

# CHAPTER THREE: FAMILY LAW

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## CHAPTER THREE: FAMILY LAW

### I. GOVERNING LEGISLATION AND RESOURCES

#### A. *Resources In Print*

1. Canadian Bar Association, Family Law Sourcebook for British Columbia (Vancouver: Continuing Legal Education Society of British Columbia, 2009).
  - This loose-leaf sourcebook contains a thorough overview of all aspects of family law, with cites to the relevant authorities for each statement of law.
2. Continuing Legal Education Society of British Columbia, Annotated Family Practice 2010-2011, [regular updates]. (Vancouver: Continuing Legal Education Society of British Columbia, 2008).
  - Family lawyer's legal bible. Has important sections from the Family Relations Act. Updated each year.
3. Continuing Legal Education Society of British Columbia, British Columbia Family Practice Manual, 4th ed. [regular updates] (Vancouver: Continuing Legal Education Society of British Columbia, 2009).
  - Loose leaf provides a solid how-to approach to common family law problems and processes.
4. Continuing Legal Education Society of British Columbia, Desk Order Divorce—An Annotated Guide (Vancouver: Continuing Legal Education Society of British Columbia, 2009).
  - Annotated guide to divorce, with regular updates.
5. John D. Gardner and A.K. Korde, British Columbia Family Law: Annotated Legislation (Markham: Lexis Nexis Butterworths, 1984-2008).
  - Loose leaf contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

#### Library References:

1. Mary Jane Mossman, Families and the Law in Canada: Cases and Commentary (Toronto: Emond Montgomery Publications, 2004).
  - A good casebook, which provides an overview of new family law issues in Canada.
2. Julien D. Payne, Payne on Divorce (Scarborough: Carswell, 1996).
  - A very good Canadian text on family law.

#### B. *Resources on the Internet*

1. **B.C. Supreme Court Services**  
Website: [www.supremecourtselfhelp.bc.ca](http://www.supremecourtselfhelp.bc.ca)
  - This service provides information to help users prepare the procedural aspects of a family or civil case. There is an office at 274 – 800 Hornby Street in Vancouver, but it does not handle phone, e-mail, or written inquiries. The staff cannot provide substantive advice on legal issues.
2. **White Paper**

Website: <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>

- The “**White Paper** on *Family Relations Act* Reform” was produced in order to solicit input and discussion into reforming the existing *Family Relations Act*.
- The **White Paper**, recently published by the BC Ministry of the Attorney General, proposes major reforms to the current family law legislation in British Columbia. The changes would replace the current *Family Relations Act* (which has not undergone a major reform since its inception in 1970) with the *Family Law Act*. Please refer to **Section I.D.4** for more information on the *Family Relations Act*.
- Be advised that none of the proposed changes have been enacted or have come into force. However, throughout the chapter, there are references to the **White Paper** and its proposed reforms to specific sections. The information found within has been taken directly from the **Executive Summary** of the **White Paper**, in order to highlight major changes to the legislation.

**NOTE:** The **White Paper** is not intended to constitute legal advice or to be a statement of the law in respect of the *Family Relations Act* or the family laws of other provinces and jurisdictions and should not be relied upon for those purposes. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.

3. **J.P. Boyd’s B.C. Family Law Web Resource**

Website: [www.bcfamilylawresource.com](http://www.bcfamilylawresource.com)

- An excellent site for those unfamiliar with family law rights and procedures. Written in plain English. A good place to begin for those who have not had the benefit of a family law course.

3. **BC Family Maintenance Enforcement Program (FMEP)**

Website: [www.fmep.gov.bc.ca](http://www.fmep.gov.bc.ca)

- Administered by the Ministry of Human Resources, this program helps families to obtain child support and spousal maintenance orders from ex-partners, and to enforce them. The program is administered through select B.C. Employment and Assistance centres.

4. **Legal Services Society Family Law in British Columbia**

Website: [www.familylaw.lss.bc.ca](http://www.familylaw.lss.bc.ca)

- This site has general information on family law, including self-help materials, forms a client needs to file for an uncontested divorce, and step-by-step instructions for filling out the forms. It also houses web versions of Legal Services Society family law publications. [Living Together, Living Apart: Common-Law Relationships, Marriage, Separation and Divorce](http://www.familylaw.lss.bc.ca/resources/publications/pub_livingTogetherLivingApart.asp) is very useful: [www.familylaw.lss.bc.ca/resources/publications/pub\\_livingTogetherLivingApart.asp](http://www.familylaw.lss.bc.ca/resources/publications/pub_livingTogetherLivingApart.asp)

5. **West Coast Leaf Family Law Legal Aid Campaign**

Website: [www.westcoastleaf.org](http://www.westcoastleaf.org)

- West Coast LEAF works to make Canada an equal place for all women by challenging laws and practices that reinforce and shape women’s disadvantage, and support laws and practices that promote women’s equality. They record women’s stories about how legal aid cuts have affected them and record the stories as sworn testimonies in the form of affidavits. They can also be reached by telephone at (604) 684-8772 and by e-mail at [info@westcoastleaf.org](mailto:info@westcoastleaf.org).

6. **British Columbia Vital Statistics Agency**  
Website: [www.vs.gov.bc.ca](http://www.vs.gov.bc.ca)
  - The Vital Statistics Agency is a service provided by the provincial Ministry of Health Services. The web site includes information on birth and death registration and certificates. It also includes wills notice registration and searches, information on how to change your name, and information on marriage licences. Contact numbers are available for various services including adoption records information.
  
7. **Ministry of Attorney General, Family Justice**  
Website: [www.ag.gov.bc.ca/family-justice](http://www.ag.gov.bc.ca/family-justice)
  - This site provides general information about a number of issues of interest to BC couples who have separated or who are about to separate. It may also be useful for guardians and other family members, such as grandparents, who may be involved in making important decisions about the family and its future.
  
8. **Department of Justice Canada**  
Spousal Support Advisory Guidelines, August 2009:  
<http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/index.html>  
Federal Child Support Guidelines, P.C. 1997-469:  
<http://www.justice.gc.ca/eng/pi/fcy-fea/sup-pen/index.html>
  
9. **British Columbia Supreme Court**  
Website: [www.courts.gov.bc.ca/supreme\\_court](http://www.courts.gov.bc.ca/supreme_court)
  
10. **Divorce Registry of Canada**  
Website: <http://www.justice.gc.ca/eng/pi/fcy-fea/div/index.html>  
Telephone: (613) 957-4519
  
11. **MOSAIC**  
Website: [www.mosaicbc.com](http://www.mosaicbc.com)  
Telephone: (604) 254-0244
  - Deals with issues that affect immigrants and refugees while settling into Canadian society. They also offer translation services.
  
12. **Interjurisdictional Support Orders**  
Web site: [www.isoforms.bc.ca](http://www.isoforms.bc.ca)
  - Interjurisdictional Support Orders (ISOs) can be obtained from other Canadian provinces and territories and from reciprocating foreign countries by following the procedure set out in the [Interjurisdictional Support Orders Act](#), S.B.C. 2002, Chapter 29.
  
13. **Children and Travel**  
Website: [www.voyage.gc.ca/preparation\\_information/children\\_enfants-eng.asp](http://www.voyage.gc.ca/preparation_information/children_enfants-eng.asp)
  
14. **Family Mediation Practicum Project**  
Website: [www.ag.gov.bc.ca/dro/family-mediation/index.htm](http://www.ag.gov.bc.ca/dro/family-mediation/index.htm)  
Telephone: (604) 516-0788
  - Provides free and/or affordable mediation services for various family disputes.
  
15. **Collaborative Divorce**  
Website: [www.collaborativepractice.com](http://www.collaborativepractice.com)  
Website: [www.collaborativedivorcebc.org](http://www.collaborativedivorcebc.org) (Vancouver)  
Website: [www.nocourt.net](http://www.nocourt.net) (Lower Mainland)

- These sites provide information about Collaborative Divorce, an option for parties wishing to resolve disputes respectfully and without going to court. Parties work out a negotiated settlement with the help of collaboratively trained professionals including (as needed) lawyers, divorce coaches, child specialists and financial specialists.

16. **Clicklaw**

Website: [www.clicklaw.bc.ca](http://www.clicklaw.bc.ca)

- Described as a “portal-project”, Clicklaw is a website aimed at enhancing access to justice in British Columbia by helping users to sort through the myriad of legal information and assistance that is available and find the most appropriate resources for a given situation.
- Visitors are directed to user-friendly resources designed for the public by contributor organizations (including the Community Legal Assistance Society and LSLAP).

17. **The Law Society of British Columbia-Family Law Mediators**

Website: <http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Family-Law-Mediators>

- The Law Society offers accreditation for those who wish to become family law mediators. Those who become accredited are able to help people reach a consensual settlement regarding issues relating to their marriage, cohabitation, separation or divorce. The website provides a list of lawyers who have been accredited, and what area of BC they practice in.

*C. Resources by Telephone*

1. **Family Justice Centres**

Family Justice Centres assist families going through a separation with issues of child custody and access, and spousal maintenance. Family justice counsellors provide dispute resolution services, and make referrals to legal aid, other legal services, and community resources for families facing separation.

Vancouver Metro/ Vancouver Island	Telephone: (250) 356-2811 Fax: (250) 356-2809
Abbotsford	Telephone: (604) 851-7055 Fax: (604) 851-7056
Chilliwack	Telephone: 1-888-288-8249 Fax: (604) 795-8258
Langley	Telephone: (604) 501-3100 Fax: (604) 532-3626
Surrey	Telephone: (604) 501-3100; (604) 501-8282 Fax: (604) 501-3112
Maple Ridge	Telephone: (604) 927-2217 Fax: (604) 466-7343
Port Coquitlam	Telephone: (604) 927-2217 Fax: (604) 927-2220
New Westminster	Telephone: (604) 660-8636 Fax: (604) 660-2414

North Vancouver

Telephone: (604) 981-0084  
Toll-free: 1-888-837-1116  
Fax: (604) 981-0035

Richmond

Telephone: (604) 660-3511  
Fax: (604) 660-3640

Vancouver City Centre

Telephone: (604) 660-2084  
Fax: (604) 660-4177

Vancouver Family Justice Centre

Telephone: (604) 660-6828  
Fax: (604) 775-0679

2. **Provincial Court Vancouver Registry**  
Family Court Registry: (604) 660-8989
3. **Provincial Court Vancouver Family Duty Counsel Service**  
Telephone: (604) 660-1508
  - Duty counsel is also available in other cities, contact Legal Services Society for a current list
  - Legal Services Society telephone: (604) 601-6000
4. **Supreme Court Vancouver Registry**  
Main switch board: (604) 660-2847  
Family Law Registry: (604) 660-2844  
Vancouver Family Inquiry: (604) 660-2486  
Courthouse Library: (604) 660-2841
5. **Supreme Court New Westminster Registry**  
Registry: (604) 660-8522  
Divorce: (604) 775-0672  
Courthouse Library: (604) 660-8577  
Family Law Counter: (604) 660-8507

**D. *Relevant Legislation***

**1. Divorce Act, R.S.C. 1985, c. 3 [DA]**

This is the federal legislation that provides for both divorce law and the determination of corollary relief (maintenance, custody, and access). Maintenance orders under the Act have effect throughout Canada. All actions under the Divorce Act are heard in B.C. Supreme Court except those applications pursuant to Rule 18-3 of the Supreme Court Family Rules, which allows such actions to be heard in certain Provincial Courts.

**NOTE:** The DA does not provide for division of matrimonial assets. A person has to seek division of matrimonial assets under the Family Relations Act.

**2. Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 [CFCSA]**

This Act provides for official apprehension of children (under 19 in B.C.) who are believed to be in need of protection or care. A hearing must be held before a judge within seven days, which may result in the temporary or permanent custody of the child being given to the Superintendent or some other agency.

**3. Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA]**

Deals with the enforcement of maintenance orders.

**4. Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]**

This provincial legislation dictates corollary relief (maintenance, custody, access, guardianship, and the division of assets) and sets out the requirements for a valid marriage contract (s. 61). Actions under the FRA dealing with matrimonial property and its use are heard exclusively in the Supreme Court. Orders for maintenance, custody, access, and guardianship under the FRA may be dealt with in either Supreme Court or Provincial Court. Common law relationships are only dealt with under the FRA. Both the FRA and the DA govern marriage relationships.

British Columbia's *Family Relations Act* has not been comprehensively reviewed since its introduction in the late 1970's. Since 2006, the British Columbia Ministry of Attorney General has been researching and consulting on how best to modernize this important area of the law. The draft legislation discussed in the **White Paper** reflects the results of the policy review. **None** of the proposed changes are currently in force, and there will most likely be changes to this Reform before it is implemented.

5. **British Columbia, Supreme Court Family Rules, B.C. Reg. 169/2009**

Website: [www.bclaws.ca](http://www.bclaws.ca)

These are the procedural rules that govern family law. Refer to these rules for the specific procedural requirements when making family law applications.

6. **British Columbia, Provincial (Family) Court Rules, B.C. Reg. 417/98**

Websites: [www.qp.gov.bc.ca/dispute/famrules.htm](http://www.qp.gov.bc.ca/dispute/famrules.htm)  
[www.bclaws.ca](http://www.bclaws.ca)

- The purpose of these rules is to allow people to obtain just, speedy, inexpensive and simple resolution of certain matters arising under the FRA (excluding property division) and certain matters under the FMEA in Provincial Court.

*E. Referrals*

1. **The Non-Legal Problem**

Many clients will have problems that are not strictly legal. If the client has a personal problem, refer the client to an appropriate social service agency in the lower mainland. The Red Book ([www2.vpl.vancouver.bc.ca/DBs/RedBook/htmlPgs/home.html](http://www2.vpl.vancouver.bc.ca/DBs/RedBook/htmlPgs/home.html)) is a very useful resource for this purpose. Often, even when a client does have a legal problem, the legal remedy will not resolve all issues for that person. Be aware of this and try to get clients the help they need.

2. **The Legal Problem**

Care should be taken in making referrals. Someone has referred this person to LSLAP and the client does not want to be shoved further down the line. **Do not refer** unless you are sure that the agency handles such problems. Telephone to confirm information and arrange an appointment if possible (see **Introduction & Student Guidelines** for referral information).

**Always have the Supervising Lawyer check all letters and any other documents you may write for your client.**

**II. LSLAP AND FAMILY LAW**

*A. What LSLAP Was PREVIOUSLY Able To Do*

**LSLAP no longer has the necessary funds to open family law files.** The following is a list of services that LSLAP was previously able to assist with, but are now unable to do.

- a) Uncontested divorces where there are no corollary relief issues to be decided. That is, custody, access and support have all been decided **and** there is a written agreement or order already in place.
- b) Provincial Court Family Matters:

Initial Applications for custody, access, child support, spousal support, restraining orders (on a case by case basis); Responding to initial application; Applications to vary a provincial court order and responding to the same; Responding to FMEP applications to enforce maintenance; Applications made pursuant to the Interjurisdictional Support Orders Act, and responding to such applications; Applications for consent orders, paternity tests, or other interim applications; Preparation of all court forms, including financial forms and providing summary advice; Indigency applications (for clients who cannot afford filing fees).

**Now, LSLAP can only refer clients to other family law resources**, such as those listed at the beginning of this chapter.

### III. MARRIAGE

#### A. *Marriage*

Marriage creates a legal relationship between two people, giving each certain legal rights and obligations. A marriage must comply with certain legal requirements. Therefore, not all marriages are valid.

#### 1. Legal Requirements

To be valid, a marriage must meet several legal requirements. Failure to meet these requirements may render the marriage void *ab initio* (void from the beginning). In other circumstances, such as sham marriages or marriage in which one party did not consent or did so under duress, may be voidable, meaning the marriage is valid until an application is made to a court to annul the marriage.

##### a) *Sex*

In the past, spouses had to be of opposite genders. This has been found to be unconstitutional (see *Reference re Same Sex Marriage*, [2004] S.C.R. 698, [2004], S.C.J. No. 75), and same-sex couples can now marry in every province and territory with the passing of Bill C-38 in the House of Commons, and subsequent passing in the Senate. Bill C-38 received Royal Assent on July 20, 2005 becoming the Civil Marriage Act, S.C. 2005, c. 33.

##### b) *Relatedness*

The federal Marriage (Prohibited Degrees) Act, 1990, c. 46, bars marriage between lineal relatives, including half-siblings and adopted siblings.

##### c) *Marital Status*

Both spouses must be unmarried at the time of the marriage.

##### d) *Age*

Both spouses must be over the age of majority (19 in B.C.; see the Age of Majority

Act, R.S.B.C. 1996, c. 7). In B.C., a minor between the ages of 16 and 19 can marry only with the consent of both of his or her parents (see the Marriage Act, R.S.B.C. 1996, c. 282, s. 28). A minor under the age of 16 can marry only if permission is granted in a Supreme Court order (s. 29). However, a marriage is not automatically invalid if the requirements of s. 28 and 29 have not been met at the time of marriage (s.30); the court may preserve the marriage if it is in the interests of justice to do so (e.g., if parties have grown up and have lived as husband and wife for some time).

*e) Mental Capacity*

At the time of the ceremony, both parties must be capable of understanding the nature of the ceremony and the rights and responsibilities involved in marriage.

**2. Foreign Marriages**

The common law rule is that the formalities of marriage – *i.e.* who can marry, who can perform weddings – are those of the law where the marriage took place, while the legal capacity of each party is governed by the law of the place where they live.

**3. Sham Marriages**

When parties marry solely for some purpose such as tax benefits or immigration status, the marriage may be voidable for lack of intent. However, courts may sometimes find the marriage binding on the parties nonetheless.

**NOTE:** The law recognizes traditional customary marriages of Aboriginal people in some circumstances where the marriage meets the criteria of English common law.

**B. Common Law Relationships**

**1. General**

There is much confusion surrounding the terms “common law spouse” and “common law relationship” both of which are widely used to describe various relationships that exist outside of marriage. What these terms describe is the legal status and rights conferred on the parties by various statutes and the common law. Each statute may give a slightly different definition of a common law “spouse”. A general rule is that for most federal legislation it takes one year of living together to qualify as common law and for most provincial legislation it takes two years to qualify. See **Section XIV: Glossary** at the end of this chapter for a brief list of definitions. For more extensive definitions, consult the current legislation.

Remember that a common law relationship is **not** a legal marriage. Nevertheless, where legal rights are conferred on common law spouses, the relationship is still valid even if one or both of the parties is currently married to someone else.

**2. Estate Considerations**

*a) Estate Administration Act, R.S.B.C. 1996, c. 122*

Where a person dies intestate (without a will) and leaves a common law spouse and/or child, the court may order that the estate be applied to the benefit of such spouse and/or child (s. 86). However, if the intestate also leaves a legal widow or widower and/or children, notice must be given to those parties and to the estate’s administrator before common law family can benefit (s. 88). The Act, however, no

longer distinguishes between legitimate and illegitimate children (s. 81).

b) *Wills Variation Act, R.S.B.C. 1996, c. 490*

Common law partners who have cohabited with the testator for more than two years can challenge a will that does not make adequate provision for the proper support and maintenance of the surviving spouse and/or children. The application must be made within six months of the granting of probate for the will.

c) *Canada Pension Plan Act, R.S.C. 1985, c. C-8*

Common law spouses who have cohabited with a contributor for one year before the contributor's death may be able to claim death benefits. Forms can be obtained from a CPP office.

d) *Workers' Compensation Act, R.S.B.C. 1996, c. 492*

A common law relationship is recognized after cohabitation for three years. If there is a child, one year is sufficient.

e) *Employment and Assistance Act, S.B.C. 2002, c. 40*

A common law relationship can arise from cohabitation as short as 3 months that is "consistent with a marriage-like relationship" (s. 1.1). Common law relationships are dealt with as marriages, and as single-family units where there are children.

## C. *Marriage or Pre-Nuptial Contracts*

### 1. **General**

**LSLAP students should never draw up marriage, cohabitation, or pre-nuptial contracts.** Those interested in drawing up such a contract on their own can be directed to the self-help kit *The Living Together Contract* published in 1993 by the International Self Counsel Press of North Vancouver. However, contracts drawn up using self-help kits are sometimes overturned in court. Clients should seek the advice of a lawyer.

**NOTE:** Independent legal advice is extremely important in order to have enforceable marriage or cohabitation agreements.

### 2. **Legislation:**

a) *Family Relations Act [FRA]*

The formal requirements for a valid marriage contract are given in s. 61 of the FRA. Agreements between unmarried couples are dealt with in s. 120.1 of the Act. For a marriage contract, the agreement and any subsequent amendments must be in writing, signed by both parties and witnessed. The agreement can take effect on the date of the marriage or the date of the agreement's execution.

While such an agreement may be binding between the spouses whether or not there has been consideration, courts have considered fairness issues when determining the validity of marriage contracts (see *Gold v. Gold*, [1993] B.C.J. No. 1799 (B.C.C.A.), and *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 (B.C.C.A.)).

In *Hartsborne v. Hartsborne*, [2004] S.C.J. No. 20 it was held that in order to be enforceable, a marriage contract must operate fairly **at the time of distribution**. To determine whether the contract is substantively fair, the court considers whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the contract was formed and whether they made adequate arrangements to address those anticipated circumstances. Courts should respect private arrangements made between the spouses regarding the division of property, especially when the parties obtained independent legal advice.

Section 65 of the FRA also allows the court to evaluate an agreement's fairness, and to reapportion the property division accordingly, by considering such factors as:

- the duration of the marriage;
- the duration of the parties' separation;
- the extent to which assets were acquired by one of the parties through inheritance or gift; and
- the present economic needs of both parties.

The **White Paper** proposals encourage more agreements between the parties than was previously found in the FRA. They provide greater clarity regarding when and how an agreement may be set aside:

- Parenting agreements may be set aside if they are not in the best interest of the child
- Child support agreements may be set aside if they fail to comply with the *Federal Child Support Guidelines*
- All agreements may be set aside for lack of procedural fairness, such as significant failure to disclose or where one party has taken unfair advantage of the other
- Property and support agreements can be set aside for non-procedural reasons in limited circumstances where it would be clearly unfair

### 3. Substance of Contract

#### a) *Assets*

The main part of the agreement usually deals with the division of assets in the event of a relationship breakdown. The agreement may provide for management and/or ownership of family assets during a marriage and/or when the relationship ends. The parties may also specify that neither party is responsible for debts of the other incurred either before or during the relationship. While it was once against public policy to contract in anticipation of future separation, today s. 61 of the FRA explicitly anticipates such considerations in a marriage contract.

#### b) *Custody*

A written agreement between spouses, married or unmarried, can specify custody and access terms between the parties. Nevertheless, the **best interests of the child remains the paramount and overriding consideration** for the court in making a order regarding custody and/or access (see the DA, s.16, and the FRA, s.24). While an agreement cannot oust the court's inherent jurisdiction over custody matters, it is recognized as a legal source of custody rights unless conflicting claims arise and the matter comes before a court (FRA, ss. 34(1)(d) and (2)(b)). Custody and access issues can be heard in both the Supreme Court and Family Court. (See **Section X:**

**Custody, Guardianship, and Access.**) The written agreement may be given the force of a court order under s. 121(2) and s. 122 of the FRA if it is filed in a Supreme Court or Provincial Court registry with duly sworn consent affidavits from any person against whom a provision is to be enforced. (These sections also apply to child and spousal maintenance, below.)

*c) Child Maintenance*

Child maintenance is not usually dealt with in a marriage agreement. While an agreement can set out child maintenance provisions, the Supreme Court can override or vary any such terms. In particular, any term purporting to exclude maintenance obligations is likely to be found invalid on public policy grounds. The court will seldom uphold an amount lower than the guidelines, even if the parties agree on it, unless there is an appropriate reason to approve it, such as some other arrangement that directly benefits the child. See **Section IX: Spousal and Child Maintenance**.

*d) Spousal Maintenance*

The law relating to contracting for or out of spousal maintenance is complex. Clients should seek legal advice before entering into an agreement for spousal maintenance. These agreements cannot oust the court's jurisdiction to order maintenance and such an agreement will be only one factor considered in determining a fair level of maintenance. See **Section IX: Spousal and Child Maintenance**.

*e) Void Conditions*

Marriage contracts sometimes incorporate terms that are not enforceable at law. For example, a clause stating, "the husband shall do all the cooking" is a contract for personal services and is therefore not enforceable. A breach of such an agreement cannot be grounds for divorce.

**NOTE:** Consider whether a marriage agreement should contain a clause stating: "Anything held to be void/voidable will be severed from the agreement leaving the rest of the agreement intact". This prevents the whole of a marriage agreement being voided by the inclusion of void conditions or clauses. See *Clarke v. Clarke* (1991), 31 R.F.L. (3d) 383 (B.C.C.A.).

## IV. DIVORCE

**LSLAP can no longer assist clients who are seeking a divorce.**

### *A. Legislation*

The federal legislation governing divorces in Canada is the DA. The DA applies to legally married couples. It does not apply to common law couples or other unmarried couples. The provincial family law legislation in B.C. is the FRA, which applies to people in all relationships. The reason there are two statutes governing this area is the division of powers under ss. 91 and 92 of Constitution Act, 1867, which gives the federal government jurisdiction over "Marriage and Divorce" (s. 91), while giving provincial governments jurisdiction over "The Solemnization of Marriage in the Province" and "Property and Civil Rights" (s. 92).

## **B. *Jurisdiction***

### **1. Supreme Court**

The Supreme Court of British Columbia has jurisdiction over both the DA and the FRA. Because all divorce claims must be heard under the DA, the Supreme Court has exclusive jurisdiction over divorce claims. The Supreme Court has concurrent jurisdiction with Provincial Court over custody, access, guardianship and support for children (including common law couples) and division of property (except for common law couples). If a Supreme Court order for custody, access, or support is made under the DA, that order supersedes any existing FRA order.

An uncontested divorce no longer requires a personal appearance in Supreme Court. Evidence can be submitted by affidavit with the application for the Divorce Order.

### **2. Provincial Court**

The Provincial Court only has jurisdiction under the FRA and cannot hear any claim under the DA, including divorce applications. The Provincial Court can make orders or vary original Provincial Court orders relating to custody, access, guardianship, child maintenance and spousal support. The court does **not** have jurisdiction to deal with claims for the division of property under the FRA.

## **C. *Requirements for a Divorce***

### **1. Jurisdiction**

To obtain a divorce in a particular province, one of the parties to the claim must have been “ordinarily resident” in that province for at least one year immediately preceding the presentation of the Notice of Family Claim (DA, s. 3(1)). A person can be “ordinarily resident” in a province and still travel or have casual or temporary residence outside the province.

There must not be another divorce proceeding involving the same parties in another jurisdiction. If two actions are pending and the proceeding filed first is not discontinued within 30 days after it is presented, the first court will have exclusive jurisdiction (s. 3(2)) to hear and determine the divorce proceeding.

### **2. A Valid Marriage: Proof of Marriage**

Section 52(1) of the Evidence Act, R.S.B.C. 1996, c. 124 states that if it is alleged in a civil proceeding that a ceremony of marriage took place in B.C. or another jurisdiction, either of the following is evidence that the ceremony took place:

- a) the evidence of a person present at the ceremony (less common); or
- b) a document purporting to be the original or a certified copy of the certificate of marriage (the church certificate is not acceptable).

The simplest way is to use a certificate of marriage or registration of marriage. Only if the certificate or registration of marriage is not available should the evidence of a person present at the ceremony be used. An official translation of the marriage certificate and a translator’s affidavit must be provided if the marriage certificate is in any language other than English. French language marriage certificates must also be translated. The court may require further proof that the marriage is valid if the documents evidencing the marriage appear

questionable. Immigration and landing documents can be used as additional proof of marriage in these situations.

If a marriage certificate absolutely cannot be provided (e.g. the records cannot be obtained from the parties' country of origin or were destroyed), and if there are no witnesses to the marriage available, a party to the divorce proceeding can attempt to prove her or his marriage by attesting to "cohabitation and reputation" in an affidavit. The court will hear evidence of the couple's "cohabitation and reputation" from the parties and witnesses. Where there are witnesses to the marriage available, a witness will be required to sign and swear an affidavit stating that: he or she was at the ceremony, it was conducted in accordance with the parties' laws and religion, and to the best of his or her knowledge, the two parties were in fact married according to their law and traditions.

### 3. Grounds for Divorce

In accordance with s. 8(1) of the DA, either or both spouses may apply for a divorce on the ground that there has been a breakdown of their marriage as evidenced by separation for a year, adultery, or physical or mental cruelty. For the divorce action to succeed, the claimant must have valid grounds under s. 8(2)(a) or 8(2)(b), and the respondent must be unable to raise a valid defence. Most divorces are based on separation rather than adultery or cruelty, in part because the accusing party must prove adultery and/or cruelty on the balance of probabilities. Where a claim for divorce based on adultery or cruelty has been filed for more than one year before the application for divorce is heard, the court will usually grant the divorce on the ground of separation.

#### D. *Divorces Based on Separation: s. 8(2)(a)*

##### 1. Separation - One Year

Under the DA, neither party needs to prove "fault" to get a divorce. Most divorces will proceed under s. 8(2)(a), separation for a period of at least one year. **Although the pleadings starting the action can be filed immediately upon separation, the Divorce Order cannot be sought until one day after the parties have been separated for one year.**

The ground of separation requires physical separation coupled with recognition by **one** of the parties that the marriage is at an end. It is not necessary that the parties form a joint intention.

##### 2. 90-Day Reconciliation Period

Any number of reconciliation attempts may be made during the separation year without affecting the application for divorce. However, if:

- the length of any reconciliation attempt exceeds 90 days; or
- the aggregate total length of reconciliations exceeds 90 days,

then the time for calculating the one year period of separation must start over again with the first day of calculation being the first day of separation after the 90+ day reconciliation ended (s. 8(3)(b)(ii)).

##### 3. Living Under the Same Roof

Some couples may choose to continue to live under the same roof after they have decided to separate for financial reasons or for the sake of the children. If they have separate bank accounts, separate bedrooms, cook their own meals, do their own laundry, etc. (i.e., if there is

an obvious severance of the conjugal relationship), they can still be considered separated.

## ***E. Divorces Based on Cruelty or Adultery: Divorce Act, s. 8(2)(b)***

Divorces based on separation require at least one year to pass before the divorce order can be granted. Divorce claims based on the ground of cruelty or adultery can result in an immediate divorce.

### **1. Adultery: s. 8(2)(b)(i)**

Adultery is voluntary sexual intercourse between a married person and a person other than his or her spouse. The meaning of “adultery” includes sexual acts outside the marriage with a person of the same sex: *S.E.P. v. D.D.P.*, [2005] B.C.J. No. 1971 (B.C.S.C.). The standard of proof for adultery is the same as the civil standard, i.e. the court must be satisfied on a balance of probabilities (see *Adolph v. Adolph* (1964), 51 W.W.R. 42 (B.C.C.A)). Proof can come in the form of an affidavit from the adulterous spouse or the adulterer.

The court will require proof that the adulterous conduct was not forgiven by the innocent spouse (condonation) and that the conduct was not conspired towards for the purposes of obtaining the divorce (collusion and connivance).

### **2. Physical or Mental Cruelty: s. 8(2)(b)(ii)**

The test for cruelty is subjective. The question asked in a cruelty case is whether the conduct is of such a kind as to render intolerable the continued cohabitation of the spouses. There is no objective standard in the sense that certain conduct will constitute cruelty in every case while other conduct will not. The respondent’s conduct may constitute cruelty even if there is no intent to be cruel. What has to be determined is the effect of the conduct on a particular person, rather than the nature of the acts committed: *Burr v. Burr*, [1983] B.C.J. No. 743.

If the spouses are still cohabiting, the court will infer that the conduct was not intolerable unless the claimant had **no** means or opportunity for leaving: *Cridge v. Cridge* (1974), 12 R.F.L. 57, (B.C.S.C.). Lack of income, children at home, and a difficulty with the English language may qualify as reasons for continuing cohabitation.

Again, to make a case based on cruelty, there must be proof on the balance of probabilities. Things that could be entered as evidence in this area include medical evidence such as charts and doctors' statements.

## ***F. Separation Agreements***

### **1. General**

A separation agreement is a legal contract that sets out the rights and responsibilities of common law or married spouses. It generally provides for a division of assets, the maintenance of a dependent spouse, and for the maintenance, custody and/or access to a child by a parent. A separation agreement can deal with some or all of these issues. It can eliminate much of the emotional disturbance involved in courtroom proceedings, and provide the parties with an arrangement to which they have both agreed, as opposed to a court order, with which neither party may be happy.

A separation agreement between married spouses will crystallize each spouse’s contingent half interest in all family property and assets of the marriage, and therefore can affect future apportionment of assets above and beyond those considered in the agreement.

It is essential that each spouse be aware of the potential influence of that agreement on future

expectations, and the legal implications of that agreement on questions of ownership and title in family assets. Each spouse should have independent legal advice, even in cases where the parties seem to be in accord on the terms of a separation agreement. If a separation agreement has been signed and one party did not have independent legal advice this may go towards evidence of unfair contracting and it may be possible to overturn the contract.

It is possible that a separation agreement containing provisions for maintenance may be regarded by the court as evidence of liability on the part of the supporting spouse. While the agreement does not usurp the court's jurisdiction in maintenance or custody matters, the court will consider the terms of the agreement when making the order.

In addition to property settlements, custody and visiting arrangements, and maintenance, the separation agreement may embrace any other matters the parties wish to include in it, and often includes estate provisions, releases, penalties for breach of the contract, etc. A separation agreement can be more flexible than a court order. For example, a court order cannot contain contingent terms, but a separation agreement can.

**NOTE:** Because of the complicated nature of separation agreements, clients who wish to make a separation agreement should be referred to family law referrals.

## 2. **Legislation - Family Relations Act [FRA]**

There is no definition of a "separation agreement" in the Act, but, under ss. 121 and 122, a written agreement for maintenance and/or custody and access that is filed in court is enforceable as if it were an order under the Act.

"Spouse", as defined under s. 121, includes a person who acknowledges in the written agreement that he or she is, or was, a spouse of the other party, whether or not they were married. "Parent" is similarly defined as a person who acknowledges in the agreement a responsibility for the child. "Child" is a person under 19 years of age who is acknowledged to be the responsibility of a party to the agreement.

If the agreement is filed in the Provincial Court, the terms of the agreement may be subject to variation by the court as any regular order. The Supreme Court cannot vary an agreement as the Provincial Court can, however it can make an order on different terms than those set out in the separation agreement. The parties may also vary or rescind the agreement without going to court. It is important to note that a separation agreement entered into pursuant to the FRA constitutes a "triggering event" under s. 56, entitling each spouse to an interest in each family asset as it is valued at that moment in time.

The **White Paper** outlines the proposed ways by which an agreement may be set aside. They can be set aside for lack of procedural fairness, for non-procedural reasons in circumstances that make it clearly unfair, if the agreement is not in the best interest of the child or when the agreement fails to comply with the *Federal Child Support Guidelines*. This list is not comprehensive, nor has this legislation come into force.

## G. *Why a Divorce Application May Be Rejected*

### 1. **Collusion**

Collusion is, simply put, both parties conspiring to obtain a divorce. A more expansive definition can be found in s. 11(4) of the DA.

Collusion is an **absolute bar** to a divorce on the grounds of cruelty or adultery.

## 2. **Condonation**

Condonation consists of forgiving a marital offence that would otherwise be a ground for divorce. There are three requirements: knowledge of the matrimonial offence by the claimant; forgiveness of the offence; and actual reinstatement of the relationship. A single attempt or a series of attempts at reconciliation totalling less than 90 days does **not** qualify as condonation.

Condonation is a **discretionary bar** to a divorce. If the matter is raised, the onus is on the claimant to disprove it.

## 3. **Connivance**

Connivance occurs when one spouse encourages the other to commit adultery or cruelty. There must be a “corrupt intention... to promote or encourage either initiation or the continuance... or it may consist of a passive acquiescence...”. Keeping watch on the other spouse does not constitute passive acquiescence: *Maddock v. Maddock*, [1958] O.R. 810 at 818, 16 D.L.R. (2d) 325 (C.A.).

Connivance is a **discretionary bar** to a divorce, similar in effect to condonation.

## 4. **Discretion of the Court**

In cases of condonation or connivance, the claim for divorce will be dismissed unless, in the court’s opinion, the public interest would be better served by granting the decree.

The court may also reject an application for divorce where: a divorce is pending in another jurisdiction; a marriage certificate or registration of marriage has not been provided; there are defects in the application materials; or there are defects in the form of draft order provided with the application. The court registry is very particular about the content and form of both the applications materials and the draft order, which may result in the rejection of the application before it gets to a judge.

## 5. **Divorce Will Not Be Granted Until Child Support Is Settled**

In a divorce proceeding, it is the duty of the court to satisfy itself that “reasonable arrangements” have been made for the support of any children of the marriage, typically having regard to the Child Support Guidelines. If such arrangements have not been made, s. 11(1)(b) of the DA requires the court to stay the granting of the divorce. When stepchildren are involved, the court will determine child support requirements for a stepfather or stepmother on a case-by-case basis. The definition of “child of the marriage” in s. 2 of the DA is broad enough to include children for whom one spouse “stands in the place of a parent”.

### *H. Other Points to Note*

#### 1. **Jurisdiction to Vary Proceedings**

Section 5(1) of the DA allows a court other than the court of original jurisdiction (that is, the court which originally made the divorce order) to vary a divorce order if:

- one of the former spouses is habitually resident in the province; or
- both former spouses accept the jurisdiction of the court.

## 2. Adjourment for Reconciliation

Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence, or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, s. 10(2) of the DA allows the court to adjourn the proceedings to give the spouse an opportunity to reconcile. The court can also, with the spouses' consent, nominate a marriage counselor, or in special circumstances, some other suitable person to assist a reconciliation.

## 3. Alteration of Effective Date of Divorce

Under s. 12 of the DA, a divorce takes effect on the thirty-first day after the day on which the judgment granting the divorce is rendered. The 31 days allow for the appeal period to expire. The court may order that the divorce take effect before this if it is of the opinion there are special circumstances and the spouses agree that no appeal from the judgment will be taken. The impending birth of a child and remarriage are generally **not** considered compelling reasons to shorten the appeal period. However, one may file an appeal waiver to remarry sooner.

## 4. Maintenance Order After Divorce Has Been Granted

Under s. 15 of the DA, for the purposes of child support, “spouse” means either a male or female who are married to each other (s. 2(1)) and also includes “former spouse”. This means that a former spouse may be able to get a maintenance order after the divorce has been granted.

## 5. Mediation

A form of mediation for separating couples is provided by the Family Justice Counsellors of the Ministry of Attorney General. It is intended to steer people out of the court system. Similar to the small claims process, if the two parties come to an agreement through mediation they may choose to sign a binding contract after the process. Should either party choose not to sign, the agreement will not be binding. There are offices throughout B.C., which can be located using the blue pages of the telephone book under B.C. Corrections Branch, or Family Court: Probation and Family Court Services. The service is confidential and free.

There is also the Family Mediation Practicum Program which aims to provide affordable mediation services to participants while also offering practical training to new mediators (along with an experienced mentor mediator). See **Section 1.B: Resources on the Internet** above.

Parties may wish to retain a private family law mediator to assist them in mediating a resolution to their family law matter. They may contact the British Columbia Mediator Roster Society for names of family law mediators. See **Section 1.B: Resources on the Internet**. Not all family law mediators are listed on the roster, and there are many family lawyers who are specifically trained and accredited in family law mediation.

## 6. Collaborative Divorce

Another option for parties dealing with family law matters is the Collaborative Divorce Model. This offers an option for parties to resolve disputes respectfully and without going to court. Parties work out a negotiated settlement with the help of collaboratively trained professionals including (as needed) lawyers, divorce coaches, child specialists and financial specialists. This allows the parties to negotiate a settlement without the threat of court. If the parties are unable to resolve matters through the Collaborative process, the Collaborative professionals will not

be involved in court proceedings. See the websites listed in **Section 1.B: Resources on the Internet** above for more information.

## **7. Rule 7-1: Judicial Case Conferences**

In cases where relief other than a simple divorce is sought in the Supreme Court, Rule 7-1 of the Supreme Court Family Rules (British Columbia) requires that a judicial case conference (JCC) be held before a party to a contested family law proceeding delivers a notice of motion or affidavit in support of an interlocutory application to the other party. The purpose of a JCC is to help the parties to come to an agreement on some or all of the matters at issue, to identify the issues that are in dispute and those that are not, explore alternatives to litigation, to schedule disclosure, discoveries, the exchange of documents, and to schedule interim applications and the trial date. JCCs may be heard by either judges or masters and are set for approximately one hour.

## **8. Divorce Law and First Nations**

Special concerns arise in cases involving First Nation Peoples registered under the Indian Act, R.S.C. 1996, c. 23, s. 68. The Indian Act sets out guidelines for and definitions of Aboriginal people, and defines who is eligible for “status”. Only “status” people are affected by the legislation under the Indian Act. One spouse’s treaty payment may be directed to the other “where the Ministry is satisfied he deserted his spouse or family without sufficient cause, conducted himself in such a manner as to justify the refusal of his spouse or family to live with him, or has been separated by imprisonment from his spouse and family” (Indian Act, s.68). As well, reserve land allocated by a certificate of possession cannot be dealt with in the same manner as a matrimonial home as the rules in the FRA do not apply to reserve land. However, in such cases, the court may ask that the spouse in possession of the reserve land pay cash compensation to the other spouse (*George v. George* (1997), 30 B.C.L.R. (3d) 107). Keep in mind that most provincial laws apply to Aboriginal people and reserve land, unless they are in direct conflict with the Indian Act. Further, a court will almost always take the cultural identity of the children into consideration when making an order for custody; see e.g. *D.H. v. H.M.*, [1999] S.C.J. No. 22, and see *Van de Perre v. Edwards*, [2001] S.C.J. No. 60.

### ***I. Availability of Divorce Services in B.C.***

#### **1. Legal Aid**

Legal Aid will provide extremely limited assistance to those who meet their income requirements. Clients must also have a risk or history of family violence, or a risk or history of child abduction, to be eligible for this service.

#### **2. LSLAP**

LSLAP can no longer aid in filing uncontested divorces or any other family law matter.

#### **3. Lawyers**

All lawyers will expect an initial payment from their client. The amount of the initial retainer will vary depending on the lawyer’s hourly rate and his or her estimation of the complexity of the case. The cost of a simple, uncontested divorce begins at approximately \$1,000 and up. Clients should compare rates before choosing a lawyer. Advise clients to use the Lawyer Referral Service (604) 687-3221 or 1-800-663-1919. The first half-hour will only cost \$25, with the lawyer charging his or her standard rate thereafter.

To minimize costs when retaining a lawyer, clients should be advised to:

- negotiate the cost of legal services in advance, so they do not come as a surprise;
- personally collect all necessary documentation rather than pay the lawyer to do it;
- call the lawyer only when imparting necessary information (every phone call costs money);
- use Family Court and Supreme Court resources (such as Family Justice Counsellors) if appropriate;
- ask for regular or scheduled billing to monitor escalating legal costs;
- carefully read all correspondence sent by the lawyer; and
- treat the lawyer as a professional.

#### 4. Divorce Services

These organizations often specialize in the mass production of divorces with minimally qualified staff. Clients should generally be advised **not** to use these services, as it is almost impossible to distinguish the reputable from the disreputable. The cost of this type of service can range from \$550 and up. Clients who are considering using one of these services should be **warned about**: divorce financing arrangements, which may involve sharp money practices; “quickie divorces”, which involve obtaining a foreign divorce decree and may not be valid in Canada; and hidden costs.

#### 5. Do-It-Yourself Divorce

It is quite possible for parties to a divorce proceeding to work through their own divorce with the help of a “do-it-yourself” divorce kit, such as the one published by Self-Counsel Press, (604) 986-3366. Most major book and stationery stores sell the kits, which include a guide and a package of the required forms. The guide is also available from the Vancouver Public Library. The forms cost \$18.95. Self-Counsel Press offers a typing service that charges \$107.00 for divorces not involving children, and \$160.50 for divorces involving children. The ease with which the divorce may be accomplished varies depending on the grounds for divorce and the difficulty of proof.

Clients who want to claim for anything more than a simple divorce should be advised to consult a lawyer. Clients should be discouraged from giving up claims to make the process simpler.

## V. UNCONTESTED DIVORCES

### A. *Required Documents*

If the client is trying to do the divorce on his or her own, the following information details the basic documents that he or she will need. A person handling his or her own divorce is advised to get a copy of the documents and instructions from Self-Counsel Press.

#### 1. Marriage Certificate

Any official, government-issued form of marriage certificate or registration of marriage is accepted. It can be either the short or long form, or a card. However, it **cannot** be a church-issued document, marriage license, or slip of paper attesting to the celebration of the marriage.

In some areas of the world (e.g. South American, Latin American, African, and Asian nations), it may be difficult to obtain an official government document.

If the marriage certificate is in a language other than English, an official certified translation must be provided. Clients who require translation can be referred to Mosaic Translations, which can be reached at (604) 254-0469, or to the Society of Translators and Interpreters of B.C., at (604) 684-2940. Marriage certificates in French must also be translated.

Clients who were married in Canada can request a copy of their marriage certificate for about \$50 (in BC) from the Department of Vital Statistics.

## **2. Photograph of the Spouse**

Clients must have a recognizable photograph of the spouse. The photograph is for service purposes and will not be returned.

## **3. Copies of Any Court Orders or Separation Agreements**

These documents can be attached to the divorce affidavits as exhibits.

If the client or spouse had previously started a divorce action, he or she must provide a filed copy of the Notice of Discontinuance that authorized discontinuance of that action.

If a separation agreement is the only document signed between the parties that involves custody, access, and maintenance of the children (i.e. if there are no court orders), the agreement may be filed in either the Provincial or the Supreme Court and enforced as a court order (ERA, ss. 121 and 122).

### ***B. Joint or Sole Application***

For joint applications, the original Notice of Family Claim, Response and three additional copies will be required: the original for filing at the registry, two copies for service, and one as a personal record. See **Section V.H: Service**, below.

A joint application is quicker and less expensive than a sole application, as well as less complicated, since the Notice of Joint Family Claim need not be served (Supreme Court Family Rules, r. 2-2). However, lawyers may require both parties to seek out independent legal advice. This could increase expenses.

### ***C. Filling Out the Notice of Family Claim***

The Registry is extremely scrupulous, and documents containing inconsistencies or omissions will be rejected. This could cost the client valuable time. Clients should be advised to check and re-check every document, especially dates and the spelling of names.

Do not use abbreviations, even common abbreviations such as “n/a” or “a.k.a” or even “B.C.”. Answer every paragraph in full – e.g. in paragraph 20, write, “There are no such children of the marriage” rather than “n/a”.

If at any time, one party is aware of errors in the supporting documents (such as the certified copy of registration of marriage), the true facts as that party knows them must be included in the document with a note stating that it is incorrect. This is because the party requesting the divorce must swear an affidavit as to the correctness of the documents and the statements contained therein.

**D. *Style of Proceedings***

The style of proceedings should use the names of both parties as they appear on the certificate or registration of marriage. What is important is that the name on the actual marriage certificate is used, even if the certificate shows a typographic error. If a party's name is different than what is shown on the marriage certificate, the style of proceedings should show the name the party presently uses and "also known as" (or "formerly known as," as appropriate) the name on the certificate.

**E. *Backing Sheets***

The backing sheet is the last page of the entire document, placed backwards so the documents can be easily identified when folded. Orders filed at the Registry for entry require backing sheets. Some Registries may also require backing sheets on all documents filed.

**F. *Notice of Family Claim***

The Notice of Family Claim will include general information about the parties, the spousal relationship history, prior court proceedings and agreements, as well as what is being sought by the claimant. The appropriate schedules should be completed and attached to the Notice of Family Claim.

For sections that give alternatives for answers, cross out the answers that do not apply. For entire sections that do not apply, delete them in their entirety or write "Not applicable".

Under Part 2 of the Notice of Family Claim, when the parties began living in a marriage-like relationship is usually (though not always) when the parties first began cohabiting. Conversely, the date of separation is the date the parties stopped living in a marriage-like relationship, even though they may have continued to live together under the same roof. If the breakdown of the marriage is due to separation, the commencement of the separation date should be noted.

Under Part 3 of the Notice of Family Claim, any separation agreement or financial agreements determining any matters related to the dissolution of the marriage should be noted. Details such as the date of the agreement, the matters resolved, and whether or not the agreements are still in effect should be set down, but the more specific details of the agreements do not need to be set out.

If the claimant is only seeking a divorce and has settled all other corollary matters without the need for court orders regarding same, he or she need only fill out the Notice of Family Claim, Schedule 1 – Divorce, and, if applicable, Schedule 5 - Other Orders if he or she wants an order changing his or her name under the Name Act.

**1. *Schedule 1: Divorce***

Place a check for each applicable box and fill in the form accordingly. Addresses must be accurate. Do not use post office boxes. A certificate of marriage or certificate of registration of marriage must be filed where the party intends to seek an uncontested divorce.

**2. *Schedule 2: Children***

Place a check for each applicable box and fill in the form accordingly. Under the DA and the FRA, children who are over the age of majority but whose illness leaves them unable to leave the care of a parent or whose attendance of a post-secondary institution leaves them financially dependent on their parent may be considered a dependent child.

**3. *Schedule 3: Spousal Support***

Place a check for each applicable box and fill in the form accordingly.

#### 4. **Schedule 4: Property**

Place a check mark for each applicable box and fill in the form accordingly. If one of the parties wishes to obtain more than the presumed 50 percent of the family assets, details and reasons should be set forth here. **Only a lawyer should deal with property issues.**

#### 5. **Schedule 5: Other Orders**

Place a check mark for each applicable box and fill in the form accordingly. If the claimant is seeking a name change, he or she should indicate the full current and new names here.

### *G. Child Support Affidavits*

Whenever there are children of the marriage, a Child Support Affidavit must be filed. Even if the matter of custody, etc. is to remain in the jurisdiction of the lower court, a judge is still required to satisfy him or herself that reasonable arrangements have been made for the care of the children, hence the requirement for financial information. It is imperative that all income, expenses, assets, and liabilities be listed on the affidavit. If a third party (i.e. a common law spouse, grandparents, etc.) will be assisting the custodial parent financially, this information should also be provided.

### *H. Service*

Personal service is only required if the client is making a sole application.

Clients should be advised that they **must** have a third party serve their divorce papers. Clients who choose to use a professional service should provide the server with a photograph of the spouse. The server should be told to take down the spouse's driver's licence number. Taking these steps will ensure that the court does not question the validity of the service.

If the respondent's address is not known, the client should write letters to friends and family members to try to locate him or her. The client might also want to consider hiring the services of a skip tracing agency. This takes extra time, but will avoid the additional costs associated with a substitute service application.

In a substitute service application, the client must make an extra application to obtain permission to serve the respondent in a way other than that normally required by the Supreme Court Family Rules. The client may also incur the cost of publishing notices in a local newspaper and or the Gazette, which could cost anywhere between \$60 and \$200, depending on the order given. Other options include posting a copy of the substitution service order and the pleadings in the court registry, mailing them to the respondent's last known address by registered mail, or serving an adult in the house where the respondent is believed to reside.

### *I. Costs*

Clients should always double-check the following court fees because they tend to change:

- Ordering a marriage certificate or registration of marriage: \$50 for couples married in B.C. It can be ordered by mail or in person. Refer to [www.vs.gov.bc.ca/marriage/certificate.html](http://www.vs.gov.bc.ca/marriage/certificate.html) for more information.
- Court fee to file the Notice of Family Claim: \$208.
- Fee for Serving the Notice of Family Claim on the respondent: varies depending upon where the respondent lives. The average fee is \$75. Process Server Fees for the Lower Mainland can run from \$50 for 4 attempts, plus \$20 for an affidavit, or \$70 to \$100 all inclusive. For other parts of B.C. or

Canada, it can cost up to \$200 for all attempts.

- Notarization: between \$25 and \$50, if the affidavit is already completed.
- Final application fee: \$62.
- Fee to apply for a certificate of divorce: \$31. (Note that there is no requirement to apply for a certificate of divorce. Once the Order for divorce has been made and is effective, the parties are divorced.)

**NOTE:** There is no fee to file a separation agreement in Provincial Court. There is a fee of \$62 to file a separation agreement in the Supreme Court.

### *J. Approximate Length of Time for Divorces*

Simple divorces, with or without children, take approximately three to four months to complete, or one to two months in the case of joint applications. Substitute service divorces take longer, an additional one or two months depending on the terms of the order for substitute service.

## **VI. SIMPLE DIVORCE PROCEDURE: STEP BY STEP**

The following are steps to help applicants through the process.

**NOTE:** If the client is representing themselves, the client is responsible for purchasing the Self-Counsel Press divorce guide and forms. The instructions and steps for filling out the forms and filing them, etc. are included in the kit.

### *A. Sole Application*

**Step 1:** Collect all necessary documents: i.e. the marriage certificate, copies of court orders or agreements regarding custody, access, and maintenance of the children.

**Step 2:** The client fills in the Notice of Family Claim

**Step 3:** The client fills in the Registration of Divorce form, available at the registry.

**Step 4:** The client should then go to the nearest Supreme Court, and bring the original and three copies of the Notice of Family Claim, the original marriage certificate or the certified copy of the marriage registration, and \$218 in cash, money order, or cheque, payable to the Minister of Finance.

**Step 5:** In the sole application process, the client must then arrange for the court-stamped Notice of Family Claim to be personally served on the respondent.

**Service by a friend:** The friend should know the respondent, but not be involved in the divorce in any way. When the friend serves the respondent, the friend should ask whether the respondent is Mr./Ms. X, and ask for identification. It would be helpful, although not mandatory, to give the friend a picture of the respondent. The friend will then have to swear an affidavit of service, and the friend will have to say how he or she identified the spouse (Supreme Court Family Rules, r. 6-3).

**Service by a Process Server:** Process Servers are listed in the Yellow Pages. They require the addresses of the respondent, home and business, the telephone numbers, and a photograph of the respondent. They will also need two copies of the Notice of Family Claim, one for the spouse, and one to staple to the affidavit of service.

**Substitute Service:** Evidence of efforts to find the respondent will be required before an order for

substitute service can be granted. Some methods of finding the respondent are:

- calling or writing to relatives (usually the most successful);
- advertising in a local newspaper;
- writing to the Superintendent of Motor Vehicles to see if any vehicles have been registered in his or her name. The client should ask whether any fees will be incurred before proceeding;
- asking the local police if they have any information on his whereabouts, although they are usually reluctant to help;
- using a credit bureau or collection agency; or
- asking friends of the respondent about his current address.

**Step 6:** Once the time for the respondent to file a Response to Family Claim has expired, the spouse applying for the divorce must swear an affidavit. The affidavit will need to be sworn before a notary public, the registry staff (\$31), or a lawyer. The time limit for filing a Response to Family Claim or Counterclaim, is 30 days, or, in the case of a substitution service order, such time as the order provides for the filing of a Response to Family Claim or Counterclaim.

**Step 7:** If there are any children, a child support affidavit must be filled out and sworn before a notary public, the registry staff, or a lawyer.

**Step 8:** The claimant applies for the divorce order. This requires:

- a) a requisition in Form F35 requesting an order that the parties be divorced;
- b) a draft of the order sought;
- c) the original of the affidavit of service complete with all exhibits;
- d) a certificate of the registrar in Form F36;
- e) a requisition requesting a search for any Response to Family Claim;
- f) an affidavit in support of the application (Form F38), sworn after the time for the respondent to file a Response to Family Claim has expired, which includes proof of the allegations made regarding the breakdown of the marriage;
- g) a child support affidavit in Form F37, if there are children; and
- h) the filing fee.

Note that when the divorce is based on adultery or cruelty, proof of the adulterous or cruel conduct must be filed in affidavit form. Proof of adultery might consist of the respondent admission to the adulterous conduct. Proof of cruelty will usually consist in the affidavits of third parties, or letters from treating physicians, psychologists or psychiatrists attached to an affidavit as exhibits.

**NOTE:** If a Response to Family Claim has been filed, the respondent has chosen to contest all or some of the relief sought and the client should be advised to see a lawyer immediately.

**Step 9:** If the court is prepared to make the order sought, the order will be available at the court registry four to six weeks after the application is filed. Clients should simply call the registry to see whether their order is ready rather than attending in person. Clients will be required to show valid photo ID to pick up their divorce order.

**Step 10:** Thirty-one days after the divorce order has been granted (the date shown on the front of the divorce order), the client may apply to get a Certificate of Divorce by filing two copies of the requisition requesting a Certificate of Divorce. The fee is \$31. Note that it is not always necessary to obtain a Certificate of Divorce.

## **B. *Joint Application***

In the joint application process, all the required documents are filed at once. All required affidavits except one of the supporting affidavits may be sworn ahead of time. At least one of the supporting affidavits **must** be sworn and filed after the other materials are filed.

**Step 1:** Complete Steps 1 to 3 above. Both parties will be required to sign the Notice of Joint Family Claim.

**Step 2:** Complete all of the documents listed in Step 8 above, **except** for: one affidavit in support of the divorce application; the affidavit of service, and the requisition asking the registrar to search for a Response to Family Claim and Counterclaim

**Step 3:** One or both parties attend court to apply for the divorce order. This requires:

- a) a requisition in Form F35 requesting an order that the parties be divorced;
- b) a draft of the order sought;
- c) a certificate of the registrar in Form F36;
- d) one affidavit in support of the application, sworn after the time for the respondent to file a Response has expired, which includes proof of the allegations made regarding the breakdown of the marriage;
- e) a child support affidavit in Form F37, if there are children; and
- f) the filing fee.

A second affidavit in support of the application must be sworn and filed after the Notice of Joint Family Claim has been filed. That affidavit can be sworn at the court registry immediately after the filing of the other materials.

**Step 4:** Complete Steps 9 and 10 above.

## **C. *Special Problems***

### **1. Serving Divorce Papers Outside Canada**

In circumstances where the respondent in a divorce action is living outside Canada, **and** is willing to go to the Canadian Consulate office nearest to where she or he lives in order to accept service, the Consul will serve the respondent at that office, for a fee. However, keep in mind that this form of service requires the respondent's cooperation, as she or he must be willing to attend at the consular office personally when notified by its staff to do so.

To comply with the requirements of this form of service, the client must forward service documents to the Consulate:

- a copy of the Notice of Family Claim ;

- a partially completed Affidavit of Service (Form F15);
- Exhibit “A” to the Affidavit of Service (i.e. a copy of the Notice of Family Claim); OR
- If the country in which the respondent lives is a contracting state under the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, the respondent can be served using Forms F12, F13, and F14. See the Supreme Court Family Rule 6-5 for more details.

The client may then serve the documents outside of Canada. The Department of Authentication of Documents will help serve the documents. Their mailing address is:

**Foreign Affairs and International Trade Canada**  
 Legal Advisory Division (JLAC)  
 125 Sussex Drive  
 Ottawa, Ontario K1A 0G2

This office in Ottawa will in turn forward the documents to the appropriate consulate office. The charge will be billed to the client at the end, and is usually \$50.

If the respondent is **not** willing to go to the consulate office to be served, the Department of External Affairs will **not** arrange service. In these cases, the client must find a friend or relative in that country who is willing to serve the respondent.

## 2. Foreign Language Marriage Certificates

Foreign language marriage certificates must be accompanied by a certified English translation. Certificates in French must also be translated. MOSAIC Translations will translate marriage documents. The minimum charge for this service is \$35. It should be noted that foreign marriages might be considered valid if the evidence shows that the marriage is valid in the foreign country. The Society of Translators and Interpreters of B.C. also translates marriage certificates: (604) 684-2940.

## 3. Amending a Document

Under Rule 8-1 of the Supreme Court Family Rules, a party may amend his or her pleadings. A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and, subject to Rules 8-2(7), 8-2(9) and 9-6(5):

- once without leave of the court, at any time before delivery of the notice of trial or hearing; and
- at any time with the written consent of all the parties.

Unless the court otherwise orders, where a party amends a document under 8-1(1), a new document, being a copy of the original document but amended and bearing the date of the original, shall be filed.

Unless the court otherwise orders, service on a party of an amended originating process or pleading shall be required if the original has been served on that party and no Response to Family Claim has been filed.

Unless the court otherwise orders, where a party amends a document under 8-1(1), the party shall deliver copies of the amended document to all the parties of record within seven days after its amendment and, where service is required under 8-1(4), the party shall serve copies on the persons required to be served as soon as reasonably possible and before taking any further step in the proceeding.

Where an amended Notice of Family Claim, Counterclaim, or third party notice is served on an opposing party, the opposing party, if he or she has already delivered a Response to Family Claim, may amend that Response to Family Claim under the following conditions:

- the opposing party must amend the Response only with respect to any matter raised by the amendments to the Notice of Family Claim, Counterclaim, or third party notice; and
- the period for filing and delivering an amended Response to Family Claim to an amended Notice of Family Claim is 14 days after the amended pleading is delivered. Where a party does not serve an amended Response as provided in 8-1(5) the party shall be deemed to rely upon his or her original Response.

#### ***D. Contested Actions***

If the claimant's action is contested, the client should retain a lawyer, or at least seek a lawyer's advice, before proceeding. However, there are some situations where it is possible for the respondent to file a Response to Family Claim without contesting the divorce application. For example, the respondent can speak to access without a contested action ensuing, but a maintenance or custody issue would definitely result in a contested action, and a considerable wait for trial.

#### ***E. "Quick" Divorces***

If there are special circumstances such that the parties would both agree to a quick divorce, the respondent can waive the waiting period after service by filing an answer, and then both parties sign a waiver of appeal. However, this will only speed up the procedure by a few weeks as the appeal period is 31 days.

It should be noted that the court might not advance the date of divorce merely because of an impending birth or marriage. The court must be "of the opinion that by reason of special circumstances the divorce should take effect earlier," and the spouses agree not to appeal the decision: DA, s. 12(2). The courts have interpreted "special circumstances" very strictly, and grant a quick divorce in exceptional cases only, e.g. where the immigration status of the claimant's fiancée is in jeopardy, but not in the case of pregnancy or ordinary remarriage.

## **VII. ALTERNATIVES TO DIVORCE**

### ***A. Annulment***

An annulment differs conceptually from a divorce because a divorce terminates a legal status, whereas an annulment is a declaration that the parties' marital status never properly existed. A declaration of nullity may be obtained for two types of marriages:

- void marriages, which are null and void *ab initio*; and
- voidable marriages, which are valid until a court of competent jurisdiction grants a declaration of nullity (although such a declaration has the effect of invalidating the marriage from its beginning).

The difference between a void and voidable marriage is less important in matrimonial proceedings in British Columbia than it once was, as the FRA makes no distinction between the two and Part 5 of the Act applies to both. For purposes other than the FRA, the distinction may still be relevant.

A marriage is void *ab initio* if:

- either of the parties was, at the time of the marriage, still married to another party;

- one of the parties did not consent to the marriage;
- the parties are related within the bonds of consanguinity; or
- the formal requirements imposed by provincial statute (such as the B.C. Marriage Act) are not fulfilled.

Misrepresentation is a ground for annulment only where the misrepresentation leads to a mistake about the identity of the other party or as to the nature of the marriage ceremony.

A voidable marriage is valid until one of the parties to it obtains a declaration of nullity. The declaration must be obtained during the parties' joint lives, and is not available if the parties are already divorced. In Canada, a marriage may be voidable in the following circumstances:

- either party is impotent or otherwise unable to consummate the marriage (as opposed to unwilling to consummate the marriage, which may constitute cruelty but does not render the marriage voidable (see *Juretic v. Ruiz* (1999), 126 B.C.A.C. 196 (C.A.)); or
- a party is under 14 years of age.

These are common law rules.

**NOTE:** If a marriage is found to be void, this does not affect the property claims that a party might have. Pursuant to s. 56 of the DA, the matrimonial regime still applies in this situation.

## ***B. Judicial Separation***

The court can no longer grant a judicial separation. Judicial separation was formerly used to sever the legal obligations and liabilities between a married couple without terminating the marriage, when a spouse's religion forbade divorce.

# **VIII. ASSETS**

## ***A. General***

The division of property on marriage breakdown is dealt with in Part 5 of the FRA. The Act creates a basic presumption of equal entitlement to family assets, real and personal property that is ordinarily used for a family purpose. Part 6 deals with the division of pensions. These two parts of the Act do not apply to common law relationships, although common law partners can contract into the property provisions of the Act. Also, the rights of the parties to family assets may be resolved by agreement, mediation or litigation. All litigation relating to property must be dealt with at the Supreme Court level. The Provincial Court does not have the jurisdiction to deal with assets.

The **White Paper** proposes significant changes to the pension and property divisions. See **Section 1.B: Resources on the Internet** and **Sections VIII.C.1 and 3: Types of Assets**.

## ***B. Legislation***

### **1. Divorce Act [DA]**

The DA does not deal with property division. The specific rights and obligations of parties to a divorce are set out in the FRA.

## 2. Family Relations Act [FRA]

Part 5 of the Act deals with the division of matrimonial property between married spouses upon the breakdown of a marriage. The Act establishes a presumption that both spouses are entitled to an equal share of all family assets. This presumption crystallizes when one of the following four “triggering events” occurs:

- a separation agreement (not defined in the Act). A separation agreement which has not been filed in court still qualifies as a triggering event;
- a declaratory judgment of the Supreme Court under s. 57, that the spouses “have no reasonable prospect of reconciliation”;
- an order for dissolution of marriage; or
- an order declaring the marriage null and void.

Once a triggering event occurs, each spouse is presumed to own an undivided one-half interest in every family asset as a tenant in common (s. 56).

Actions for the division of property under the Act must be commenced within two years following divorce. To be safe, the claim should be commenced within two years of the triggering event. If an application is made after two years, a lawyer should also bring an action in constructive or resulting trust.

Until one of these triggering events occurs, only the titled spouse can deal with assets and property not specifically bound by a written agreement between the spouses. But, a third party entering into a property transaction may require assurance that a non-owning spouse’s latent contingent interest is not likely to spring up or that it has been waived, and that spouse may be required to endorse or guarantee the transaction or to sign a waiver. See s. 64 of the FRA.

### C. *Types of Assets*

#### 1. **Family Assets**

A family asset is defined by s. 58(2) of the FRA as “property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose”. This suggests a functional test that determines whether the asset was “ordinarily used” and for a “family purpose”. It also includes assets expected to be used for a family purpose. The term “property” is not defined in the Act and it has been given an expanded definition.

The **White Paper** suggests enacting major reforms to the law’s property division regime that would:

- Extend it to common-law spouses who have lived together for two years in a marriage-like relationship or who are in a marriage-like relationship of some permanence and have children together
- Exclude certain types of property (e.g. pre-relationship property, gifts and inheritances) from the pool of family property to be divided 5-50
- Limit judicial discretion to reapportion family property or to divide excluded property to circumstances where it would be clearly unfair not to do so
- Provide the debts are subject to division
- Set as defaults: the date of separation as the triggering event and the date of the court order or agreement as the valuation date
- Limit the ability of judges to set aside or change property division agreements

- Enable interim orders, including for the distribution of property for the purposes of funding litigation or dispute resolution
- Enact conflict of laws provisions to address property outside British Columbia

## 2. Savings

A savings account “ordinarily used for a family purpose” is also a family asset, even when it is in the name of one spouse, and drawn upon only by that spouse. With family assets such as family savings accounts or pensions, there is a presumption of equal entitlement.

## 3. Pensions and RRSPs

Rights under an annuity, pension, home ownership, or registered retirement savings plan are considered family assets, including each party’s Canadian Pension Plan (C.P.P.) credits: Family Relations Act s. 58(3)(d). In *Murray v. Murray*, (12 April 1979), Vancouver 5936/D832457 (B.C.S.C), the husband had an RRSP and his wife contributed to a teacher’s RRSP of lesser value; the court added the assets of the two plans at the time of separation, and each spouse was entitled to a half share of this total; the husband paid his wife the deficiency between the value of her plan and her half-share entitlement.

The **White Paper** proposes to enact most of the recommendations made by the British Columbia Law Institute in 2006 in its report on division of pensions. It further proposes to apply the pension division scheme to unmarried spouses, allowing unmarried spouses to claim entitlement to their spouse’s pension benefits upon the breakdown of their relationship (as long as they meet the definition of “spouse” under the proposed Act).

**NOTE:** B.C. is one of the few provinces that allow spouses to enter into a written agreement to waive the equalization of their pensionable credits under the C.P.P.

## 4. Real Property

It is often necessary to take early steps to secure the title to real property when there is a separation. This is particularly so where property is registered in the name of only one spouse, and there is a risk of that party disposing of or encumbering the property, or where judgments are likely to be registered against one party’s interest, which might prejudice the other party. Under s. 67 (1) of the Family Relations Act, one may request an automatic restraining order to prevent the sale of family assets including real property. There are several ways of protecting a spouse’s interest.

### a) *Certificates of Pending Litigation and Caveats*

Caveats and Certificates of Pending Litigation are warnings to potential purchasers and establish claim priority over the property from the day the Caveat or Certificate of Pending Litigation is filed. This document will defeat the presumption of claim priority given to the bona fide purchaser for value. Entitlement to a certificate of pending litigation is limited. See the Land Title Act, R.S.B.C. 1996, c.250 and Annotated Land Title Act by Gregory and Gregory for the procedure and forms.

**b) Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246**

This Act applies where a party has elected not to commence legal proceedings, but needs to protect his or her interest in real property. It provides an alternative to a Certificate of Pending Litigation for a married spouse (not common law) where the “property” was the “matrimonial home”. The Act allows a charge to be placed on land that will prevent disposition of the property without the written consent of the applicant for the charge (refer to the Land (Spouse Protection) Act and the Land Title Act for the registration procedure). Note that this only applies while the parties are legally married. The charge may be struck out on the death of, or final divorce from, the applicant.

Registration of a charge by one spouse under the Land (Spouse Protection) Act prevents the other spouse from selling or encumbering his or her share, but is not protection against a creditor who could obtain an order for sale of the house. So long as you are legally married to your spouse, one may file against the property without the other spouse’s notice or consent, in order to prevent the transfer of the property.

**c) *Registration of a Notice Under the Land Title Act***

A spouse who is a party to a marriage agreement or a separation agreement may file a notice in the Land Title Office regarding any lands to which the agreement relates (Family Relations Act, s. 63). This applies to married spouses only.

The information required in the notice includes the names and addresses of the spouses, the legal description of the land, and the provisions of the agreement relating to that land. The Registrar may then register this notice in the same manner as a charge on the land.

Once the notice is registered, there can be no subsequent registration of a lease, mortgage, transfer, etc., unless both spouses or former spouses sign a cancellation or postponement notice in the prescribed form. A spouse or former spouse may apply to the Supreme Court for an order to cancel or postpone a notice where the other party to the agreement cannot be found after reasonable search, or unreasonably refuses to sign a cancellation or postponement, or is mentally incompetent.

The use of notice will also extend to mobile homes (FRA, s. 63(6)).

**d) *Supreme Court Family Rules***

Generally, Rule 15-8 of the Supreme Court Family Rules governs legal remedies for joint tenants. Where a dispute arises, an application can be made to the Supreme Court to settle the matter, but clients should be advised that a court action is costly and a negotiated settlement is generally to their advantage because courts have a wide discretion to distribute matrimonial property under Rule 15-8. E.g., a court could order the sale of property at a time when the housing market is poor, resulting in a low sale price. Sometimes, a spouse should consider selling his or her interest in a property to the other spouse.

**e) *Limitation Period***

A former spouse is considered a “spouse” within the meaning of the FRA (s. 1) for the purpose of proceedings to enforce or vary an existing order. However, where an entirely new order is sought, the parties cease to be “spouses” within the meaning of the Act after 2 years has passed since the order granting the divorce was made. This

distinction has engendered a debate as to whether there is a limitation period for the redistribution of property “between spouses” under the FRA. See *Staires v. Staires* (1991), 34 R.F.L. (3d) 376 (B.C.S.C.) and *Tatlock v. Tatlock* (1992), 71 B.C.L.R. (2d) 194 (S.C.). The Supreme Court of Canada partially addressed the issue in *Stein v. Stein*, [2008] 2 S.C.R. 263, 2008 SCC 35, para. 12: “...the [Family Relations Act] does not place any temporal limits on the division of assets. Nor does it state that once assets have been subject to an initial division, a reapportionment cannot occur at some point in the future”.

Practically speaking, since a court order granting a divorce will usually include provisions respecting the division of property, it would be somewhat uncommon to make an initial application for the division of property after the divorce. Should the issue arise however, clinicians are advised to carefully review both the case law, and s.1 of the Act. Clients should be advised to bring applications for the division of property within 2 years of the divorce.

#### *f) Interim Relief*

A court may order temporary occupation and possession of the family residence and its contents by just one spouse (FRA, s. 124). A court may also restrict access by the other spouse (s. 126) and postpone the rights of the other spouse to sell or otherwise dispose of the property (s. 125). These provisions also apply to common law couples.

### **5. Business Assets**

The FRA divides assets into “family,” “business,” and other “assets”. Property owned solely by one spouse and used primarily for business purposes

The only factors the court can consider are set out in s. 65:

1. the duration of marriage (the general presumption of the FRA has been in favour of equal distribution, especially in the case of a long marriage), and of the period of living separate and apart;
2. when the property was acquired or disposed of, and whether it was an inheritance or a gift to one spouse;
3. what each spouse needs to become economically independent and self-sufficient; and
4. “any other circumstances” relating to the acquisition, care, use, etc. of the property, or to the “capacity and liabilities of a spouse”. The latter refers to family debts. The decision in *Mallen v. Mallen*, [1992] B.C.J. No. 649 (B.C.C.A.) confirms that debt is only dealt with at the s. 65 stage of the analysis regarding the distribution of family assets.

There is case law on each consideration that should be consulted.

“Any other circumstances” of the last consideration is clearly a catch-all phrase, and reviewing “capacity and liabilities” of a spouse coupled with the policy of ensuring that spouses become “economically independent and self-sufficient” confers on the B.C. courts a wide discretion to reapportion. The Supreme Court is also empowered under s. 65 to consider “other property” not covered by s. 56 or the marriage agreement: see *Hefji v. Hefji* (July 7 1998), Vancouver CA022776 (B.C.C.A.).

Note that the courts will determine any entitlement to and quantum of spousal support after the assets have been divided, as the division of assets may accomplish part or all of the goals that spousal support is intended to accomplish.

## D. *Use of Assets*

The court can award one spouse exclusive use of assets pending further agreement between the parties or a court order. This can include large assets such as a home and car; or smaller assets as may be required to operate a business, or for the departing spouse's television, computer, books, for example.

## E. *Unmarried Couples*

Unmarried couples will rarely end up with as much compensation as married couples. When couples marry, they make a choice to opt into the property provisions of the FRA and the responsibilities contained therein. A couple who elects not to marry is similarly deprived of the other benefits of the Act, such as the presumption to an equal interest in all property owned by either or both spouses: see *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84 (S.C.C.).

The **White Paper** proposes to enact major changes to the division of property for unmarried couples. It proposes to extend the law's property division regime to common-law spouses who have lived together for two years in a marriage-like relationship or who are in a marriage-like relationship of some permanence and have children together.

The courts will recognize an equitable interest of a common law spouse in all the property and assets acquired by the couple through the joint efforts of the two spouses, although registered in the name of the other spouse (i.e. a constructive trust). The scope of constructive trusts was greatly expanded in *Peter v. Beblow* (1993), 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, in which the court found a constructive trust arising from the contributions made by homemaking and childcare services, which allowed for the inclusion of money that would otherwise be paid for such services to be used as mortgage payments. Claims in trust may be constructive, resulting, or express. Constructive trusts are the most common type of trust claim, where the court imposes a trust to remedy the unjust enrichment of one party at the deprivation of the other. However, there are limits, and a court will not interfere where the elements of constructive trust are not present. A causal connection must be found to exist between the contribution made and the property in question. Refer to a general text for a more comprehensive description of the elements of constructive trust.

# IX. SPOUSAL AND CHILD MAINTENANCE

## A. *General*

Maintenance is the financial support one person provides for another person (adult or child). This support is meant to provide for that person's reasonable needs (i.e. food, clothing, shelter, education, and medical care). Spousal maintenance is intended to pay for basic living expenses and is highly discretionary. In contrast, child maintenance is an obligation acquired through parenthood; it is mandatory with firm guidelines. Child support always takes precedence over spousal maintenance if a party's ability to provide financial support is limited.

An application for maintenance may be made under either the FRA or the DA, but it is essential to look into the standards, limitations and other important differences between the Acts. The parties may also agree on the issue of maintenance and incorporate their agreement into a written document (a separation agreement), which may have the legal status and force of a personal contract. An agreement is not completely determinative of the issue however; the court will make orders superseding the provisions of an agreement in order to bring the obligations of parties in line with the requirements of statute.

In making an order for spousal maintenance, the court will not look to the conduct (or misconduct) of the parties, but will consider the "condition, means and other circumstances of each" in making an order. Nevertheless, in *Leskun v. Leskun*, [2006] S.C.J. No.25 (S.C.C.), the court held that the **effect** of

spousal misconduct on the other spouse's ability to achieve self-sufficiency should be taken into consideration. In some cases, the court will refer the matter to the registrar who holds an independent inquiry into the spouses' assets, income liabilities, etc., and then recommends a "reasonable" maintenance payment. This recommendation does not become an order until a judge confirms it. Arrangements for spousal support can be made as part of a separation agreement, granted at the time of a divorce or, if no order for maintenance is made or denied at the time of divorce, within a reasonable time thereafter. Because of the way "spouse" is defined under the Family Relations Act, initial applications for spousal maintenance under this Act must be brought within 2 years of the order granting divorce, or within one year of the date of separation for common law relationships.

Orders for child support are almost always fixed according to the schedule of support payments set out in the Child Support Guidelines, which are based on the payer's gross income and the number of children for whom support is being paid.

The court will not grant a divorce if there are not reasonable arrangements made for child support (DA, s.11). The level of child support is based on the income of the non-custodial parent and is set out in the Federal Child Support Guidelines.

The **White Paper** proposes only minor changes to the child support provisions to ensure consistency with the new Act's language and structure and to the spousal support provisions. Further, they suggest the elimination of parental support obligations.

## **B. Courts**

Both the Supreme Court and the Provincial Court have the powers to grant or vary maintenance orders under the FRA, but only the Supreme Court can grant or vary maintenance orders under the DA. Only the Supreme Court can grant interim relief under the DA or the FRA.

### **1. Provincial Court**

The Provincial (Family) Court is often the most accessible court to lay litigants. It can deal with applications for maintenance made under the FRA, as well with variation of previous Provincial Court child or spousal support and arrears of child or spousal support orders. Applications can be made at certain Provincial (Family) Courts for a Supreme Court Hearing.

### **2. Supreme Court**

The Supreme Court can order interim relief under the DA or FRA or make an order for maintenance upon the granting of a divorce order. If a Supreme Court order for maintenance is made under the DA, that order ousts any provincial statutory jurisdiction in that matter. While obtaining interim relief from the Supreme Court is more expensive than obtaining a Provincial (Family) Court order, it can be faster if the application is urgent or if the party wishes to proceed *ex parte* (without notice to the other side).

## **C. Enforcement**

### **1. Family Maintenance Enforcement Act (R.S.B.C. 1996, c. 127) [FMEA]**

This Act, passed in 1988, gives the provincial government extensive powers to collect maintenance arrears, including:

- a Notice of Attachment (s. 17);
- 12-month garnishing orders (s. 18);
- Attachment Orders (s. 24); and
- Attachment of money owing by the Crown (s. 25) including Income Tax refunds and Employment Insurance benefits directly from the Federal Crown.

Any person, who receives a Maintenance Order or Separation Agreement that has been filed in court, may voluntarily register with the program. In addition, all recipients of B.C. Benefits income assistance, or other social assistance, such as day-care subsidies, must enrol in the program if the Director of Income Assistance requires that they do so.

## 2. Reciprocal Enforcement

If properly filed in B.C., a maintenance order from another jurisdiction is enforceable under the EMEA. All other Canadian jurisdictions have similar legislation and will enforce B.C. orders on registration in their courts. Many foreign jurisdictions will also enforce B.C. orders; see the table of reciprocating states in the Court Order Enforcement Act, R.S.B.C. 1996, c. 78.

## 3. Variation of Orders

Spousal support orders may be varied where there have been changes in the needs, means, capacities and economic circumstances of each party (DA, s. 17(4.1), FRA s. 96(1)). The court may also reduce the amount of maintenance to a spouse where it finds that the spouse or former spouse “is not making reasonable efforts” to become self-sufficient (FRA, s. 96(4)).

There may also be a variation in child support levels. Child support levels will change with a change in income, which is virtually automatic when one makes an application in court. Provincial Court orders made in other Canadian jurisdictions and in certain reciprocating foreign states may be varied under the Interjurisdictional Support Orders Act, S.B.C 2002, c. 29. The Act creates a system where an application is made through the filing of prescribed documents and filed with the Reciprocals Office in British Columbia, which is responsible for transmitting the documents to the originating jurisdiction for adjudication.

Support orders made under the DA may only be varied through the provisions of ss. 17, 18 and 19. In this process, someone seeking to change a support order made in another Canadian jurisdiction must apply to the courts of B.C. for a provisional order. The provisional order is sent to the originating jurisdiction for a second hearing to confirm the order. Unless the order is confirmed, the provisional order has no effect.

## 4. Agreements

The court can enforce written agreements that provide for the payment of child or spousal support. Under ss. 121 and 122 of the Family Relations Act, a written agreement concerning support may be filed in the Provincial Court and in the Supreme Court. Once filed, the agreement has the effect of a court order for enforcement purposes.

### *D. Spousal Maintenance*

The fundamental question in determining spousal maintenance is whether the division of assets in a divorce has satisfied spousal support requirements.

## 1. Legislation

### a) *Divorce Act [DA]*

Section 15.2 of the DA creates an obligation to support a spouse. However, s. 15.3(1) directs the court to give priority to child maintenance in any application for child and spousal maintenance under the DA. Essentially, income should be allocated to child maintenance, with reference to the Federal Child Support Guidelines, and to spousal maintenance with whatever income remains.

### b) *Family Relations Act [FRA]*

Any person may apply under Part 7 for a maintenance order on his or her own behalf (s. 91). The Attorney General may designate persons to make an application on behalf of a parent or a spouse, s. 91(2). Section 89 of the FRA sets out the obligation to support a spouse. The definition of “spouse” in the Act includes common law couples that have cohabited for not less than two years and where an application is brought within one year after the relationship terminated.

While s. 93(3) of the Act allows for lump sum payments, for charging property with payment under an order, for a contingent payment or a varying payment, some case authority holds that a periodic stream of payments may be the most equitable form of payment.

The **White Paper** proposes the following minor changes to spousal support provisions:

- Align provincial spousal support factors and objectives more closely with the *Divorce Act*
- Explicitly permit periodic reviews
- Permit variation applications in light of the spousal support objectives and factors where there has been a change in circumstances, new evidence or a failure to make full and frank disclosure
- Limit consideration of a spouse’s alleged misconduct to that which “arbitrarily or unreasonably” affects the need for more support or the ability to provide it
- Provide the spousal support obligations continue after the death of the paying spouse unless otherwise agreed or ordered
- Clarify that spousal support should be awarded only where spousal support objectives have not already been met through property division
- *Spousal support advisory Guidelines* will not be referred to in the Act and will remain advisory

### c) *Spousal Support Advisory Guidelines*

The final version of the Spousal Support Advisory Guidelines (SSAG) was published in July 2008. The SSAG do not have the force of law and are not expected to become law.

The SSAG set out two basic mathematical formulae for determining the quantum and duration of spousal support when a person’s entitlement to receive support is established: the “with children” formula when the parties have dependent children, and the “without children” formula when child support is not being paid. The “without children” formula is relatively simple, however the “with children” formula

cannot be completed without the assistance of a computer program (refer to [www.justice.gc.ca/eng/pi/pad-rpad/res/spag/ex.html](http://www.justice.gc.ca/eng/pi/pad-rpad/res/spag/ex.html)).

While the SSAG have no regulatory effect and are merely “informal”, and “advisory”, they are nevertheless being used by the courts and the bar.

## 2. Principles of Spousal Support

### a) *General*

Spousal support is calculated after the division of the assets. The question becomes whether the need is still there after the assets have been divided. The purpose of spousal maintenance is to relieve economic hardship resulting from the marriage or its breakdown. Most recent court decisions have focused on the effect of the marriage in either impairing or improving each spouse’s economic prospects. While both the DA (in s. 15.2(6)) and the FRA (in s. 93(4)) refer to the objective of self-sufficiency, this is only one of the factors that a court will consider. For example, in cases where a spouse has health issues or lacks marketable skills due to a prolonged absence from the work force, a court may find it is unrealistic to expect a spouse to be self-sufficient. See *Moge v. Moge*, [1992] 3 S.C.R. 813; see also *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

### b) *Factors considered*

While the underlying principles may be the same, the DA and the FRA differ slightly in the factors they direct the courts to consider.

Section 15.2 of the Divorce Act directs courts to consider the condition, means, need and other circumstances of each spouse, including:

1. the length of time the spouses cohabited;
2. the functions performed by each spouse during cohabitation; and
3. any order, agreement or arrangement relating to support of either spouse.

Section 89 of the FRA refers to the obligation to support the other spouse based on:

1. the role of each spouse in their family;
2. an express or implied agreement between them that one has responsibility for the support of the other;
3. any custodial obligations if there is a child;
4. the economic circumstances of each spouse; and
5. the ability, capacity and reasonable efforts made by either spouse to become self-sufficient.

### 3. Issues Related to Spousal Support

#### a) *Employment and Income Assistance and Spousal Support*

As part of the Family Maintenance Program, spouses applying for Employment and Income Assistance will be required to sign a document allowing the ministry to take steps necessary to obtain spousal support on their behalf. The ministry will do this regardless of any understanding regarding support that may exist between the spouses.

#### b) *Taxes and Spousal Support*

Spousal support is treated by the recipient as taxable income. The spouse who pays support is entitled to deduct the amount from income tax. The spouse who receives support is required to declare it as income, in contrast to child support which has no income tax consequences. The spouse paying support may 'gross up' the amount of support to account for taxes, making this spouse responsible for paying income tax. It is essential that support payments be identified as such in court orders and separation agreements if the payor is to be able to claim a deduction. As a rule, oral or informal agreements are not sufficient to establish the status of payments as spousal support.

Other tax issues can arise if payments are made through a corporate account or if the payor has a lower tax burden than usual (i.e. aboriginal spouses or U.S. residents).

## E. *Child Maintenance*

### 1. General

Child support is intended to cover most of a child's day-to-day expenses. The minimum amount of child maintenance payable is determined by the Federal Child Support Guidelines, which set maintenance levels based on the payor's income and the number of children to be supported. Several web sites, including J.P. Boyd's helpful site, offer online child maintenance calculators (see **Section I.B: Resources on the Internet**, above).

The court may also provide for "special or extraordinary" expenses in a Child Support Order (see s. 7 of the Federal Child Support Guidelines), in addition to the basic child support order, requiring payment for other expenses such as child care, health related expenses (e.g. orthodontic treatment, hearing aids, prescription drugs, speech therapy, contact lenses and professional counselling), expenses for child care in order to maintain employment (see *Bially v. Bially* (1997), 28 R.F.L. (4<sup>th</sup>) 418 (Sask. Q.B.)), and expenses for extracurricular activities.

Expenses for extracurricular activities must be reasonable having regard to the parents' means, but need not be restricted to a special talent of the child. "Extraordinary" is also determined by what would be extraordinary in a household with a similar income; it depends on the lifestyle of the family.

### 2. Legislation

#### a) *Divorce Act [DA]*

An order for child maintenance made under the DA has effect throughout Canada (s. 14). Under s. 17(1) of the DA, any court of competent jurisdiction, as defined by s. 5, can vary, rescind, or suspend an order.

Children born within the marriage and adopted children are treated equally under the DA. However, some controversy remains as to whether a stepchild, for whom the respondent stood *in loco parentis*, qualifies for maintenance under the DA. Child support will be assessed in light of the biological parents' support obligation.

*b) Family Relations Act [FRA]*

Under the FRA, the obligation to support a child (s. 88) extends to a stepparent, and by the s. 1 definition of “parent”, this may include a person who cohabits with the parent of a child as a common law partner and contributes to the support and maintenance of the child for a period of not less than one year (including during the period of pregnancy).

Factors to be considered by the court in granting maintenance can be found in the guidelines that apply to the DA and the FRA. Liability for support by one parent does not alter the liability of the other parent, or that of subsequent persons who come to stand *in loco parentis*.

Section 93(5)(e) allows recovery for the prenatal care of the mother or child and for the birth of the child. Section 95(1) of the FRA gives the court jurisdiction to presume the paternity of a child where a man denies he is the father of a child.

The Federal Child Support Guidelines have now been incorporated into British Columbia's FRA. Therefore, if a parent seeks a child maintenance order they will fall under the same guidelines.

*c) Child Support Guidelines*

The Child Support Guidelines are federal regulations that determine the amount of child support owing, and vary from province to province. The guidelines establish how much child support must be paid based on the payor's income and the number of children for whom support is to be paid. For more information refer to s. 88 of the FRA or the resources listed at the end of the chapter.

**F. *Obligation to Support a Parent (Parental Support)***

Obligations to support a parent are set out in s. 90 of the Family Relations Act; here, “child” is defined as an adult child of a parent, and “parent” is defined as a father or mother dependent on a child by reason of age, illness, infirmity, or economic circumstances. The child is liable to support the parent, having regard to the other responsibilities, needs, and liabilities of that child.

**X. CUSTODY, GUARDIANSHIP AND ACCESS**

**A. *General***

Disputes over custody of minor children are often the most difficult issues to resolve during the breakdown of a marriage or other relationship. While custody of a child is never decided absolutely and irrevocably, the decision about who gets interim custody is particularly important because courts do not like to change custody arrangements unless it is necessary. Children usually stay with the parent who has provided primary care in the past and who can spend the most time with them. Sometimes, courts will order joint custody on an interim basis so that neither parent's position is prejudiced.

In all cases, the **best interests of the child are paramount** (DA, s. 16(8); FRA, s. 24).

In addition to custody, courts can also make decisions regarding guardianship of minor children. Guardianship gives a parent or other person “a full and active” role in determining the course of a child’s life and upbringing (see e.g. *Charlton v. Charlton*, [1980] B.C.J. No. 22). There is considerable overlap between the two, but it is useful to note that while having custody usually includes having guardianship, the reverse is often not true.

The case law on custody and guardianship has developed to the point where there is a presumption in favour of joint custody and joint guardianship (although there is no legislative presumption). A parent seeking sole custody will generally have to show that there is a serious defect in the other person’s parenting skills, that the other person is geographically distant, or that the parents are utterly unable to communicate without fighting before the court will consider granting such an application.

The **White Paper** proposes the following changes to the law surrounding guardianship:

- Replace the terms “custody” and “access” with “guardianship” and “parenting time”
- Define “guardianship” through a list of “parental responsibilities” that can be allocated to allow for more customized parenting arrangements
- Provide that parents retain responsibility for their children upon separation if they have lived together with the child after the child’s birth. (Note: this does not mean that the law presumes an automatic 50-50 split of parental responsibilities or parenting time.) If they have not, the parent with whom the child lives is the guardian
- Consolidate guardianship of the children into the new law by including testamentary and standby guardianship

The **White Paper** also suggests making the child’s best interests the *only* consideration in parenting disputes and identify children’s safety as an overarching objective of the best interests of the child test. They also plan on adding further best interests’ factors, including the history of the child’s care, family violence, and consideration of civil or criminal proceedings relevant to the safety or well-being of the child. Finally, they hope to provide for *consideration of a child’s view* “unless it would inappropriate” to encourage greater inclusion of the children’s view.

## B. *Legislation*

### 1. **Divorce Act**

The DA only speaks of access and custody. Under s. 16, the Supreme Court may make an order for custody. This order will supersede any existing FRA orders, which cover custody, access, and guardianship, and can be registered for enforcement with any other Superior Provincial Court in Canada. The Supreme Court can also grant interim custody before a divorce action is heard.

The DA applies only to married couples. Under the Act, the person making the application for custody must have been “habitually resident” in the province for at least one year prior.

### 2. **Family Relations Act**

Whereas the DA deals solely with custody and access, the FRA deals with both custody and guardianship. Under the FRA, DA orders for custody are presumed to include guardianship. “Any person” may apply for custody and guardianship of a child (s. 16). The Act requires only that the child is “habitually resident” in B.C. at the time of the application for the court to have jurisdiction to hear an application for custody or guardianship.

**NOTE:** The **White Paper** propose changes to guardianship under the FRA, as is mentioned in **Section X.A: Custody, Guardianship and Access.**

## **C. Courts**

### **1. Supreme Court**

The Supreme Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, pursuant to the DA, the FRA, and the Child, Family and Community Service Act. This includes orders restraining contact or entry to the matrimonial home.

The Supreme Court has *parens patriae* jurisdiction over all children in the province. In operation, this can allow the court to transcend the statutory letter of the law in the best interests of the child.

A written agreement about custody or guardianship may be given the force of a court order under ss. 121 and 122 of the FRA if it is filed in court.

An order made under the DA can be registered for enforcement in any other province's Supreme Court registry.

### **2. Provincial Court**

The Provincial Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, pursuant to the FRA, and the Child, Family and Community Service Act. This includes restraining orders but does not include orders restraining entry to the matrimonial home. A written agreement about custody or guardianship may be given the force of a court order under ss. 121 and 122 of the FRA if it is filed in court.

## **D. Custody**

In the absence of a court order or a written agreement, custody of a child remains with the person with whom the child usually resides. If two or more persons claim custody under this head, the person who usually has the day-to-day personal care of the child has legal custody rights under the FRA (ss. 34(2)(c) and (d)). One must bear in mind that the Act does not touch on day-to-day life until it is invoked, usually by filing a lawsuit or by making an application.

When application for a custody order is made, the court may impose any terms or conditions in a custody order it deems to be “in the best interests of the child” (FRA, s. 35). A person or persons who has custody rights under a court order may exercise those rights to the exclusion of all other persons (s. 34(2)(a)).

### **1. Factors in Awarding Custody**

The factors that the court must consider in determining the “best interests of the child” are set out in s. 24 of the FRA and at s. 16 of the DA. These factors include the child's health and emotional well-being, his or her education and training and the love, affection and similar ties that exist between the child and other persons such as relatives and family friends. If appropriate, the views of the child will be considered. For a custody order relating to a teenager to be practical, it must reasonably conform to the wishes of the child (*O'Connell v. McIndoe* (1998), 42 R.F.L. (4th) 77 (B.C.C.A.), *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363

(B.C.C.A.)).

Other factors have emerged through the common law, including a preference that siblings remain together and a willingness to look into the character, personality and moral fitness of each parent. However, there is no presumption against the separation of siblings (*P. (A.H.) v. P. (A.C.)*, 1999 BCCA 203). The welfare of the child is not determined solely on the basis of material advantages or physical comfort, but also considers psychological, spiritual, and emotional factors (*King v. Low*, (1985), 44 R.F.L. (2d) 113 (S.C.C.)). The court will take into account the personality, character, stability, and conduct of a parent, if appropriate (*Bell v. Kirk* (1986), 3 R.F.L. (3d) 377 (B.C.C.A.)).

Agreements between parties regarding custody do not oust the court's jurisdiction. An agreement is important, but only one of several factors to be taken into consideration when determining the best interests of the child. The degree of bonding between child and parent is also taken into consideration. The biological link does not outweigh other considerations, but when all other factors are equal, the custody of the child is best served with the biological parents (*L. (A.) v. K. (D.)*, 2000 BCCA 455; *H. (C.R.) v. H. (B.A.)*, 2005 BCCA 277).

Race and aboriginal heritage are relevant considerations, but neither is determinative of custody alone. The importance of race differs in adoption cases, where it may be given more weight because the court is making a decision about the child's exposure to his or her race or culture (*Van de Perre v. Edwards*, 2001 SCC 60). Aboriginal heritage is to be weighed along with other factors in a determination of a child's best interests (*H. (D.) v. M. (H.)*, [1997] B.C.J. No. 2144 (QL) (S.C.)).

Clients may wish to vary a custody order. The threshold for a variation of a custody or access order is a material change in the circumstances affecting the child. There is no legal presumption in favour of the custodial parent, although that parent's views are entitled to respect. The focus is on the best interests of the child, not the interests and rights of the parents (*Gordon v. Goertz*, 2001 BCSC 649).

Section 15 of the FRA allows the court to order an assessment by a psychologist of each party's parenting abilities and relationship with the child. These reports are particularly important where the dispute over custody is bitter and unlikely to settle. An assessment provides the court with an independent and neutral expert opinion. Where expert evidence would assist the court, the court can order a s. 15 report (*Gupta v. Gupta*, 2001 BCSC 649).

The FRA contains presumptions about custody and guardianship when one parent is absent (ss. 27 and 34). These sections of the Act allow for the lone parent to make decisions in a child's life absent a second parent.

## 2. Types of Custody Orders

### a) *Interim Orders*

An interim order is a temporary order made once the proceedings have commenced but before the final order is pronounced. Courts will usually make interim custody orders while an action in divorce is underway, with an eye to the child's immediate best interests. Courts tend to favour stability, so an interim order is likely to favour the party with custody at the time of the marriage breakdown. This is also why an interim order in your client's favour may be of substantial weight in determining a final custody order.

***b) Sole Custody***

Sole custody, in which one parent provides the primary residence and is mostly responsible for day-to-day care, can be granted in cases where the parents request such an arrangement, where they live far apart, or where relations between the parties are so poor as to preclude cooperation.

***c) Joint Custody***

In joint custody, both parents have custody of the child. While the child may reside primarily with one parent, the parents cooperate in raising the child, acting as both joint custodians and joint guardians of the child.

***d) Shared Custody***

Shared custody is a form of joint custody in which the child spends an almost equal time with each parent, often switching homes on a frequent basis, every few days or once a week. Usually, this requires that the parents live near one another and have good communications skills and that the child is able to adapt to living in two homes.

***e) Split Custody***

On rare occasions, courts will order siblings to live with separate parents. This is usually a drastic solution, ordered only after a FRA s. 15 report is submitted to the court.

**3. Other Custody Issues**

***a) Consent Orders***

Where there is agreement on the terms of maintenance or custody provisions, but no written agreement, a consent order may be made by the court (FRA, s. 10) if the written consent of the party against whom the order is to be enforced has been obtained. The order can extend only to the terms consented to.

***b) Enforcement of Custody Orders***

Where a custody order is in force, the court may make an order prohibiting interference with a child. The court may further order sureties and/or documents from the person against whom the order is made, and require that person to report to the court for a period of time (FRA, s. 38).

Also available are Police Officer Enforcement Clauses, in which a police officer is given the authority to enforce a custody order.

A child abducted and taken elsewhere within the province will be returned to the rightful custodian. Abduction is an offence under s. 128 of the FRA with a possibility of criminal proceedings (Criminal Code, R.S.C. 1985, c. C-46, ss. 280-281). The Criminal Code makes it an offence for a non-custodial parent to abduct a child. Where a custody order is in effect, abduction amounts to contempt of court.

### *c) Parental Mobility*

Issues of parental mobility may arise in conjunction with custody issues. That is, one parent may wish to relocate away from another parent with whom they share custody. In *Gordon v. Goertz*, [1996] 5 W.W.R. 457 (S.C.C.), the Supreme Court of Canada set out the basic principles. Once the parent applying for the change meets a threshold requirement of demonstrating a material change in the circumstances affecting the child, the court is required to begin a fresh inquiry into what is in the best interests of the child. Factors to be considered include: the desirability of maximizing contact between the child and both parents, the disruption to the child, and the child's views.

*One v. One*. 2000 BCSC 1584 identifies the following list of factors to be considered in determining whether a proposed move is in a child's best interests: i) the parenting capabilities of and the child's relationship with parents and their new partners; ii) employment, security and prospects of the parents and, where appropriate, their partners; iii) access to and support of extended family; iv) the difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed; v) the effect of the move on the child's academic situation; vi) the psychological and emotional well-being of the child; vii) the disruption of the child's existing social and community support and routine; viii) the desirability of the proposed new family unit for the child; ix) the relative parenting capabilities of either parent and the respective ability to discharge parenting responsibilities; x) the child's relationship with both parents; xi) the separation of siblings; xii) and the retraining or educational opportunities for the moving parent.

### *E. Access*

Unless a parent poses a risk to the safety or well-being of the child, he or she will usually be allowed access or visiting rights. Courts can make an order for access and may view a custodial parent who denies access as acting against the best interests of the child.

**NOTE:** It is important to note that access is a distinct and separate issue from child maintenance. **Denial of access is not grounds to withhold maintenance; nor is a failure to pay maintenance grounds for withholding access.**

#### **1. Factors Considered in Making an Access Order**

The overriding principle remains the **best interests of the child**. The courts will not be bound by the wishes of the child. The courts will look into several factors in making access orders. These include:

- The age of the child: older children will be allowed longer visits, but courts will also consider the wishes of children over 12 who may not wish to see the non-custodial parent;
- Distance between homes: if the distances are great, courts may order longer stays;
- Conduct of the non-custodial parent: access can be denied for reasons such as alcoholism, abuse, past attempts to abduct the child, or attempts to alienate the child from the custodial parent;
- Health of the non-custodial parent: if health problems limit the non-custodial parent's ability to care for the child, access may be limited;

## 2. Types of Access Orders

### a) *Interim Orders*

After making an interim custody order, a court will often grant access on an interim basis. Usually, such an order will favour the status quo, so as to minimize disruption for the child.

### b) *Specified and Unspecified Access*

Specified orders set out the times and places at which the non-custodial parent must have access to the child. Specified orders are generally preferred. Unspecified access is less common and is ordered when the parents are willing to accommodate one another.

### c) *Conditional Access*

Courts may impose requirements, such as not smoking or using drugs or alcohol in the presence of the child. If the parent fails to meet the condition, access may be denied.

### d) *Supervised Access*

Courts may order visits to be supervised by a designated third party if there are concerns about abuse, abduction, mental and physical handicaps or attempts to alienate the child from the custodial parent. It is up to the custodial parent to demonstrate that access should be supervised.

## F. *Guardianship*

Guardianship may be the most important aspect of any legal arrangements concerning the care and control of the children. Guardianship encompasses the whole bundle of rights and obligations involved in parenting a child, including making decisions about the child's school, moral instruction, religion, health care, dental care, extracurricular activities, etc.

When they are still together, parents are presumed to be joint guardians, playing a "full and active role" in the upbringing of the child (see e.g. *Charlton v. Charlton*). Upon marital breakdown, this can change either by agreement, by order of the court, or by the operation of s. 27 of the FRA, which defines the sole and joint guardianship of parents in various situations.

Parents can also appoint a guardian in a will. If the parents are both dead or have abandoned the child, the Public Guardian and Trustee becomes the child's guardian.

### 1. **Kinds of Guardianship**

#### a) *Sole Guardianship*

The parents or a court may decide that one parent should be the sole guardian. This effectively strips the other parent of any role he or she might have in raising the child. This is an extreme step, taken only when one parent has been shown to be either uninterested in or incapable of proper parenting.

***b) Joint Guardianship***

A court will order or the parents will agree to joint guardianship, setting out the party's duties to one another in some detail. The standard arrangement, set out below, is known as the Joyce Model, a set of rules frequently incorporated in court orders and separation agreements.

The parties are to share joint guardianship of the child, defined as follows:

- a) the parents are to be the joint guardians of the estate of the child;
- b) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the child;
- c) the parent who has the primary responsibility for the day-to-day care of the child will have the obligation to advise the other parent of any matters of a significant nature affecting the child;
- d) the parent who has primary care will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the child, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the child;
- e) the parent who does not have primary care will have the obligation to discuss the foregoing issues with the parent and each parent shall have the obligation to try to reach agreement on those major decisions;
- f) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the primary care parent shall have the right to make such decision;
- g) the other parent shall have the right to seek a review of any decision which that parent considers contrary to the best interest of the child; and
- h) each parent 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 care givers.

***G. Other issues***

**1. Child Abduction**

***a) Criminal Code***

Sections 280 to 285 of the Criminal Code deal with the offences of abduction. Section 282(1) provides that:

Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person in contravention to the custody provisions of a custody order in relation to that person made by a court anywhere in Canada with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence (maximum 10 years imprisonment)... or an offence punishable on summary conviction.

Section 283 creates a similar offence for circumstances in which there is no custody order.

**NOTE:** One should be especially careful when giving advice in custody disputes to avoid inadvertently giving advice that may lead to the commission of these offences.

If there is evidence that a parent may abduct a child, or if there is evidence that visits are very “disturbing and harmful”, access may be denied. See *Re Sharp* (1962), 36 D.L.R. (2d) 328 (B.C.C.A.).

## *b) Child Abduction Convention*

The Hague Convention on the Civil Aspects of International Child Abduction enables a person whose custody rights have been violated to apply to a “Central Authority” (each party to the convention must create such a body) for the voluntary return of the child, or to apply for a court order. Keep in mind that not every country is a signatory to the Hague Convention. Applications can be made either in the person’s jurisdiction or in the jurisdiction to which the child has been abducted.

Each Central Authority has several tasks:

- i) to discover the whereabouts of the child;
- ii) to take precautions to prevent harm to the child;
- iii) to encourage voluntary return of the child or some other agreeable arrangement;
- iv) to facilitate administrative processes; and
- v) to arrange for legal advice where necessary.

It appears that the Convention applies where the parents are formally separated and the child has been in the sole custody of one parent.

Finally, it should be noted that the Central Authority does not decide the merits of any custody order. It is merely an enforcement agency.

A federal coordinator of the Department of Justice deals with abductions to France, Switzerland, Portugal and Canada. The contact number is (613) 995-6426.

If the child has been taken to another jurisdiction, contact the Department of External Affairs, 125 Sussex Drive Ottawa, K1A 0G2. Attention: J.L.A. The contact number is (613) 995-8807.

A further resource in the case of abductions and violations of custody orders is the office of the Child Youth and Family Advocate, 600-595 Howe Street, Vancouver, B.C. The contact number is (604) 775-3203.

## **2. Child, Family and Community Service Act**

Under the Act, a Director or member of the municipal or provincial police forces can apprehend any child under the age of 19 years when the child is believed to be in need of protection or care. Section 6 lists conditions justifying temporary protective custody under this Act.

Within seven days after the child's removal, a Director must attend Supreme or Provincial Court for a presentation hearing. The Director must, if possible, inform the child, if 12 years of age or over, and each parent of the time, date, and place of the hearing. If the situation warrants it, a hearing may result in temporary (or permanent) custody of the child being given to the Director or some other agency (see **Chapter 5: Children and the Law**).

## **XI. ADOPTION**

### *A. Legislation*

#### **1. Adoption Act, R.S.B.C. 1996, c. 5**

The Adoption Act governs adoptions in B.C. The Act provides for the licensing of adoption agencies, which, in addition to the Director of Adoption, exclusively provides for the facilitation, matching, adoption planning, pre-placement assessment, placement services, and post-placement counselling and assessments for adoptions in B.C.

The Adoption Act enables any adult person to apply to adopt a child, or to adopt another adult person. Under ss. 5 and 29, one or two adults may apply to adopt a child. This allows unmarried couples, including same sex-couples, to apply to adopt.

For all purposes, an adopted child becomes the natural child of the adopting parent(s). The Adoption Act states that the rights are those of a child born in lawful wedlock to the adopting parent(s), and the existing parents of the adopted child cease to be the child's parents.

Two legal exceptions under the Act are:

- a) an adopted First Nations child does not lose status, rights, privileges, disabilities, and limitations acquired under the Indian Act and other Acts (s. 37(7)); and
- b) adoption adds a prohibited degree of consanguinity for the purpose of marriage or laws relating to incest (s. 37(4)).

The adopted person takes the given names specified in the adoption order, and the surname of the adopting parents, unless the court orders otherwise (s. 36).

An adoption effected under the law of some other jurisdiction is valid in B.C. as though it had been made under B.C.'s adoption legislation (s. 47).

Under the Adoption Act, s. 63(1), birth records may be disclosed to both birth parents and adult adoptees. The Reunion Registry facilitates reunions and disclosure of records. The Act provides for filing of non-disclosure vetoes and no-contact vetoes (ss. 65 and 66). Furthermore, openness agreements are recognized by statute (s.59) and may be entered into by the adoptive parents, the birth parents, and others with a relationship to the child, after consents to adoption have been signed.

### *B. Procedure*

#### **1. Consent**

Section 13 of the Adoption Act requires that no adoption order may be made without the written consent of:

- the child, if 12 years of age or over; children aged between 7 and 11 must be interviewed to ascertain whether they understand the meaning of adoption, and their views on the proposed name changes;
- the birth mother; to be valid, the child must be at least 10 days old at the date of the mother's written consent;
- the father; and
- any person appointed as the child's guardian; where a child is a permanent ward of the Superintendent of Family and Child Services, the Superintendent, as guardian, must consent.

The court may dispense with the need for consent from some of these parties. Parental consent may be dispensed with if it is in the best interest of the child or if the person has abandoned or deserted the child, cannot be found, is incapable of giving consent, has persistently neglected or refused to contribute to support he or she is liable for, or is a person whose consent ought, in all the circumstances of the case, to be dispensed with (s. 17). The consent of a child over 12 years of age can only be dispensed with if the child is not capable of giving an informed consent (s. 17(2)).

The consent shall be supported by affidavit of the person consenting and of the witness to the consent. Each affidavit must state that the effect of the consent and of adoption was fully explained to the person consenting, and that he or she signed the consent freely and voluntarily. The affidavit of the witness must support this. Preferably; the witness to the consent should be the lawyer or notary public who explains the effect of the consent and adoption.

No one, other than the child to be adopted, may revoke his or her consent without showing that it is in the child's best interests.

## 2. Notifying the Director of Adoption

The Director of Adoption is designated under the Family and Child Service Act, and appointed by the provincial government. A person wishing to apply to adopt must notify the Director of Adoption in writing of his or her intention (Adoption Act, s. 31) at least six months before filing the application unless:

- the child has been placed in a licensed adoption agency;
- the child is related to the applicant by blood; or
- the applicant is the child's stepparent.

The Director of Adoption then makes an inquiry and files a report with the court before the hearing date. Not less than 21 days before the date fixed for the hearing of the application or an application to dispense with consent, the applicant must give a copy of the application with a notice of the date of hearing to the Superintendent or licensed adoption agency.

The court may dispense with the times needed for the notices where the Superintendent's report shows good cause that the waiting period is not necessary to protect the interests of all parties (s. 6(9)).

Potential adoptive parents must notify either the Director of Adoption or the adoption agency as soon as possible before the child is received in their home, and then in writing within 14 days after the child is received. Prior notice is required to allow the adoption agency or the Director of Adoption to receive or provide information to and from the natural and adoptive

parents. Such information may include providing alternatives to the birth parents, doing a pre-placement assessment of the adoptive parents, counselling adoptive children if necessary, and ensuring that children over 12 have given an informed consent.

Under s. 33, a post-placement assessment must be made by either the Director of Adoption or the adoption agency, providing a recommendation on whether the adoption should be made or not, or whether insufficient information is available to make the determination.

### **3. Adoption by the Child's Blood Relatives or Stepparents**

The Director of Adoption does not need to be notified or make a report where an adult husband and his wife apply together to adopt a child of either of them, or where a blood relative of a child applies to adopt the child, unless the applicants conduct towards the child has shown a need for the making of an adoption order (s. 7(1)).

In the case of stepparent and blood relative adoptions, the application may not be made until the child has lived with, and been in the custody of, the applicant for at least six months prior to the application, except by order of the court. The court may still order a report from the Superintendent. Where a report from the Superintendent is not necessary, the material filed in support of the application should inform the Superintendent:

- whose care the child has been under since birth;
- in the event that the natural parents were married, consent of both parents or proper reasons for the omission of such consent;
- how long the applicants have been married;
- the ages and occupations of the applicants;
- whether or not either of the applicants have any other children living with them;
- that the applicants have the ability to bring up, maintain and educate the child; and
- any unusual circumstances relevant to the application.

### **4. Where all Parties Have Consented to Adoption**

If all of the necessary consents have been obtained, no notice need to be given and the application is made under Rule 17-1(24) of the B.C. Supreme Court Family Rules. The real application is thus the Requisition made to the registry and all other documents can be "the material on which the application is founded".

### **5. Where a Consent is Not Obtained**

Where a consent is not obtained, Rule 17-1(24)0-7(1) cannot be used and an application must be made to the court to dispense with consent.

Subject to circumstances where s. 42 of the Adoption Act apply, an application under section 11 of the *Adoption Act* dispensing with notice of a proposed adoption to a birth father and an application under section 17 of the Adoption Act dispensing with consent to an adoption, may be included in an application for an order for adoption under Supreme Court Family Rule 17-1(26). See Family Practice Direction 1: Adoption Applications (online at: [http://www.courts.gov.bc.ca/supreme\\_court/practice\\_and\\_procedure/family\\_practice\\_directions.aspx](http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx)).

Since it is preferred that the petition not contain requests to dispense with consents, the applicants should file, with the petition, a Notice of Motion and supporting affidavit under Rule 44 asking that such consent be dispensed with. Note that for the application for an order dispensing with consent to be granted there can be no person whose “interests may be affected” by the adoption order.

## 6. Revocation of Consent

Fraud, undue influence, or duress may invalidate consent. In the absence of such defect with the agreement, the court may only revoke consent if it is in the best interests of the child.

Consent may be revoked in writing before the child is placed (Adoption Act, s. 18). The birth mother may revoke within 30 days of the child’s birth regardless of the child’s placement. The child may revoke consent at any time before the order is made (s. 20). After the child has been placed, subject to the above, consent may be revoked only by court order and only if it would be in the best interests of the child. The application for revocation of consent must be made before the granting of the adoption order (s. 22).

## 7. Checklist for Filing an Adoption

The applicant should include:

- the petitioners’ affidavit;
- Petition to the Court (Form F73);
- front page;
- second page: facts when no Superintendent’s report required;
- second page: facts when Superintendent’s report is required;
- consent of parent to adoption;
- affidavit of witness to parent’s consent;
- affidavit of parent’s consent to adoption;
- requisition to have adoption heard in chambers;
- Notice of Hearing of petition (Form F75);
- sample Requisition re: Desk Order for Adoption; and
- sample Desk Order for Adoption (no hearing necessary); and/or order after hearing in chambers.

## XII. NAME CHANGES

### A. *Legislation: Name Act, R.S.B.C. 1996, c. 328*

The instructions for changing a surname are outlined in the Name Act. The procedures for changing a first name are much less formal and are not set out in legal rules (see **Section XII.C: Changing a First**

**Name**, below). The Department of Vital Statistics provides a name change package complete with forms and instructions. They can be reached in Vancouver at (604) 660-2937.

Note the court decision in *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 which declared ss. 3(1)(b) and 3(6)(b) of the British Columbia Vital Statistics Act unconstitutional. These sections prevented a father from having the registration of the child's surname altered, violating the father's rights under s. 15(1) of the Canadian Charter of Rights and Freedoms.

## **B. *Changing a Surname***

### **1. General**

Any person may apply to change his or her own name.

#### ***a) At the Time of Marriage***

A person may elect to:

- retain the surname he or she had immediately before marriage;
- use the surname he or she had at birth; or
- use the surname of his or her spouse by marriage.

#### ***b) A Parent with Custody of an Unmarried Child***

A parent with custody may change the surname of their child. He or she must submit written consent of:

- the child if the child has attained the age of 12 years;
- the other parent, if living; and
- the applicant's spouse if the application is to change the child's surname to that of the applicant's spouse.

A parent with custody of an unmarried child may allow that child to informally use any surname he or she wants, and that child may be registered in grade one under that name. No consent from the other parent is necessary in this case. A parent may apply to change a minor child's name legally. It is also possible to apply for a change of name if the other parent:

- a) isn't paying maintenance for the child;
- b) hasn't exercised access of the child for over one year; **and**
- c) the whereabouts of the other parent are unknown.

#### ***c) A Widowed Person***

A widowed person may apply to change their surname. The applicant must submit a death certificate, or if the death occurred in British Columbia they may state date and place of death and name of spouse.

*d) A Divorced Person*

A divorced person may, upon divorce, go by the name listed on his or her birth certificate.

**2. Eligibility**

To be eligible to change his or her name under the Name Act, a person must be:

- a) an adult; or
- b) if a minor, must be a parent having custody of his or her children;

**and:**

- a) must have lived in B.C. for at least three months; **or**
- b) must have resided in the province for at least three months immediately prior to the date of application (s. 3).

**3. Procedure**

**NOTE:** A change of name application can be included in the Notice of Family Claim and attached Schedule 5: Other Orders filed in divorce proceedings to avoid the procedure described below.

*a) When the Applicant Has Already Assumed the Name*

Sometimes the name to be legally adopted is one that has already been informally assumed. The assumed name should be indicated when preparing the application form. For example: "...change my name from John Doe, known as Henry Smith, to Henry Smith".

*b) Publishing Notices of Intention*

A person who wishes to legally change his or her name is no longer required to publish a notice of intention.

*c) Making the Application*

When making application for a change in his or her surname or given name, or both the surname and given name, the applicant must insert his or her name in full in the notice of application for a change of name.

Application for a legal change of name must be accompanied by:

- i) the birth certificate, landed immigrant identification card or Canadian citizenship certificate of the applicant, and others included in the application;
- ii) a marriage certificate where the change affects the name of a married man or woman (not required for persons married in British Columbia);
- iii) any required consents, as above;

- iv) proof of custody from applicants who have been divorced, respecting any children included in the application who were born prior to the divorce;
- v) the statutory fee of \$137, and \$27 for each additional individual; and
- vi) proof of death from widowed applicants respecting any children included in the application.

**NOTE:** Information can be obtained from the Division of Vital Statistics (Vancouver telephone: (604) 660-2937; website: <http://www.vs.gov.bc.ca/>) regarding other related procedures such as a bride's election of surname at marriage, and changes of name resulting from adoption, legitimisation of birth, dissolution of marriage, or due to improper registration of the birth originally.

### C. *Changing a First Name*

#### 1. **Eligibility**

Anyone may change his or her first name. However, minors should be advised that they must obtain the written consent of their parents to do so.

#### 2. **Procedure**

The client does not need to go through the application procedures necessary for changing a surname. The client can start using another first name at any time.

All identification – including credit cards, driver's license, social insurance card, school records (where applicable), health care cards, bank accounts, and birth certificates – should be changed to the first name being used. This can be done by contacting the relevant organizations and filling out a Change of Name Form.

Usually, the client's former first name will become a middle name instead.

## XIII. COURT PROCEDURES

### A. *Supreme Court*

The Supreme Court is the only court that hears actions under the DA. Under the FRA, the Supreme Court has both statutory and inherent jurisdiction to decide all maintenance, division of property, custody, and access matters. Therefore, all FRA issues can be incorporated into a divorce action.

All Supreme Court procedures in family law proceedings are governed by the Supreme Court Family Rules effective July 1, 2010. (The Supreme Court Family Rules replace the former Rules of Court in respect of family law matters). Unless a client is familiar with these rules and able to strictly adhere to the formal procedures, this person should appear in Supreme Court with representation.

Actions are started when a claimant files a Notice of Family Claim or a Petition to Court. Matters may be decided through interlocutory applications or by trial. Interlocutory applications are hearings held in chambers. No witnesses are called. Instead, all evidence is taken from sworn affidavits. If the judge or master is satisfied with the credibility and substance of the evidence presented, then an interim order can be granted. A final order may be obtained at trial or by way of a summary trial on affidavit evidence if there are no serious issues of credibility.

## B. *Small Claims Court*

Clients can enforce agreements concerning the division of assets between persons in a common law relationship and between those in other relationships in Small Claims Court. See **Chapter 22: Small Claims Procedure** for more details. Also, one may be able to make a trust claim in Small Claims Court.

## C. *Provincial (Family) Court*

### 1. **Jurisdiction**

Provincial (Family) Court has jurisdiction under the FRA over matters of custody, access, maintenance and guardianship, subject to the jurisdiction of the superior courts and the federal government. Provincial (Family) Court has jurisdiction over the enforcement of maintenance orders whether made in Supreme Court or Provincial (Family) Court (*Butler v. Butler* (1981), 27 B.C.L.R. 268 (B.C.C.A.)) and has original jurisdiction to make maintenance orders and to vary or rescind its own orders. Provincial (Family) Court can also make, vary, rescind, or enforce its own custody/access orders, but does not have the power to make orders regarding occupancy of the family home (*Polglase v. Polglase* (1982), 1 S.C.R. 62). Where the Supreme Court has made an order respecting custody, access, maintenance, or child support, Provincial (Family) Court will be unable to vary that order, although the court can enforce the order.

The Provincial Court offers free counselling and mediation services to family members considering separation or divorce. The Family Justice Counsellors (who may also be probation officers) will try to help the parties reach agreement on contentious matters.

### 2. **Contacting Provincial (Family) Court**

Clients should phone Provincial Court (and ask for the Family Court Division) in advance to arrange an interview. An Intake Officer will speak with the client, and if the problem is something the Provincial Court deals with, the client will be assigned to a Counsellor and an appointment will be arranged.

For a list of Family Courts in the Lower Mainland, see **Chapter 23: Referrals**.

### 3. **Family Justice Counsellors**

**One should understand that Family Justice Counsellors are not lawyers and do not necessarily know what the client's rights and obligations are. Clients should seek legal advice before signing any agreement.**

The Family Justice Counselling Service helps people seeking remedies for their family problems through the court or through counselling and mediation services. The aim of the counsellors is not reconciliation. Where a couple indicates a willingness to restore the marriage, they will be referred to a marriage counsellor. There are also clerks who help clients understand and implement child support guidelines.

Counselling is non-adversarial. The counsellors are impartial third parties who will assist both spouses in coming to an out-of-court settlement, although the counsellors are not of a uniform quality and expertise. After gathering minimal information, the Counsellor will normally send a letter to the other spouse to advise him or her of the situation and try to set up a meeting with the first spouse and the counsellor. All information received from a spouse is private and confidential and will not be given out except with the express permission of that person, or as required by law.

Counsellors attempt to avoid court disputes by obtaining a Consent Order. If this is not

possible, pertinent details regarding custody and maintenance will be obtained, and forms will be prepared for court.

The counsellors will:

- provide information regarding the court processes, available options, and current legislation;
- offer conciliation and mediation services;
- investigate the matters under dispute;
- help with court applications and general preparation for court; and
- screen for family violence situations and direct parties to the appropriate services.

The client can choose to avoid the counselling service and appear in court directly. The counsellor to whom the client has been assigned will still offer assistance with the application forms, etc. The Family Justice Counsellors can be reached at (604) 660-6828 (Vancouver) or (604) 660-8636 (Burnaby).

Family Justice Counsellors deal exclusively with issues of children and support. In limited circumstances, and for clients with assets or debt less than \$25,000, a Family Justice Counsellor can mediate an agreement.

#### **4. Provincial (Family) Court Proceedings**

##### ***a) Application to Obtain an Order***

Most proceedings in Provincial Court are commenced by filing an Application to Obtain an Order (Form 1). The application commences an action in Provincial Court, and requests a specific remedy. The application can be filed at either the court registry or in a family justice registry. For procedure see [Provincial Court \(Family\) Rules](#).

The application must be filed with the registry, and must be personally served on the respondent by someone other than the applicant unless the judge orders otherwise. The following documents must be served with the filed copy of the application when it is served on the respondent:

- a blank reply form (Form 3);
- a blank financial statement form (Form 4), if the applicant is seeking an order for child, spousal or parental maintenance or a variation of child, spousal or parental maintenance; and
- a filed copy of the applicant's financial statement and applicable documentation under Rule 4 (2), if applicable.

##### ***b) Reply***

The respondent must file a reply within 30 days of being served with a copy of the application, or a default judgment may be sought in favour of the applicant. If the respondent disagrees with the remedy sought, he or she should be advised to obtain legal counsel to dispute the applicant's claim.

The respondent must:

- complete a reply in Form 3, following the instructions on the form;
- file that reply, together with three copies of it, in the registry where the application was filed; and
- if applicable, file the original and three copies of the respondent's financial statement and applicable documentation referred to in Rule 4 (2)(b).

In the reply, the respondent may:

- consent to one or more of the orders in the application;
- disagree with anything claimed in the application, stating the reasons for the disagreement;
- apply to the court for child access, spousal maintenance, or a restraining order prohibiting interference under the Family Relations Act; and/or
- apply to the court for an order to change existing orders or agreements.

**c) *Family Justice Registries***

Family Justice Registries are designated by Rule 1 of the Provincial Court (Family) Rules. Under the definitions in the Rules, "family justice registry" means the Vancouver (Robson Square), Surrey, Kelowna or Nanaimo registry. Under Rule 5, at these registries, the parties will be obliged to comply with additional requirements before the application is heard (unless the parties fall into the exception outlined in Rule 5(2)). Both parties will meet with a Family Justice Counsellor. If a settlement cannot be reached with the assistance of the counsellors, the matter will be referred to court.

For more information, see the website: <http://www.ag.gov.bc.ca/family-justice/help/counsellors/index.htm>.

**d) *Parenting After Separation Program***

Pursuant to Rule 21 of the Provincial Court (Family) Rules, parties who file at a "designated registry" must also attend a Parenting After Separation Program if there is a dispute over issues respecting children. These include the following registries: Abbotsford, Chilliwack, Kamloops, Kelowna, Nanaimo, New Westminster, North Vancouver, Port Coquitlam, Prince George, Richmond, Surrey, Vancouver (Robson Square) and Victoria.

The program is a free three-hour session and open to all parents and others (for example, grandparents) where custody, guardianship, access, and support issues are involved. For more information, see the web site: <http://www.ag.gov.bc.ca/family-justice/help/pas/index.htm>.

**e) *First Appearance***

If the application is filed with the court registry, the clerk must serve the parties with notice of the time and place they are to attend court for a first appearance to fix a date for the hearing of the application. Note that this notice is titled "Trial Notice" although the matter is set for a fix-date hearing.

*f) Pre-Trial Conferences*

The parties may be ordered to hold a pre-trial conference during which the judge may rule on any issues not requiring evidence, make an order, discuss the procedure that will be followed at trial, order that certain evidence be produced, or make arrangements for disclosure of one party's evidence to the other.

*g) Family Case Conference*

A judge may order a family case conference, or one may be requested. The conference is informal and off the record. The meeting is between the relevant parties and a judge and is intended to reach a settlement. Note that the judge has the authority to make orders whether or not the parties agree to the order. Rule 7 of the Provincial Court (Family) Rules governs Family Case Conferences.

*b) Witnesses*

Witnesses are summoned to the court by subpoena. However, a subpoena is not necessary if the witness is prepared to appear in court voluntarily. If a subpoenaed witness does not appear in court, a warrant may be issued for his or her arrest. To require the attendance of a witness, a party must complete a subpoena in Form 15, and serve a copy of the subpoena on the witness personally at least seven days before the date the witness is required to appear.

In Provincial (Family) Court, the person who subpoenas the witness is responsible for that witness' reasonable estimated travel expenses.

*i) Affidavit Evidence*

At trial, evidence may be given orally or by sworn affidavit. Evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge (Rule 13), either on application brought by notice of motion under Rule 12 or under Rule 8(4)(g). This evidence must be in Form 17.

*j) Notices of Motion*

Three copies of a notice of motion (Rule 12) must be filed in the court registry and one copy must be served on the other parties at least seven days before the date for hearing the notice of motion in court when a party wishes:

- an interim order to be made (FRA, s. 9);
- to file documents in another registry;
- to have a pre-trial conference;
- to cancel a subpoena;
- an order to produce documents;
- an order requiring that paternity tests be taken;
- to use another method of service (no notice required);
- to settle the terms of an order;

- to extend a time limit;
- to change or cancel an *ex parte* order;
- to have a file transferred;
- to have disclosure; or
- to obtain directions on procedures not in the Provincial (Family) Court Rules.

***k) Trial***

Provincial (Family) Court trial is an adversarial proceeding. Clients are there to give the judge enough facts so that he or she can make a decision about the application. However, the judge often gets involved in the presentation of evidence, especially where one party is not represented by counsel.

***l) Procedure for Enforcement of Custody Orders***

An Application Form (Form 21) and copy of the custody order must be filed in the registry.

***m) Procedure for Enforcement of Maintenance Orders***

The most effective and simplest method of enforcing Maintenance Orders is to register with the Family Maintenance Enforcement Program. For more information call or write the Enrolment Office, Box 5789, Victoria, B.C., V8R 6S8; telephone: (250) 356-8889, toll-free: 1-800-663-7616.

***n) Orders***

Orders come into effect on the day that they are made, unless the judge orders otherwise. If the party in whose favour the order is made is unrepresented, a clerk must prepare the order. Otherwise the favoured party's lawyer will prepare the order.

If there is a dispute about the terms of an order, a party may apply to a judge to have the dispute settled. Once an order is signed and approved, it must be given to the court registry to be signed by the judge and filed with the court. Otherwise, the order is not enforceable. At any time, a judge may correct a clerical error in an order.

***o) Compliance with Provincial Court (Family) Rules***

If any of the Provincial Court (Family) Rules (British Columbia) are not complied with, the judge may disregard the incorrect procedure or order, order the hearing or trial to continue as if the respondent were absent, or give any direction he or she thinks is fair.

## **APPENDIX A: GLOSSARY**

### **ANNULMENT**

A judicial pronouncement declaring a marriage invalid. Although it is commonly thought that an annulment has the same effect as if the marriage never took place, it is still possible to divide property under Part 5 of the Family Relations Act.

### **APPLICANT/CLAIMANT**

Person seeking a court order. In Provincial Court, the parties are called the applicant and the respondent, but they are claimant and the respondent under the Family Relations Act and the Divorce Act.

### **CHILD**

Under the Divorce Act: a “child of the marriage’ is a child of two spouses or former spouses who... is under the age of majority and who has not withdrawn from their charge, or 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 necessities of life”.

Under the Family Relations Act: “a person under the age of 19 years” (FRA, s. 1(1)). However, for the purposes of child maintenance “includes a person who is 19 years of age or older and, in relation to the parents of the person, is unable because of illness, disability, or other cause, to withdraw from their charge or to obtain the necessities of life” (Family Relations Act, s. 87).

Under the Adoption Act: “an unmarried person under the age of 19 years”.

### **CUSTODY**

Caring for a child on a day-to-day basis. Custody can be either sole or joint.

### **DECLARATORY JUDGMENT**

A judgment given by the court in the form of a declaration, such as a s. 57 (Family Relations Act) declaration that there is no possibility of reconciliation.

### **DEPENDANT**

Anyone who relies on another to support him or her.

### **SERVICE EX JURIS**

When the person to be served is outside the province.

### **FILING**

As in filing pleadings, affidavits, property and financial statements, etc. in court. A document is filed at the court registry and forms part of the court record.

### **GUARDIANSHIP**

Involves the right to be consulted on matters relating to the child’s upbringing, such as religion, education, extracurricular activities, social environment, etc. Please note that the definition of guardianship varies between the Family Relations Act and the Divorce Act.

### **INTERIM ORDER**

An order that is granted prior to the making of a final order. The order is good until a further order of the court or agreement between the parties is made. The final order will not automatically be the same as the interim order. An interim order to determine custody and asset management while the matter is still in dispute is common in many divorce proceedings.

### **INTERIM EX PARTE ORDER**

A temporary order made when one party is not present by reason of lack of notice. This order is usually only

granted in an emergency, such as the kidnapping of a child.

### **JUDICIAL SEPARATION**

A decree by the courts that does not affect the couple's marital status, it simply acknowledges the union's disintegration. More expensive than a divorce and hardly ever used.

### ***IN LOCO PARENTIS***

Where someone who is not the biological parent of a child steps in and takes over all the duties and responsibilities of a parent for that child. This commonly includes stepparents.

### **PETITIONER/CLAIMANT**

The person who presents a petition to start an action in a court or legislature. There is no longer any such thing as a divorce petition, a Writ of Summons or Statement of Claim. Now there is a specialized Notice of Family Claim and, in particular cases such as adoptions, a Petition to Court.

### **RESPONDENT**

Person against whom a court order is sought. In Provincial Court, the parties are called the applicant and the respondent, but they are called the claimant and the respondent under the Supreme Court Family Rules and the Divorce Act.

### **SERVICE**

The act of delivering a document such as a Notice of Family Claim to a person is known as personal service. There is a distinction between personal service and ordinary service in the Supreme Court Family Rules; see Part 6 for details. In the Provincial Court (Family) Rules, see Rule 3.

### **SPOUSE**

The definition of spouse is changing under pressure from recent court rulings. It is wise to check the legislation for any recent changes.

Divorce Act: "either of a man or woman who are married to each other".

Supreme Court Family Rules: either a legally married spouse or "a man or woman not married to each other, who lived together as husband and wife for a period of not less than two years" and who made an application under the Act within one year of separation. Same-sex partners are now viewed as common law spouses provided the marriage-like relationship lasts for at least two years and the application for relief is commenced within one year of separation. The definition of "stepparent" includes a same-sex partner who also qualifies as a same-sex spouse (see s. 1 of the Family Relations Act regarding the definition of spouse).

Estate Administration Act: under s. 85, parties must have cohabited for two years AND the claiming spouse must have been maintained AND the two years must run immediately preceding the death of a person who is united to another person by a marriage that, while not legal, is valid at common law.

Wills Variation Act: the definition includes:

- 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) a person who has lived and cohabited with another person, for a period of at least two years immediately before the other person's death, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

### **SUBSTITUTED SERVICE**

When an applicant, for a good reason, cannot serve the respondent personally because that person cannot be found, the court may make an order providing for service in some other way (i.e. by letter, advertisement, or service on a relative).

**NOTICE OF FAMILY CLAIM**

Documents that must be filed to commence most formal proceedings in the Supreme Court, for divorce and corollary relief.