the *Adoption Act*,<sup>10</sup> including where a child is conceived as a result of assisted reproduction.

Assisted reproduction is defined as a means of conceiving a child other than by sexual intercourse, and is now governed both by the *Family Law Act*, which largely addresses the effect of assisted reproduction agreements on the determination of a child’s parentage, and by the federal *Assisted Human Reproduction Act*,<sup>11</sup> which *inter alia* governs payment for services related to assisted reproduction.

#### a. Conception without Assisted Reproduction

Pursuant to s. 26(1), the parents of a child are presumed to be the birth mother and biological father. The presumptions of paternity from s. 95 of the *Family Relations Act* are carried forward at s. 26(2).

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<sup>10</sup> *Adoption Act*, RSBC 1996, c. 5.

<sup>11</sup> *Assisted Human Reproduction Act*, SC 2004, c. 2.

Where there is any doubt or uncertainty as the parentage of a child, the Supreme Court may make a declaration of parentage under s. 31(1) of the *Family Law Act*. Tissue or blood samples may be taken for the purposes of a parentage test on application pursuant to s. 33(2). The Provincial Court may only make determinations of parentage where necessary to resolve a matter within its jurisdiction.

### **b. Conception with Assisted Reproduction**

Under s. 24(1), the donor of gametes is not a parent merely by virtue of the donation. A donor may become a parent if an assisted reproduction agreement so provides.

Under s. 27(1), the birth mother of a child conceived by assisted reproduction is presumed to be the child's mother, regardless of the source of the gametes, subject to an assisted reproduction agreement, executed prior to conception, which provides to the contrary.

As a result of the operation of ss. 27 and 30 and the definition of "intended parents" at s. 20(1), a child may have up to five persons who qualify as parents for all purposes of the law in British Columbia and the provisions of the *Family Law Act* on child support: up to two intended parents, the donor of the sperm, the donor of the ovum and the surrogate mother.

## **2. The Best Interests of the Child**

Section 37(1) provides that the only consideration to be taken into account in making an order or agreement for the care of a child is the child's best interests. Under subsection (2), to determine the child's best interests, the court or the parties must take into account all of the child's needs and circumstances, including a list of factors much expanded from that found at s. 24(1) of the *Family Relations Act*. New factors include the history of the child's care, the child's need for stability, and the existence of any civil or criminal proceedings relevant to the child's safety, security and well being.

Matters relating to family violence are prominent in the *Family Law Act*. In addition to the availability of protection orders, discussed below, the best interests factors at s. 37(2) include:

- (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;

Where family violence has occurred, the court is required to consider a number of additional factors set out at s. 38 to evaluate the s. 37(2)(g) and (h) best interests factors:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

### 3. Guardianship

The *Family Relations Act* concepts of custody, guardianship and access are not continued in the *Family Law Act*. In their place is a refashioned and expanded concept of guardianship, akin to the common law concept of guardianship, under which guardians have “parental responsibilities” that they are required to exercise in consultation with one another, and have “parenting time” with their children.

Pursuant to s. 39(1), cohabiting parents are presumed to each be a guardian of their child, during their relationship and after separation. A parent who did not cohabit with the child is presumed not to be a guardian unless, under s. 39(3), that parent regularly cares for the child.

A person who is not a parent may only become a guardian by court order, pursuant to s. 50. Under s. 51, a person applying for guardianship must demonstrate why the appointment is in the best interests of the child, on notice to all of the child's guardians and adults with whom the child lives. The consent of children age 12 and older is required.

When an application is made for guardianship of a treaty first nations child, including a Nisga'a child, the first nations government must be served with notice of the application and has standing in the proceeding pursuant to ss. 208 and 209.

### **a. Parental Responsibilities**

Under s. 40(2), each guardian may exercise all parental responsibilities with respect to a child and must do so in the best interests of the child and in consultation with the child's other guardians, unless an order or agreement provides to the contrary. Parental responsibilities are non-exhaustively listed at s. 41 and include day-to-day decision-making, determining where the child resides and the manner of the child's education, applying for licences and permits for the child, and giving or withholding permission on behalf of the child. Pursuant to s. 40(3), parental responsibilities may be shared between or allocated among guardians.

A guardian may apply to court under s. 49 for directions on an issue affecting a child.

### **b. Parenting Time**

Pursuant to s. 42 of the *Family Law Act*, the time a guardian is with a child is "parenting time." During a guardian's parenting time, the guardian has day-to-day care of the child and is responsible for day-to-day decision-making on behalf of the child.

### **c. Parenting Arrangements**

The arrangements set out in an order or agreement for parental responsibilities and parenting time are collectively referred to a "parenting arrangements." Under s. 40(4), no particular parenting arrangements must be presumed to be in the best interests of a child, including that parental responsibilities or parenting time should be shared equally or that decisions should be made separately or by more than one guardian together.

Under s. 44(4), the court must set aside an agreement on parenting arrangements if the agreement is not in the best interests of the child.

Under s. 47, orders for parenting arrangements may be varied if there has been a change in the needs or circumstances of the child since the order was made, including as a result of a change in the circumstances of another person.

### **d. Temporary Incapacity**

Pursuant to s. 43(2), where a guardian is temporarily unable to exercise specific parental responsibilities, including day-to-day decision-making and:

- (a) making decisions about with whom the child will live and associate;
- (b) making decisions regarding the child's schooling and extracurricular activities;
- (c) giving or refusing consent to medical treatment;

- (d) requesting and receiving information about the child’s schooling and healthcare from third parties; and,
- (e) “exercising any other responsibilities reasonably necessary to nurture the child’s development,

the guardian may authorize a person to exercise those parental responsibilities on his or her behalf during the period of incapacity.

#### **e. Permanent Incapacity and Death**

Pursuant to s. 53, a guardian may appoint a person as guardian effective on the guardian’s death, by will or by a form to be prescribed by regulation. Pursuant to s. 55, a guardian facing permanent incapacity may appoint a person as guardian effective when specified conditions are met, such as the guardian’s incapacity, by a form to be prescribed by regulation. A guardian may not appoint a guardian with greater parental responsibilities than he or she holds at the time of the appointment.

The death of a guardian does not vest guardianship in a parent who is not a guardian.

#### **4. Contact**

A person who is not a guardian, including a parent who is not a guardian, may have “contact with a child.” Contact is not included in the term “parenting arrangements;” that term applies only to guardians.

Pursuant to s. 58(4), the court must set aside an agreement for contact if the agreement is not in the best interests of the child.

Under s. 60, orders for parenting arrangements may be varied if there has been a change in the needs or circumstances of the child since the order was made, including as a result of a change in the circumstances of another person. A person with contact may also apply to vary a contact order upon being notified of a guardian’s intention to relocate with the child.

#### **5. Assessments**

Pursuant to s. 211, the court may appoint a person to assess the needs of a child, the views of the child or the ability of a person to meet the child’s needs, and may allocate the costs of the assessment among the parties. The assessor must be a person approved by the court.

## 6. Relocation and Removal of Children

### a. Removal

Pursuant to s. 64(1) of the *Family Law Act*, the court may make an order that a person not remove a child from a specified area. Where the court concludes that a person intends to remove a child and is unlikely to return, the court may, under subsection (2), also require the person post security, surrender travel documents, transfer property to a trustee or pay child support to a trustee.

Where a child has been wrongfully removed to British Columbia and it is determined under s. 74 that the court lacks jurisdiction, the court may, among other things, order that the child be returned to a specified place under s. 77(2).

Pursuant to s. 80(4), relief may also be sought under the *Hague Convention on the Civil Aspects of International Child Abduction*.

### b. Relocation

Section 65(1) defines “relocation” as a change in the residence of a child “that can reasonably be expected to have a significant impact on the child’s relationship” with a guardian or other persons “having a significant role in the child’s life.”

Pursuant to s. 66(1), where a guardian plans to relocate with a child, the guardian must give 60 days’ notice to all other guardians and persons with contact. Guardians objecting to the move must, under s. 68, file an application for an order prohibiting the relocation within 30 days, failing which the guardian may relocate.

The tests to permit or prohibit a proposed relocation are set out at s. 69. Where the child’s guardians do not have equal or near-equal parenting time, the guardian wishing to relocate must establish that:

- (a) reasonable arrangements have been proposed to preserve the child’s relationship with the other guardians, persons with contact and persons with significant roles in the child’s life; and,
- (b) the relocation is proposed in good faith.

Where these factors are established, the move is presumed to be in the best interests of the child unless the guardian seeking to prohibit the move establishes otherwise.

Where the guardian proposing to move and an objecting guardian have an equal or near-equal allocation of parenting time, the guardian proposing to move must establish that:

- (a) reasonable arrangements have been proposed to preserve the child's relationship with the other guardians, persons with contact and persons with significant roles in the child's life;
- (b) the relocation is proposed in good faith; and,
- (c) the relocation is in the best interests of the child.

Under s. 60(6), the court must consider "all relevant factors" to determine whether a move is made in good faith, including the reasons for the proposed relocation, whether the relocation is likely to improve the quality of life of the child or of the guardian, and any restrictions on a guardian's ability to relocate set out in an agreement or order.

### **c. Orders Consequent to Relocation**

Where an order is made allowing a guardian to relocate that affects an order or agreement for parenting arrangements the court may, under s. 70, make or vary an order for parenting arrangements with the object of preserving, to the extent possible, the parenting arrangements in the original order or agreement.

### **7. Children's Property**

Pursuant to ss. 176 and 178, a guardian is not presumptively the trustee of a child's property except for property in a class or with a value below an amount to be prescribed by regulation. The Supreme Court may appoint a trustee under s. 179(1) upon consideration of factors set out at subsection (2), including the child's views, the wishes of the child's guardians and the opinion of the Public Guardian and Trustee.

The court may, under s. 180, vary an order appointing a trustee if it would be in the best interests of the child to do so.

Unless an order or trust document provides to the contrary, the trust property and an accounting must be delivered to the child upon the child reaching age 19.

## **B. CHILD SUPPORT AND SPOUSAL SUPPORT**

### **1. Child Support**

Pursuant to s. 150(1), the amount of child support must be determined in accordance with the Child Support Guidelines. Section 147 imposes important limits on children's entitlement to benefit from child support and the obligations of persons other than parents to provide it.

Under s. 148(3) the court may set aside an agreement for child support if it would make a different order.

The court may prospectively or retroactively vary a child support order under s. 152, if, since the making of the order, there has been a change in circumstances as defined by the Child Support Guidelines or if new evidence has become available, including evidence of a lack of disclosure.

#### **a. Entitlement**

Under s. 147(1), children, defined by s. 146 to include minors and older children unable to withdraw from the charge of their parents or guardians, are entitled to benefit from the payment of child support except for children who:

- (a) are spouses; or,
- (b) have voluntarily withdrawn from the charge of their parents or guardians, for reasons other than family violence or objectively intolerable living circumstances.

A child who has withdrawn may resume eligibility for child support upon returning to the charge of his or her parents or guardians; similar provisions are not provided for children who marry and divorce during the period of their minority.

#### **b. Quantum**

Under s. 147(3), the child support obligation of a non-parent guardian is secondary to that of a parent. Under s. 147(5), the obligation of a stepparent is secondary to those of a parent and a non-parent guardian, and extends only as may be appropriate considering the standard of living enjoyed by the child while cohabiting with the stepparent and the length of the period of cohabitation.

## **2. Spousal Support**

The spousal support provisions of the *Family Law Act* have been harmonized with the *Divorce Act*. The *Spousal Support Advisory Guidelines*<sup>12</sup> is not referenced but will doubtless continue to assist in the determination of quantum and duration once entitlement is established.

Pursuant to s. 166, when making an order on spousal support the court may consider misconduct that causes or prolongs a need for support or affects the ability of a person to pay spousal support.

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<sup>12</sup> R. Thompson & C. Rogerson, *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008), available online at [www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html).



The court may prospectively or retroactively vary a spousal support order under s. 167, if, since the making of the order, there has been a change in the needs, means and other circumstances of either spouse or if new evidence has become available, including evidence of a lack of disclosure.

#### a. Entitlement

For the purposes of spousal support, “spouse” is defined at s. 3 as including married spouses, persons who have cohabited in a marriage-like relationship for at least two years, and persons who have cohabited in shorter marriage-like relationships but have had a child together. Pursuant to s. 198(2), proceedings for spousal support must be brought within two years of the date of divorce or nullity for married spouses, or within two years of the date of separation for unmarried spouses.<sup>13</sup>

Under s. 160, a spouse’s entitlement to spousal support is to be determined upon consideration of the objectives for spousal support, borrowed from the *Divorce Act* and set out at s. 161.

#### b. Quantum and Duration

Under s. 160, where a spouse is entitled to receive spousal support, quantum and duration are to be determined upon consideration of the factors for spousal support, borrowed from the *Divorce Act* and set out at s. 162.

#### c. Reviews

Under s. 168, orders and agreements for spousal support may provide for the review of a spousal support obligation, and may prescribe:

- (a) the factors that will trigger the review, such as the passage of a specific period of time or the occurrence of a specific event;
- (b) the matters to be considered at the review; and,
- (c) the dispute resolution mechanism to be employed at the review.

Orders and agreements for spousal support that are silent as to effect of a spouse becoming entitled to receive pensions benefits may be reviewed pursuant to s. 169 when either spouse or former spouse becomes entitled to or begins receiving pension benefits.

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<sup>13</sup> As the definition of “spouse” at s. 3(2) includes former spouses, unmarried persons who cohabited for less than two years, had a child together and separated on or after 18 March 2011 will be “spouses” for the purposes of the *Family Law Act* when it comes into force on 18 March 2013, and may apply for spousal support accordingly.

#### d. Agreements

Pursuant to s. 165(3), the court may not make an order for spousal support in the face of an agreement on spousal support, including an agreement waiving spousal support, unless the agreement is set aside following an application under s. 164.

Section 164 prescribes two tests to set aside agreements on spousal support, one at subsection (3) that examines the circumstances of the negotiation and execution of the agreement, and another at subsection (5) under which the court may set aside an agreement which is “significantly unfair” in light of the parties’ intentions to achieve finality and any changes in circumstances since the agreement was made.

#### 3. Arrears of Support

Pursuant to s. 174(1) of the *Family Law Act*, the court may reduce or cancel arrears of child support or spousal support accumulating under an order or agreement if satisfied that it would be grossly unfair not to reduce or cancel the arrears after considering the factors listed at subsection (2).

When reducing arrears, the court may also order that interest not accumulate on the reduced amount if it would be grossly unfair not to so order. When cancelling arrears, the court may also cancel interest that accrued on the accumulated arrears if it would be grossly unfair not to so order.

#### 4. Support Obligations after Death

Where a person obliged to pay child support or spousal support has life insurance, the court may, under s. 170(e), require the payor to maintain the premiums on the policy and designate the recipient as the beneficiary of the policy, either permanently or for a specified period of time.

Under s. 170(g), the court may, after considering the factors set out at s. 171(1), order that an obligation to pay child support or spousal support will survive the death of the payor as a debt of the payor’s estate. Where an order or agreement is silent on the effect of the payor’s death, a recipient may, upon the payor’s death, apply under s. 171(3) for an order that the support obligation continue. In either circumstance, the personal representative of the payor has standing to apply to vary or terminate a support obligation.

### C. PROPERTY AND DEBT

The scheme for the division of property and allocation of debt set out at Parts 5 and 6 of the *Family Law Act* is new to British Columbia, and must be read with close attention.

## 1. Entitlement

The property and debt provisions of the act apply to both to married spouses and to persons cohabiting in a marriage-like relationship for at least two years as a result of the definition of spouse at s. 3(1). Pursuant to s. 198(2), proceedings for the division of property or allocation of debt must be brought within two years of the date of divorce or nullity for married spouses, or within two years of the date of separation for unmarried spouses.<sup>14</sup>

## 2. Family Property, Family Debt and Excluded Property

The *Family Law Act* divides property into two classes, “family property” and “excluded property.” Under s. 84(1), family property is broadly defined as all property owned by either spouse at the date of separation; s. 85(1) lists property that is excluded from the pool of property that is family property. Pursuant to s. 81(1), each spouse is presumed to have a one-half interest in family property, regardless of their use or contribution; pursuant to s. 96, excluded property is presumed to remain the property of the owning spouse.

Family debt is defined by s. 86 as the debt incurred by either spouse between the date of cohabitation and the date of separation. Family debt includes debt incurred after the date of separation if the debt was incurred for the purpose of maintaining family property. Each spouse is presumed to be responsible for one-half of the family debt.

### a. Excluded Property

A spouse’s excluded property will generally consist of the property owned by the spouse at the date the parties began to cohabit, as well as certain property acquired after the date of cohabitation, such as gifts and inheritances, certain kinds of settlements, court awards and insurance proceeds, property held in trust for the spouse, and property acquired with excluded property.

### b. Family Property

Family property is all property other than excluded property and generally consists of the property acquired by either spouse after the date of cohabitation, other than property acquired with the use of excluded assets. Perhaps most importantly, family property also includes the increase in value of excluded property after the date of cohabitation or, in the case of excluded property acquired after the date of cohabitation, the date of receipt.

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<sup>14</sup> As the definition of “spouse” at s. 3(2) includes former spouses, unmarried persons who cohabited for at least two years and separated on or after 18 March 2011 will be “spouses” for the purposes of the *Family Law Act* when it comes into force on 18 March 2013, and may apply for the division of property and allocation of debt accordingly.

Under s. 84(2) and (3), family property includes:

- (a) an interest in a corporation, partnership, venture, association and business;
- (b) property owing to a spouse;
- (c) bank accounts;
- (d) pensions, annuities, retirements savings plans and income plans; and,
- (e) trusts to which the spouse contributed and of which the spouse is a beneficiary, has control over distributions, or has the power to terminate and a reversionary interest.

### c. Triggering Event and Valuation Date

The sole triggering provided in the *Family Law Act* is the date of separation. Section 81(b) states that:

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.

There is no equivalent to *Family Relations Act*, s. 57 in the new act.

Under s. 87(a) of the *Family Law Act*, the value of family property must be based on fair market value; under s. 87(b), the date of the valuation of family property and family debt is the date of the trial or agreement dividing property and debt.

### 3. Interim Orders

Pursuant to s. 91(1), the court must make a financial restraining order akin to that available under *Family Relations Act*, s. 67 on the application of a spouse unless the respondent spouse is able to establish that the disposal of the property will not prejudice the applicant's claim. The court may make a variety of related orders under subsection (2), including orders for the delivery and safekeeping of property, orders prohibiting the transfer of property and orders vesting property in the applicant.

The court may make orders for the exclusive occupancy of the family home under s. 90. Note that under s. 226 the court may make a conduct order requiring a party to maintain and pay for utility services to a residence.

Under s. 89, the court may make orders for the interim distribution of family property to fund a dispute resolution process, to fund a proceeding under the act or

to obtain information or evidence in support of a dispute resolution process or proceeding.

#### **4. Orders Dividing Property and Allocating Debt**

Pursuant to s. 81, each spouse is presumed to have a one-half interest in family property unless an order or agreement provides to the contrary. Section 97 gives the court its general powers to effect the division of property and debt and provides that the court may:

- (a) determine any matter respecting the ownership, right of possession, or division of property or debt;
- (b) make any order that is necessary to give effect to a division of property or debt;
- (c) declare who has ownership of or right of possession to property;
- (d) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;
- (e) require partition or sale of property and payment out of the proceeds of sale to one spouse or both in specified proportions or amounts;
- (f) declare that one spouse is responsible for payment of a family debt and must indemnify the other spouse for the debt;
- (g) require the sale of property for the purposes of paying a family debt; and,
- (h) transfer property to a spouse.

Note that where a treaty first nation may alienate treaty lands, a spouse is a member of the first nation and a claim is made in respect of treaty lands, the first nation may participate in the proceeding under s. 210, and the court must consider any laws of the first nation restricting the alienation of treaty lands.

Under s. 94(2), the court may not make an order dividing property or allocating debt in the face of an agreement on those matters unless the agreement is set aside following an application under s. 93.

##### **a. Dividing Family Property and Family Debt Unequally**

Under s. 95(1) of the *Family Law Act*, the court may divide family property, including pension benefits, and allocate family debt unequally if an equal division would be “significantly unfair,” having regard to a list of factors set out at subsections (2) and (3), which include:

- (a) the length of the spousal relationship;
- (b) a spouse's contribution to the career of the other spouse;
- (c) whether family debt was incurred in the normal course of the relationship between the spouses;
- (d) the ability of each spouse to pay a share of the family debt, if the amount of family debt exceeds the value of family property;
- (e) 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;
- (f) whether a spouse acting in bad faith disposed of family property or substantially reduced the value of family property;
- (g) tax liabilities that may be incurred as a result of the transfer or sale of property or as a result of an order; and,
- (h) the extent to which the objectives of spousal support under s. 161 have been met.

#### **b. Dividing Excluded Property**

The court may divide excluded property under s. 96 in one of two circumstances: where family property or family debt located outside British Columbia cannot be divided; or, where it would be "significantly unfair" not to divide the excluded property in light of the length of the spousal relationship and the non-owner's direct contribution to the excluded property.

#### **c. Foreign Property**

Under s. 106, the court may make orders under s. 109 for the possession of or transfer of title to property located outside British Columbia if certain conditions are met, including that:

- (a) both spouses submit, either in an agreement or during the proceeding, to the jurisdiction of the court in respect of the division of property;
- (b) at least one spouse is habitually resident in British Columbia when the proceeding for the division of property was started; and,
- (c) there is a real and substantial connection between British Columbia and the facts on which the proceeding for the division of property is based.

## 5. Agreements

Pursuant to s. 94(2), the court may not make an order for the division of property or allocation of debt in the face of an agreement on those matters unless the agreement is set aside following an application under s. 93. Pursuant to s. 92, however, spouses may make an agreement contrary to the general scheme of the act which does not divide family property or family debt, divides excluded property, or divides family property and family debt unequally.

Section 93 prescribes two tests to set aside an agreement on property or debt, one at subsection (3) that examines the circumstances of the negotiation and execution of the agreement, and another at subsection (5) under which the court may set aside an agreement which is “significantly unfair” in light of the parties’ intentions to achieve certainty and finality.

## 6. Dividing Pensions

Pursuant to s. 111(1), where an interest in a pension is family property under s. 84(2)(e), the interest is to be divided in accordance with Part 6. The general scheme of Part 6 is straightforward. Local defined benefit plans, defined contribution plans, hybrid plans and matured plans are divided according to Division 2, Part 6. Other pensionable benefits, including annuities, supplemental plans, disability benefits and extraprovincial plans are divided according to Division 3. Survivor benefits are addressed under Division 4.

The precise amount of the non-member’s interest in a pension is to be prescribed by regulation, but may be determined by an order or agreement. Under s. 140, both spouses are responsible for paying any fees charged to administer the division of pension benefits.

### a. Unmatured Local Plans

Under s. 114, defined contribution plans are divided by transferring the non-member’s interest to the non-member or, with the consent of the administrator, vesting the non-member’s interest as a limited member of the plan.

Under s. 115, defined benefit plans are divided by vesting the non-member’s interest in the plan as a limited member or by transferring the commuted value of the plan to the non-member.

With the consent of the administrator, hybrid plans may be divided under s. 116 as if all of the benefits are a defined contribution plan or a defined benefit plan. Otherwise, the portion of a hybrid plan that is determined by a defined contribution provision is divided under s. 114 and the portion that is determined by a defined contribution provision is divided under s. 115.

### **b. Matured Local Plans**

Matured plans are divided under s. 117 by diverting to the non-member his or her proportionate share of the benefits until such time as the non-member dies or benefits under the plan terminate.

### **c. Extraprovincial Plans**

Pursuant to s. 123(2), extraprovincial plans are to be divided under the legislation of the jurisdiction regulating the plan if that legislation provides a means of satisfying the non-member's interest, or otherwise by treating the plan as a matured plan and diverting to the non-member his or her proportionate share of the benefits when they are paid.

If the application of the foreign legislation governing the plan would yield an unfair result, the court may require that the plan be treated as a matured plan.

### **d. Disability Benefits**

Disability benefits paid under a plan may be divided under s. 122 in the manner of a matured pension.

### **e. Orders and Agreements Dividing Pensions**

Where an agreement or final order on property is silent on the division of a spouse's pension benefits, including disability benefits, the benefits are deemed to be wholly allocated to the member under ss. 111(2) and 122(3). The parties may however subsequently agree to divide benefits under s. 112(2).

Under s. 127(1), an agreement may provide that a non-member will receive none or less than his or her proportionate share. Spouses may also elect not to equalize their Canada Pension Plan credits.

Under s. 129, the court may reapportion a member's benefits in favour of the non-member to provide the non-member with an income stream where the parties' circumstances would otherwise require an order for spousal support.

## **D. PROTECTION ORDERS**

Family violence is expansively defined at s. 1 of the *Family Law Act* as including:

- (a) physical, sexual, psychological and emotional abuse;
- (b) intimidation, harassment, threats and stalking;
- (c) restricting a person's autonomy and withholding the necessities of life;



- (d) damaging property; and,
- (e) in the case of children, direct or indirect exposure to family violence.

A person who is at risk of family violence, or a person on that person's behalf, may apply for a protection order under s. 183. Such applications may be brought independent of any other proceeding under the act, and may be brought without notice.

"Family member" is defined at s. 1 and includes former spouses, relatives with whom a person resides and the person's child.

### 1. Factors

In considering whether to make a protection order, the court must consider seven risk factors set out at s. 184(1), including:

- (a) any history of family violence, and whether there is a pattern of repetitive or escalating violence;
- (b) the presence of circumstances increasing the risk of violence, such as substance abuse and mental health issues; and,
- (c) the presence of circumstances increasing the vulnerability of a person, such as pregnancy and age.

A number of factors that are not relevant to the making of protection orders are set out at s. 184(4), including:

- (a) whether the person against whom the protection order is sought was previously protected by a protection order;
- (b) whether criminal charges have been laid against the person against whom the protection order is sought; and,
- (c) whether the person sought to be protected by the protection order has a history of returning to live with the person against whom the protection order is sought.

### 2. Available Orders

The available protection orders are listed at s. 183(3) and include orders restricting communication, attendance at a place and stalking behaviours, reporting requirements, removal from the family home, and seizure of weapons. The court may impose additional terms as may be necessary to protect a person or implement

the protection order. Pursuant to s. 183(4), protection orders expire in one year unless otherwise ordered.

The court may, under s. 187(1), vary a protection order to shorten, extend, terminate or otherwise modify the order. Such applications must be brought prior to the expiry of the order.

Pursuant to s. 189(2), where a protection order, including a restraining order made under the *Criminal Code*<sup>15</sup> or a foreign order equivalent to a protection order, conflicts with another order made under the *Family Law Act*, the *Family Law Act* order is suspended to the extent of the conflict until the other order is varied to resolve the conflict or the protection order is terminated.

## E. ENFORCING ORDERS AND AGREEMENTS

The *Family Law Act* contains a range of enforcement mechanisms available to both the Provincial Court and the Supreme Court. Special enforcement provisions are available for a number of matters, such as the withholding of parenting time or failing to comply with a production order. Where special provisions are not made, the act's general enforcement provisions are available.

The general enforcement provisions are set out at s. 230. Under subsection (2), the may enforce an order by requiring a party to:

- (a) post security;
- (b) pay expenses incurred by the other party as a result of the party's actions; or,
- (c) pay up to \$5,000 for the benefit of person affected by the party's actions or as a fine.

The court may imprison a party for up to 30 days where no other remedy will secure the party's compliance, pursuant to s. 231(2). Imprisonment is available as an extraordinary remedy for all matters under the act except protection orders.

The court may also, where a party has misused or frustrated the court process, make an order under s. 221 that a party be prohibited from making further applications or taking further steps in a proceeding until the party has complied with an order made under the act.

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<sup>15</sup> *Criminal Code*, RSC 1985, c. C-46.

Pursuant to s. 232, the *Offence Act*<sup>16</sup> is inapplicable to matters under the *Family Law Act* except to the limited extent provided at s. 244 in respect of the work of search officers.

## 1. Children

Agreements for parenting arrangements and contact may be filed in court under ss. 44(3) and 58(3) of the *Family Law Act*, and upon filing are enforceable as orders.

Orders of the Supreme Court for parenting arrangements and contact may be filed in the Provincial Court under s. 195 and be enforced as an order of that court.

### a. Guardianship and Parental Responsibilities

No specific remedy is provided for a failure to abide by the obligations of guardianship, such as the obligation to consult with other guardians or to determine parental responsibilities in the best interests of the child. The act's general and extraordinary enforcement provisions at ss. 230 and 231(2) therefore apply.

Section 231(5) provides an additional extraordinary remedy where a child is withheld from a guardian by a person with contact, and allows the court to order that a police officer apprehend and return the child to the guardian.

### b. Parenting Time and Contact

The unreasonable withholding of parenting time or contact, or a failure to exercise parenting time or contact, may be addressed on application under ss. 61 and 63. The court may make a variety of orders to enforce orders and agreements for parenting time or contact, including requiring the parties to participate in dispute resolution, requiring a party or a child to attend counselling, requiring a party to reimburse the other party's expenses incurred as a result of the party's behaviour and, in the case of withheld parenting time or contact, providing for make-up time.

The extraordinary enforcement provisions of s. 231 apply where a parenting time or contact is withheld. Subsection (4) provides an additional extraordinary remedy and allows the court to order that a police officer apprehend and deliver the child to a guardian with parenting time or a person with contact.

## 2. Child Support and Spousal Support

Agreements for child support and spousal support may be filed in court under ss. 148(2) and 163(3), and upon filing are enforceable as orders.

The *Family Law Act* provides no specific remedy for failure to abide by an order to pay child support or spousal support. The general and extraordinary enforcement

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<sup>16</sup> *Offence Act*, RSBC 1996, c. 338.

provisions set out at ss. 230 and 231(2) will therefore apply, in addition to the provisions of the *Family Maintenance Enforcement Act*.<sup>17</sup>

### 3. Property and Debt

#### a. Family Property, Family Debt and Excluded Property

Agreements for the division of property or allocation of debt may be filed in the land title office under s. 99, and upon filing will prevent the registration of transfers and mortgages. Such agreements may also be filed as a financing statement encumbering manufactured homes in the personal property registry under s. 100.

Pursuant to s. 103(2), an interest in land under an order or agreement is deemed to be an interest affecting a transferee under *Land Title Act*, s. 29(2)(c).<sup>18</sup>

No specific remedy is provided for the enforcement of orders respecting family property, family debt and excluded property, except for the enforcement of interests in land under s. 104, and the general enforcement provisions at s. 230 therefore apply to those orders. The extraordinary remedy set out at s. 231(2) applies to all matters under Part 5.

#### b. Pensions

Section 130 allows the court to make orders or give directions to enforce the division of pension benefits provided in an order or agreement. The extraordinary remedy set out at s. 231(2) applies to all matters under Part 6.

### 4. Protection Orders

Pursuant to s. 188(1), protection orders may not be enforced by any means under the *Family Law Act* or the *Offence Act*, although police officers are authorized to “take action” to enforce protection orders under s. 188(2). Breach of a protection order may only otherwise be enforced under *Criminal Code*, s. 127.

## IV. DISPUTE RESOLUTION PROCESSES

### A. COURT PROCESSES

Under s. 199(1), the court is required to conduct proceedings under the *Family Law Act* with as little delay and formality as possible, and in a matter that seeks to minimize conflict and promote cooperation. Where a child is affected by a proceeding, the court must, under subsection (2), consider the impact of the

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<sup>17</sup> *Family Maintenance Enforcement Act*, RSBC 1996, c. 127.

<sup>18</sup> *Land Title Act*, RSBC 1996, c. 250.

proceeding on the child and encourage the parties to focus on the best interests of the child.

### **1. Vexatious Litigants**

Where a party has made a trivial application or conducted a proceeding in a manner which misuses the court process, the court may, under s. 221(1), prohibit the party from making further applications or continuing a proceeding without leave. Under subsection (2), the court may direct that the prohibition order have effect for a specified period of time or until a party complies with an order, impose terms and conditions, require the restrained party to pay the expenses of the other party incurred as a result of the party's conduct, or require the party to pay up to \$5,000 for the benefit of another person or as a fine.

### **2. Conduct Orders**

The court may make conduct orders under Part 10, Division 5 for one or more of the purposes listed at s. 222:

- (a) to facilitate the resolution of a dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute and to "facilitate arrangements pending final determination" of a proceeding; and,
- (c) to prevent misuse of the court process.

Conduct orders include orders that the parties attempt dispute resolution; requiring a person to attend counselling; restricting communication between the parties; requiring a party to post security or report to the court; or restricting a person from doing or not doing a thing.

Conduct orders may be enforced under s. 228 by: the making of further conduct orders or any other orders the court deems necessary; requiring a party to pay the expenses of the other party incurred as a result of the party's conduct; or, requiring a party to pay up to \$5,000 for the benefit of another person or as a fine. The act's extraordinary enforcement remedy set out at s. 231(2) is also available.

#### **a. Maintenance of the Family Home**

Under s. 226, the court may make an order requiring a party to pay the rent or mortgage, utilities and other expenses of a residence, and prohibiting a party from terminating utilities at the residence.

### b. Case Management Orders

Under s. 223(1), the court may make case management orders striking all or part of a claim or application, adjourning a proceeding while the parties attempt a dispute resolution process or requiring that all further applications be heard by the judge making the order.

### 3. Appeals

Final orders of the Provincial Court may be appealed to the Supreme Court pursuant to s. 233, subject to a 40-day time limit. Interim orders may not be appealed and may therefore only be challenged under the *Judicial Review Procedure Act*.<sup>19</sup>

Pursuant to s. 234, orders appealed from remain in effect unless the court making the order orders otherwise.

The *Family Law Act* does not otherwise address appeals of interim and final orders of the Supreme Court.

## B. NON-COURT DISPUTE RESOLUTION PROCESSES

“Family dispute resolution” is defined at s. 1 as including mediation, arbitration, collaborative family law, parenting coordination and other processes to be set by regulation. Section 5(1) imposes a general duty to provide full and accurate disclosure on all parties for the purposes of resolving a dispute, whether the parties are using court or non-court family dispute resolution processes.

Under s. 198(5), the running of the two-year time limit set out at s. 198(2) is suspended while the parties are engaged in family dispute resolution with a family dispute resolution professional.

Section 1 defines “family dispute resolution professional” as including lawyers, mediators, arbitrators and parenting coordinators. Family dispute resolution professionals are required by s. 8 to: screen for family violence and assess the extent to which it affects a party’s safety and capacity to negotiate; discuss the advisability of family dispute resolution with a party; and, advise a party that matters involving children are to be resolved considering only the best interests of the child. Pursuant to s. 197, lawyers are required to certify their compliance with s. 8 when commencing a *Family Law Act* proceeding.

### 1. Agreements

Under s. 6, agreements on family law matters are presumed to be binding on parties, whether consideration is provided or not.

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<sup>19</sup> *Judicial Review Procedure Act*, RSBC 1996, c. 241.

Where the court sets aside part of an agreement, under s. 214(1) the part set aside is deemed severed from the agreement so as to preserve the continued effect of the parts not set aside. Subsection (2) addresses the doctrine of merger and provides that the court may make an order including some of the terms of an agreement without the remainder of the agreement losing effect.

## 2. Parenting Coordination

Pursuant to s. 15, parties may agree or the court may order that a parenting coordinator be appointed to assist with the implementation of an order or agreement for parenting arrangements or contact. Such appointments may be made for renewable terms of up to two years.

Under s. 17, parenting coordinators may assist parties by building consensus on parenting disputes and addressing communication issues, conflict resolution strategies and recommending resources for improving communication and parenting skills, and by making determinations on a limited range of parenting issues described at s. 18.

Parenting coordinators' determinations are binding on the parties. Determinations may be filed in court pursuant to s. 18(5)(b), and upon filing may be enforced as a court order. The court may set aside a determination under s. 19 where the parenting coordinator acted outside his or her authority or made an error of law or mixed fact and law; the court may otherwise make such orders as may be necessary to enforce compliance with the determination.

## V. TRANSITIONAL PROVISIONS AND COMING INTO FORCE

### A. PROVISIONS PRESENTLY IN FORCE

Under s. 482, the *Family Law Act* will be fully in force by order of the Lieutenant Governor; government announced 18 March 2013 as the effective date in June 2012. Certain important provisions came into force at the date of royal assent, including:

- (a) pursuant to s. 258, s. 90 of the *Family Relations Act* on parental support is repealed, as is s. 120.1 on the effect of the property agreements made by unmarried parties; and,
- (b) pursuant to ss. 388 and 390, the phrase "husband and wife" is replaced by "spouse" at ss. 1 and 3 of the *Land (Spouse Protection) Act*.<sup>20</sup>

Less consequential changes, replacing language such as "husband and wife," "man or woman," "father" and "mother" with "spouse," "two people" and "parent" in various

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<sup>20</sup> *Land (Spouse Protection) Act*, RSBC 1996, c. 246.

enactments including the *Law and Equity Act*, the *Marriage Act*, the *School Act* and the *Wills Act*, are also in force.

The *Family Relations Act* will be repealed when the *Family Law Act* comes into force. Until that time, the *Family Relations Act* remains law in British Columbia. Pursuant to s. 254, the coming-into-force of the act is not a change in circumstances for any purpose of the act relating to the variation or termination of orders.

## B. TRANSITIONAL PROVISIONS

The transitional provisions of the *Family Law Act* are brief and are set out at Part 13. Section 256 provides that regulations may be made as necessary for the “orderly transition” from the *Family Relations Act* to the *Family Law Act*.

### 1. Children

Section 251 provides for the translation of orders and agreements for custody, guardianship and access into the conceptual scheme of the *Family Law Act*:

- (a) if a party has custody or guardianship of a child, the party is a guardian under the *Family Law Act* and has parental responsibilities and parenting time with the child;
- (b) if a party has access to a child but is not a custodian or guardian of a child, the party has contact with the child; and,
- (c) a party’s parental responsibilities, parenting time or contact are as described in the order for custody, guardianship or access.

### 2. Property and Debt

Section 252(2) provides that, unless the parties otherwise agree:

- (a) a proceeding to enforce or set aside an agreement on the division of property continues under the *Family Relations Act* as if the act had not been repealed; and,
- (b) a proceeding for the division of property under the *Family Relations Act* continues under that act.