# CHAPTER THREE: FAMILY LAW

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# CHAPTER THREE: FAMILY LAW

## I. INTRODUCTION

### Note on the Family Law Act and this Manual

On March 18, 2013, British Columbia's *Family Law Act* [*FLA*] came into force. The *FLA* is the culmination of many years of research and policy development, and has transformed British Columbia family law dramatically.

The current Manual chapter deals primarily with the *FLA* rather than the previous *Family Relations Act* [*FRA*]. If you are starting a legal challenge in family law now or in the future, the *FLA* will apply to your case. However, if you made a claim for property division before the *FLA* came into force (March 18, 2013), then those claims will be decided under the *FRA*; all of your other claims (such as for parenting arrangements, child support, spousal support) will be dealt with under the *FLA*, or the *Divorce Act* (*DA*), if it applies.

If your case still involves the *FRA*, we encourage you to look at an older version of this Manual, as we will not deal with the *FRA* in this version.

## II. GOVERNING LEGISLATION AND RESOURCES

### Resources in Print

1. Continuing Legal Education Society of British Columbia, *Family Law Sourcebook for British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia, 2015).

   - 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 2011 - 2012* [regular updates]. (Vancouver: Continuing Legal Education Society of British Columbia, 2008).

   - This is an essential resource for many family law lawyers, and is updated each year.

3. Continuing Legal Education Society of British Columbia, *British Columbia Family Practice Manual*, 5th ed. [regular updates] (Vancouver: Continuing Legal Education Society of British Columbia, 2011).

   - Loose leaf manual providing 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, 2013).

   - 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).

   - This loose leaf guide contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

6. The Honourable Madam Justice Carol Huddart and Trudi L Brown, QC, *British Columbia Family Law Practice, 2015 Edition + E-Book* (Markham: Lexis Nexis Butterworths, 1984-2008).

   - This loose leaf guide 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.

## Resources on the Internet

1. **Ministry of Justice – Family Law Legislation**

    Website: www.ag.gov.bc.ca/legislation/family-law

    Resources that are particularly relevant include:

    - Table of Concordance (http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained) – allows for quick cross-referencing from the *FRA* sections to the *FLA* sections.

    - Family Law Act Explained (http://www2.gov.bc.ca/gov/content/justice/about-bcs-justicesystem/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained) – an excellent primer on the major changes behind the *FLA*, breaking down the purpose of each new section individually.

    - Questions and Answers (http://www2.gov.bc.ca/gov/content/justice/about-bcs-justicesystem/legislation-policy/legislation-updates/family-law-act/family-law-act-questions-and-answers) – perhaps the best and most concise introduction to the changes that can be found on this website.

2. **BC Supreme Court Services**

    Website: 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 290 – 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.

3. **J.P. Boyd's BC Family Law Web Resource**

    Website: http://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law.

    - This is an excellent site for those unfamiliar with family law rights and procedures, written in plain English. It is a good place to begin for those who have not had the benefit of a family law course.

    - The Family Law Resource is one of the leading resources in BC, particularly for the *Family Law*

    *Act*.

    - There is a link to forms for both matters in the Provincial Court and Supreme Court.

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

Website: www.fmep.gov.bc.ca

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

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

Website: 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* is very useful: http://www.lss.bc.ca/publications/pub.php?pub=347

  This publication is available in English, French, Simplified and Traditional Chinese, Punjabi, and Spanish.

6. **British Columbia Vital Statistics Agency**

Website: http://www2.gov.bc.ca/gov/content/life-events

- 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. Marriage certificates can also be ordered online.

7. **Ministry of Attorney General**

Website: http://www2.gov.bc.ca/gov/content/life-events/divorce/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**

About Spousal Support/Spousal Support Advisory Guidelines:

http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html

About Child Support/Federal Child Support Guidelines, P.C. 1997-469:

http://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/sbs-eng.pdf

9. **Support Calculator**

Website: http://www.mysupportcalculator.ca/

- People can use this website to calculate how much child support and spousal support they have to pay under the guidelines.

10. **British Columbia Supreme Court**

Website: www.courts.gov.bc.ca/supreme_court

- Procedural guidelines for divorce proceedings can be found on this website.

11. **Divorce Registry of Canada**

Website: http://www.justice.gc.ca/eng/fl-df/divorce/crdp-bead.html

Telephone: (613) 957-4519

- The registry is relevant as you need to fill in and print out a form and file it with the Court when you are seeking a divorce. This is required so that the Divorce Registry can confirm that you have not already been divorced.

12. **MOSAIC**

Website: 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.

13. **Interjurisdictional Support Orders**

Web site: 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*, SBC 2002, Chapter 29.

14. **Children and Travel**

Website: http://travel.gc.ca/travelling/publications/travelling-with-children

15. **Ministry of Justice Dispute Resolution Office**

Website: http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/dispute resolution-office

Telephone: (250) 387-1480

- Develops and implements dispute resolution services and justice transformation projects with administrative tribunals, courts, government ministries and agencies and external organizations.

16. **Collaborative Divorce**

Website: https://www.collaborativepractice.com/

Website: www.collaborativedivorcebc.org (Vancouver)

Website: http://nocourt.net/ (Lower Mainland)

Website: www.bccollaborativerostersociety.com

- 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.

17. **Clicklaw**

Website: 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).

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

Website: 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.

19. **BC Hear the Child Society** Website:

http://www.hearthechild.ca

- This society provides a provincial roster of qualified child interviewers who work in the legal and mental health fields.

## 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 support as well as child support issues. Family justice counsellors provide dispute resolution services, and make referrals to legal aid, other legal services, and community resources for families facing separation.

**Note: The Family Justice Centres are not legal resources.**

| Location | Telephone | Fax |
|---|---|---|
| Vancouver – Commercial Drive | (604) 660-6828 | (604) 775-0679 |
| Vancouver – Robson Square | (604) 660-2084 | (604) 660-4177 |
| Victoria | (250) 356-7012 | (250) 356-6093 |
| Nanaimo | (250) 741-5447 | * |
| Abbotsford | (604) 851-7055 | (604) 851-7056 |
| Chilliwack | (1-888) 288-8249 | (604) 795-8258 |
| Langley | (604) 501-3100 | (604) 532-3626 |
| Surrey | (604) 501-3100 | (604) 501-3112 |
| Maple Ridge | (604) 927-2217 | (604) 466-7343 |
| Port Coquitlam | (604) 927-2217 | (604) 927-2220 |
| New Westminster | (604) 660-8636 | (604) 660-2414 |
| North Vancouver | (604) 981-0084 | (604) 981-0035 |
| Richmond | (604) 660-3511 | (604) 660-3640 |

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**

   Administration: (604) 660-2847

   Family Law Registry: (604) 660-2486

   Courthouse Library: (604) 660-2841

5. **Supreme Court New Westminster Registry**

   Civil Registry: (604) 660-8522

   Criminal Registry: (604) 660-8521

   Divorce: (604) 775-0671

   Courthouse Library: (604) 660-8577

   Family Law Duty Counsel: (604) 775-0628

## Relevant Legislation

### 1. Divorce Act, RSC 1985, c 3 [DA]

This is the federal legislation that provides for both divorce law and the determination of corollary relief (support, custody, and access). Support orders under the Act have effect throughout Canada. All actions under the *Divorce Act* are generally heard in BC Supreme Court. However, if the Attorney General has designated a Provincial Court registry as a Supreme Court Registry under s 4 of the *Provincial Court Act*, then that Provincial Court may decide interlocutory applications made under the *Divorce Act*.

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

### 2. Child, Family and Community Service Act, RSBC 1996, c 46 [CFCSA]

This Act provides for official apprehension of children (under 19 in BC) who are believed to be in need of protection or care. A hearing must be held before a judge within seven days. The hearing does not lead to any temporary or permanent custody orders, except by consent. Separate hearings are held for temporarily custodial orders and continuing custodial orders.

The enforcement of **child support and spousal support** orders is administered by the Family Maintenance Enforcement Program.

### 3. Family Relations Act, RSBC 1996, c 128 [FRA]

The *FRA* has been replaced by the *FLA* and is no longer in force except for actions that commenced before the *FLA* was in effect, and only in respect of property and pension division.

### 4. Family Law Act, SBC 2011, c 25 [FLA]

The *FLA* came into force on March 18, 2013, and replaced the *Family Relations Act*. The *FLA* places the safety and best interests of the child first when families are going through separation and divorce. It also clarifies parental responsibilities and the division of assets if relationships break down, addresses family violence and encourages families to resolve their disputes out of Court.

Some of the main changes in the *FLA* include:

- Shifting focus to the safety and best interests of the child
- Moving from custody to guardianship and parenting arrangements
- Clarifying the law on family violence and its impact on family Court decisions

- Defining the responsibilities of guardians
- Expanding the toolbox to enforce family Court orders

Since March 18, 2013, the *FRA* no longer applies except only in dealing with the division of assets for proceedings which were filed before the *FLA* came into force. This includes cases that were commenced while the *FRA* was the relevant statute. Essentially, this means that child-related issues are determined by the *FLA*, while property division issues that commenced under the *FRA* will continue to be governed by the *FRA* unless the parties agree to transition their legal matter to be governed under the *FLA*. Sections 250-255 of the *FLA* allow parties to transition legal matters concerning care of and time with children, property division, pension benefits, and restraining orders from the *FRA* to the *FLA*. Property division for cases that were started after March 18, 2013 will be governed by the *FLA*, including actions commenced by common law spouses before the *FLA* came into force, if the pleadings are amended to include division of property and debt under the *FLA*.

### 5. Family Homes on Reserves and Matrimonial Interests or Rights Act, (SC 2013, c 20) [FHRMIRA]

FHRMIRA came into force in 2013 and governs family law cases involving property located on Indian Reserves. FHRMIRA also incorporates the local laws of the First Nation where the Reserve is located.

Matters regarding the division of matrimonial interests or rights in property on Reserve may become complicated as some orders require consultation with the Band Council and with other Band Members, other than the spouses, who have an interest or right in the home. It is important to consult FHRMIRA as well as the Band's legislation and investigate all of the potential interests in the matrimonial home when dealing with these matters.

### 6. British Columbia Supreme Court Family Rules, BC Reg. 169/2009

Website: http://canlii.ca/t/8mcr

These are the procedural rules that govern family law cases brought in the Supreme Court. Refer to these rules for the specific procedural requirements when making family law applications.

### 7. British Columbia Provincial (Family) Court Rules, BC Reg. 417/98

Websites: http://canlii.ca/t/85pb

These are the procedural rules that govern family law cases brought in the Provincial Court.

## Referrals

### I. 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 (http://www.bc211.ca) 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.

### II. The Legal Problem

Care should be taken in making referrals. Someone has referred this person to you 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.

# III. MARRIAGE

## 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.

## 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, the marriage may be voidable, meaning the marriage is valid until an order is made by the 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] SCR 698, [2004], SCJ 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*, SC 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.

Both spouses must be over the age of majority (19 in BC; see the *Age of Majority Act*, RSBC 1996, c7). In BC, 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*, RSBC 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).

### d) 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.

### e) Residency

The *Civil Marriage Act*, SC 2005, c 33 was passed in 2014. With this new act, marriages performed in Canada between non-Canadian residents will be valid in Canada, regardless of the law in either spouse's country of residence. Additionally, Canadian courts will be able to grant divorces to non-resident spouses who were married in Canada, and who are unable to get divorced in their own state because that state does not recognize the validity of the marriage.

### f) 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.

### g) 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, the marriage may not be void for lack of intent alone, and courts may find the marriage valid and binding when the parties consented to the union (for example, see *Grewal v Kaur*, 2009 Carswell Ont 7511, 84 Imm LR (3d) 227 (Ont SCJ). Sham marriages are uncommon.

### h) Customary Marriage

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

## Common Law Relationships

### i) General

Common law spouses have certain rights/obligations conferred on them 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 in a "marriage-like relationship" to qualify as common law and for most provincial legislation it takes two years to qualify (See *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623 for a summary of the indicators to be considered when determining whether parties have lived in a "marriage-like relationship"; see *Matteucci v Greenberg*, 2014 BCSC 1434; *Trudeau v Panter*, 2013 BCSC 706 that merely living together does not mean a relationship is marriagelike).

Under the *FLA*, a person will be considered a 'spouse' if they have lived in a marriage-like relationship and have a child together (for spousal support only), or if they have lived in a marriage-like relationship for a continuous period of 2 years (see *CAM. v MDQ*, 2014 BCPC 110 regarding the child exception to living together for two years). This period begins when the couple began to live together in a marriagelike relationship. Someone separating within two years of *FLA* coming into force is a spouse (*Meservy v Field*, 2013 BCSC 2378).

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 and obligations 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.

### j) Estate Considerations

#### 1. Wills, Estates and Succession Act (which came into force March 31, 2014)

Two persons of either gender are considered spouses under this act if they are either married to each other, or if they have lived in a marriage-like relationship for at least 2 years (s 2(1)(b)). They cease to be considered spouses if one or both partners terminates the relationship (s 2(2)(b)).

If two or more persons are entitled to a spousal share of an intestate estate (estate for which the deceased has not left a will), they may agree on how to portion the share. If they cannot agree, a court will determine how to portion the spousal share between them.

If two or more persons are eligible to apply to be given priority as a spouse in the division of an intestate estate, they may agree on who is to apply. If they cannot agree, the Court can make a decision.

#### 2. Canada Pension Plan Act, RSC 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.

### 3. Workers' Compensation Act, RSBC 1996, c 492

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

### 4. Employment and Assistance Act, SBC 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 singlefamily units where there are children.

## Marriage, Pre-Nuptial, and Cohabitation Agreements

### k) General

Marriage or pre-nuptial agreements are agreements drafted by a married couple or in contemplation of marriage that address how to resolve a family law dispute, if one should arise. Cohabitation agreements similarly govern family law disputes between unmarried couples who expect to live in a marriage-like relationship for at least 2 years. Agreements can address matters that may be the subject of a dispute in the future, the means of resolving a dispute, and the implementation of the agreement. Agreements cannot override dispute resolution procedures mandated by statute.

Those interested in drawing up marriage, cohabitation, or pre-nuptial contracts on their own can be directed to the self-help kit. However, contracts drawn up using self-help kits are often overturned in Court. Independent legal advice is extremely important in order to have enforceable marriage or cohabitation agreements, and persons wishing to rely on a pre-nuptial agreement are strongly encouraged to seek the advice of a lawyer.

### l) Legislation:

#### 1. Family Law Act [FLA]

The new *FLA* attempts to increase the enforceability of marriage, cohabitation, and pre-nuptial contracts, and to provide clearer guidelines for the circumstances under which they can be binding. Agreements will be binding on the parties whether or not a family dispute resolution professional has been consulted, and whether or not the agreement has been filed with a court. Agreements will be binding on children who are parents or spouses (Part 2, s 6).

Section 93(3) of the *FLA* also states that courts can set aside an agreement if:

a) spouses do not make full and honest disclosure of all relevant financial information

b) one spouse takes improper advantage of another's vulnerability

c) one spouse does not understand the nature or consequence of the agreement

d) other circumstances that would cause, under common law, all or part of the contract to be voidable

The above concerns are often addressed by having the parties obtain independent legal advice.

Section 93(5) of the *FLA* states that the courts can also set aside an agreement if they find the agreement substantially unfair after considering these factors:

(a) the length of time that has passed since the agreement was made;

(b) the intention of the spouses, in making the agreement, to achieve certainty; (c)

the degree to which the spouses relied on the terms of the agreement.

The *FLA* is drafted to make it harder for courts to set aside agreements on the basis of unfairness. The Court will only set aside an agreement made between spouses respecting the division of property and debt, if the division agreed to would be "substantially different" from the division that the Court would

order and "significantly unfair" to one of the spouses (See *Thomson v Young*, [2014] CarswellBC 1287 (BCSC)).

The test for setting aside an agreement is to first look at the formation of the agreement (s 93(3)) and then the effects of the agreement (s 93(5)). Please note that section 93(4) states that a Court may refuse to set an agreement aside even if it was unfairly reached (*Asselin v Roy*, 2013 BCSC 1681).

Section 1 of the *FLA* provides a definition of "Written Agreement" as an agreement written and signed by all parties. Written agreements should also be witnessed by someone over the age of 19 to address potential evidentiary issues at a later date.

## m) Substance of Contract

The main part of the agreement usually deals with the division of property and debt in the event of a relationship breakdown. The agreement may provide for management and/or ownership of family property during a marriage or cohabitation 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, section 92 of the *FLA* explicitly anticipates such considerations in a marriage contract. Under the *FLA*, spouses can agree on how to divide family property, and what debts or items are eligible for division.

Section 93 of the *FLA* states that agreements respecting property division can be set aside for lack of procedural fairness, such as failure to disclose, where one party has taken advantage of the other, or where one spouse did not appreciate the consequences of the agreement.

According to section 93(4) and (5) of the FLA, the Court will only set aside an agreement on property under these sections "if the division agreed to would be 'substantially different' from the division that the Court would order and 'significantly unfair' to one of the spouses".

### 1. Parenting Arrangements

Parenting arrangements are generally never in cohabitation or marriage agreements.

Parenting arrangements are covered by section 44 of the *FLA*. Please note that an agreement for contact is not an agreement for "parenting arrangements" and will not be enforced under this section.

Agreements made about parenting are not binding unless made after separation or when parties are about to separate with the purpose of being effective upon separation (s 44(2)).

*FLA* section 44(3) holds that the written agreement may be given the force of a Court order if it is filed in a Supreme Court or Provincial Court registry. A Court must alter or set aside the terms of a parenting agreement if they are found not to be in the best interests of the child (s 44(4)).

Section 58 of the *FLA* outlines guidelines for agreements regarding contact with children. The *FLA* only emphasizes the importance of the best interests test, upgrading it from the "paramount" consideration to the "only" consideration.

For more information on Custody and Parenting, see **Section X: Custody, Guardianship, and Access**.

### 2. Child Support

Per section 148 of the *FLA*, an agreement respecting child support is binding only if the agreement is made after separation, or when the parties are about to separate, for the purpose of being effective on separation. It would thus not be binding if it is in a marriage/cohabitation agreement.

Courts can override or vary any such terms that are inconsistent with *Federal Child Support Guidelines* (*Young v Young*, 2013 BCSC 1574) or with section 150 of the *FLA* [*Determining Child Support*]. Section 150 states that the amount of child support is to be determined by the *Federal Child Support Guidelines* (*Thibault v White*, 2014 BCSC 497). These guidelines have not been changed by the new *FLA* and old court decisions interpreting the guidelines continue to apply (*SML v RXR*, 2013 BCPC 123).

The primary objective is to ensure, so far as practicable, that the children will enjoy a reasonably consistent, and reasonably adequate, standard of living, unaffected, so far as is practicable, by changes in the relationships among their parents and step-parents (See *B (C) v B (M),* [2014] CarswellBC 1212 (BCPC)). It is also important to note that any term purporting to exclude support 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. It is important to note that the Court may refuse an application for a Divorce Order if the Court is not satisfied that appropriate arrangements have been made for the support of the parties' children. See **Section VIII: Spousal and Child Support**.

#### 3. Spousal Support

The law relating to contracting out of spousal support is complex. Clients should seek professional legal advice before entering into an agreement for spousal support. Under the *FLA*, spousal support agreements that are filed with a Court registry will be treated as if an order of the Court (*FLA*, s 163), but can be set aside for lack of procedural fairness, such as failure to disclose, where one party has taken advantage of the other, or where one spouse did not appreciate the consequences of the agreement; they can also be set aside if the Court finds that the agreement is significantly unfair (see s 164 of the *FLA*).See **Section VIII: Spousal and Child Support**.

#### 4. 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 (BCCA).

**NOTE:** Consider whether any agreement should contain a clause stating that the greater detail in the Agreement does not merge with any later Order. This ensures that if a Divorce Order is granted at a later date, the terms of the Agreement continue to apply unless expressly stated otherwise. This is more applicable to Separation Agreements.

# IV. DIVORCE

## Legislation

The federal legislation governing divorces in Canada is the *DA*. The *DA* applies to legally married couples, including same sex couples as long as residency requirements for one spouse are met. It does not apply to common law couples or other unmarried couples. The provincial family law legislation in BC is the *FLA*, which applies to people in all relationships. The reason there are two statutes governing this area is the division of powers under sections 91 and 92 of the *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).

## Jurisdiction

### a) Supreme Court

The Supreme Court of British Columbia has jurisdiction over both the *DA* and the *FLA*. 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 guardianship, parenting arrangements and

support for children (including common law couples) while division of property is under exclusive jurisdiction of the Supreme Court. If a Supreme Court order for custody, access, or support is made under the *DA*, that order supersedes any existing *FLA* order. However, given the new *FLA* and change of terms under the provincial legislation (custody, guardianship and access to guardianship, parenting arrangements and contract), there is likely to be litigation about which act applies and when.

An uncontested divorce does not require a personal appearance in Supreme Court. Evidence can be submitted by affidavit with the application for the Divorce Order, called a "Desk Order Divorce". In fact, parties are required to submit applications for Divorce by way of a "Desk Order" unless there is a reason to bring it on by way of application in Chambers.

### b) Provincial Court

The Provincial Court only has jurisdiction to hear matters under the *FLA* 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 guardianship, parenting arrangements, contact, child support, and spousal support. The Court does **not** have jurisdiction to deal with claims for the division of **property** under the *FLA*.

## Requirements for a Divorce

### c) 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.

*An Act to Amend the Civil Marriage Act* received Royal Assent and came into force on June 26, 2013. It allows nonresident couples married in Canada to divorce in Canada if they cannot get a divorce where they live.

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 (*DA* s 3(2)) to hear and determine the divorce proceeding. Parties must submit a clearance form, filled out online and printed, at the time of filing the Notice of Family Claim and Marriage Certificate.

### d) A Valid Marriage: Proof of Marriage

Section 52(1) of the *Evidence Act*, RSBC 1996, c 124 states that if it is alleged in a civil proceeding that a ceremony of marriage took place in BC 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). Note: A certified copy is often not accepted by the Registry and all efforts should be made to obtain the original marriage certificate.

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. In British Columbia, a party can obtain an original marriage certificate from Vital Statistics by filling out a request form. See the Vital Statistics website at https://www.vs.gov.bc.ca/marriage/certificate.html

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 laws and religion of the country where the parties married, and to the best of his or her knowledge, the two parties were in fact married according to their law and traditions.

### e) 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 one year separation.

Note the decision of McPhail v McPhail, 2001 BCCA 250, in which the Court found that, where both the grounds of cruelty and the grounds of a one year separation for divorce exist, it would be appropriate for a trial judge to exercise his or her discretion to grant the divorce on the grounds of a one year separation (no-fault) instead of on cruelty (fault). This was extended in *Aquilini v. Aquilini,* 2013 BCSC 217 to state that a one year separation should be used as the grounds for divorce instead of adultery where both exist.

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

### f) 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 recognition by **one** of the parties that the marriage is at an end. It is not necessary that the parties form a joint intention. It is also not necessary that the two parties live in separate homes, although they must live "separate and apart" and demonstrate their intention to separate. For example the parties may, move into separate bedrooms in the same home.

### g) 90-Day Reconciliation Period

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

1) the length of any reconciliation attempt exceeds 90 days; or
2) 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)).

### h) 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. Indications of separation include: 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.

This is the case for the *DA*, though it should be noted that the Canada Revenue Agency (CRA) takes a different position when it comes to taxes and child benefit payments. The CRA does not recognize living separate and apart under the same roof for the purpose of tax benefits unless there is a separate suite in the home.

## 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.

### i) 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 (*SEP v DDP*, [2005] BCJ No 1971 (BCSC)). The standard of proof for adultery is the same as the civil standard: the Court must be satisfied on a balance of probabilities (see *Adolph v Adolph* (1964), 51 W.W.R. 42 (BCC.A)). Proof can come in the form of an affidavit from one or both of the adulterers.

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).

### j) 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] BCJ 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 RFL 57, (BCSC)). 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.

## Why a Divorce Application May Be Rejected

### k) 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.

### l) 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.

### m) 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] OR 810 at 818, 16 DLR (2d) 325 (CA).

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

### n) 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 divorce.

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.

### o) 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 Federal 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".

## Separation Agreements

### p) General – Family Law Act

The *FLA* defines a written agreement as an agreement that is in writing and signed by all parties (s 1 *FLA*). A separation agreement is a legal contract that generally provides for a division of property and debt, the support of a dependent spouse, and for the support, guardianship and parenting arrangements of 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. Part 2, Section 6 outlines that parties are able to make agreements to resolve disputes and respecting matters at issue in a family law dispute and subject to the *FLA*, the agreement is binding on the parties.

The overarching test for any agreements made regarding Part 4 of the *FLA* (guardianship, parenting arrangement contact) is the best interest of the child test in section 37 of the *FLA*. Children's interests are now the only consideration.

A separation agreement between spouses can also deal with division of family property and family debt, as well as any assets excluded from division.

Section 85 of the *FLA* excludes the following from the division of family property:

- property acquired by a spouse before the relationship between the spouses began;
- inheritances to a spouse;
- gifts to a spouse from a third party;
- a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for ○ loss to both spouses, or ○ lost income of a spouse;
- money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for ○ loss to both spouses, or ○ lost income of a spouse;
- property referred to in any of the paragraphs above that is held in trust for the benefit of a spouse;
- a spouse's beneficial interest in property held in a discretionary trust ○ to which the spouse did not contribute, and ○ that is settled by a person other than the spouse;

- property derived from property or the disposition of property referred to in any of the above paragraphs.

It is essential that each spouse be aware of the potential influence of any agreement on future expectations, and the legal implications of the 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 agreement 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 support 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 support, guardianship or parenting arrangements, the Court will consider the terms of the agreement when making the order. Whether the Court will uphold the terms of the agreement changes depending on the subject matter of the agreement. See sections of the *FLA* that apply to each subject matter. Note also that any orders respecting agreements are subject to s 214 of the *FLA*.

In addition to property settlements, guardianship or parenting arrangements, and support, 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.

## Other Points to Note

### q) Jurisdiction to Vary Proceedings

Section 5(1) of the *DA* allows a Court in a province other than the Court of original jurisdiction (that is, the Court which originally made an order) to vary an order made under the *DA* if:

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

### r) Adjournment for Reconciliation under the DA

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.

### s) Alteration of Effective Date of Divorce

Under s 12 of the *DA*, a divorce takes effect on the 31st 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.

### t) Support Order After Divorce Has Been Granted

Under s 15 of the *DA*, for the purposes of child support, "spouse" means either of two persons 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 support order after the divorce has been granted.

## u) 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 BC, which can be located using the blue pages of the telephone book under BC Corrections Branch, or Family Court: Probation and Family Court Services. The service is confidential and free. Family Justice Counsellors cannot deal with property and debt division.

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.

The new *FLA* favours out of Court resolution of issues, and even gives courts the authority to refer parties to counselling and mediation (s 224 *FLA*). It also formally recognizes the role of and duties of family dispute resolution professionals (Section 8), family justice counsellors (section10), and parenting coordinators (Part 2, Division 3).

## v) 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.

## w) 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 application 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 1-1/2 hours. Parties can set more than one Judicial Case Conference.

## x) Divorce Law and First Nations People

Special concerns arise in cases involving First Nation People registered under the *Indian Act*, RSC 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 *FLA* 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 BCLR (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, courts 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] SCJ No 22, and see *Van de Perre v Edwards*, [2001] SCJ No 60.

Furthermore, for First Nation Peoples living on reserves, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20) applies and can affect the division of assets in the case of divorce or separation (see ss 43, 46).

### y) Other Procedural Options

There are many other procedural options available to parties in Family Law disputes. Section 8 of the *FLA* requires counsel and other Family Dispute Resolution Professionals to discuss the advisability of the various types of family dispute resolution, which include those listed above as well as the following:

**Mediation:**

- Family Law Arbitration. See http://www.justicebc.ca/en/fam/help/arbitrators/index.html for more information
- Med/Arb, which is a combination of both Mediation and Arbitration.
- Judicial Settlement Conferences pursuant to Rule 7-2 of the *Supreme Court Family Rules*
- Family Case Conferences pursuant to Rule 7(1) of the *Provincial Court (Family) Rules*
- The use of a Parenting Coordinator to address ongoing parenting and communication issues between the parties after an order or agreement has been reached for the parenting arrangement. For more information see http://www.bcparentingcoordinators.com/

## Availability of Divorce Services in BC

### z) 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. Legal Aid will not assist with divorces.

### aa) 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. Advise clients to use the Lawyer Referral Service (604) 687-3221 or 1-800-6631919. 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.

# V. UNCONTESTED DIVORCES

## Required Documents

If the spouse 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 SelfCounsel Press.

### a) Marriage Certificate

Any official, **government-issued** form of marriage certificate or registration of marriage can be accepted. Importantly, 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, 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. Claimants who require translation can be referred to Mosaic Translations, which can be reached at (604) 2540469, or to the Society of Translators and Interpreters of BC, at (604) 684-2940. Marriage certificates in French must also be translated.

Claimants who were married in Canada can request a copy of their marriage certificate for about $27 (in BC) from the Department of Vital Statistics.

### b) Photograph of the Spouse

Claimants must have a recognizable photograph of the spouse. The photograph is for service purposes and will not be returned. The process server usually returns the photo with the affidavit of personal service. They should also provide information about how to locate the spouse (i.e. their address, their employer's address, the make and model of their vehicle)

### c) 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 guardianship, parenting arrangements, consent and support of the children (i.e. if there are no court orders), the agreement maybe filed in either the Provincial or the Supreme Court and enforced as a court order. Section 44 of the *FLA* allows for written agreements respecting parenting arrangements, while section 148 allows for written agreements respecting child support and section 163 allows for written agreements respecting spousal support. The separation agreement does not need to be filed in Court to obtain a divorce order. However, if there are children of the marriage, the agreement should be attached to the affidavit regarding child support as evidence of the parties' agreement.

## Joint or Sole Application

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

A joint application is quicker and less expensive than a sole application, as well as less complicated, since a Notice of Joint Family Claim need not be served (*Supreme Court Family Rules*, r. 2-2). However, if lawyers or a mediator is preparing the joint claim, both parties will need to seek out independent legal advice from their own lawyer.

## 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 "BC". Answer every paragraph in full.

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

## Style of Proceedings

The style of proceedings should use the names of both parties as they appear on the certificate or registration of marriage. That said, the wife's maiden name on the marriage certificate is not an alias and you need not use "also known as" or add it to the style of proceedings. If the certificate shows a typographic error, you may wish to include in the style of proceedings the name the party presently uses and "also known as" (or "formerly known as," as appropriate) the name on the certificate.

## 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.

## 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.

Follow the directions outlined on the forms carefully.

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, any orders from the Courts, and/or other proceedings in the Courts 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*.

The forms must include an address for service. This address has to be within 30 km from the courthouse. It can include a fax number and/or an email address. The address must be kept up to date with the Court and opposing party.

### d) 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 government issued certificate of marriage or certificate of registration of marriage must be filed where the party intends to seek an uncontested divorce.

### e) Schedule 2: Children

Place a check for each applicable box and fill in the form accordingly. Under the *DA* and the *FLA* s 146, 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.**With the FLA now enacted, which Act you are seeking an order under (the DA or FLA) can have an impact on the parties' rights. Before checking one box or the other where it specifies the Acts, seek legal advice from a lawyer.**

### f) Schedule 3: Spousal Support

Place a check for each applicable box and fill in the form accordingly. A lawyer should be consulted for advice on entitlement to spousal support. **With the FLA now enacted, which Act you are seeking an order under (the DA or FLA) can have an impact on the parties' rights. Before checking one box or the other where**

**it specifies the Acts, seek legal advice from a lawyer. The test for awarding spousal support is the same, however, there are different limitation dates for the two.**

### g) 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 equal division of family division and family debt, details and reasons should be set forth here. **Only a lawyer should deal with property issues.**

### h) 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.

## Child Support Affidavits

Whenever there are children of the marriage and you are ready to submit the requisition for a Desk Order Divorce, a Child Support Affidavit must be filed. Even if the matter of guardianship, 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 of both the child support claimant and the respondent be listed on the affidavit.

## Service

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

Claimants **must** have a third party, over the age of 18, serve their Notice of Family Claim. 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.

**Note:** If the process server serves the Notice of Family Claim based on a photograph and does not, or is not able to obtain the spouses' driver's license number, the client must swear an additional affidavit confirming the identity of his or her spouse in the photograph used.

If the respondent's address is not known, the claimant 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 skiptracing agency. This takes extra time, but will avoid the additional costs associated with a substitute service application.

In a substitute service application, the claimant 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 $111 and $315 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, serving an adult in the house where the respondent is believed to reside, or serving the respondent through e-mail or Facebook.

## Costs

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

- Ordering a marriage certificate or registration of marriage: $27 for couples married in BC. It can be ordered by mail or in person. Refer to www.vs.gov.bc.ca/marriage/certificate.html for more information.
- Court fee to file the Notice of Family Claim for divorce: $210 ($200 for filing the Notice of Family Claim and $10 for filing the registration of divorce)
- Fee for Serving the Notice of Family Claim on the respondent: varies depending upon where the respondent lives. The average fee is $100. Process Server Fees for the Lower Mainland can run from $69 plus $20 for an affidavit, or $70 to $100 all inclusive. For other parts of BC or Canada, it can cost $200 or more for all attempts.

- Notarization: between $25 and $50, if the affidavit is already completed.
- Final application fee: $80 (for requisition for the Desk Order Divorce).
- Fee to apply for a certificate of divorce: $40. (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 $90 to file a separation agreement in the Supreme Court.

### 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. Please note that these time estimates do not account for delay caused if the Court rejects some portion of the material filed and it needs to be redone.

## 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.

### Sole Application

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

**Step 2:** The client fills in the Notice of Family Claim and relevant schedules.

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

**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 $210 in cash, debit, 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 personal 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 personal 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;
- asking friends of the respondent about his current address; or
- searching on Google and social media sites such as Facebook.

**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 ($40), 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 and any supplementary affidavits confirming the identification of the respondent;

d) a certificate of the registrar in Form F36;

e) a requisition requesting a search for any Response to Family Claim;

f) an affidavit, sworn within 30 days of the date in which the application is made, in support of the application (Form F38), sworn after the time for the respondent to file a Response to Family Claim has expired (no earlier than one year after the date of separation if the ground of divorce is that the spouses have lived separate and apart for one year), which includes proof of the allegations made regarding the breakdown of the marriage or (in the case where the only ground of divorce is that the spouses have lived one year separate and apart) a sworn statement that the facts in the Notice of Family Claim are true;

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 a lawyer's advice should be sought immediately.

**Step 9:** If the Court is prepared to make the order sought, the order will be available at the Court registry some time 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 $40. Note that it is not always necessary to obtain a Certificate of Divorce.

## Joint Application

In the joint application process, most of 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 Notice of Family Claim or Notice of Joint Family Claim has been filed 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.

## Special Problems

### a) 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:

1. a copy of the Notice of Family Claim;
2. a partially completed Affidavit of Service (Form F15);
3. Exhibit "A" to the Affidavit of Service (i.e. a copy of the Notice of Family Claim); OR
4. 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 determine if the court outside of Canada has jurisdiction to hear the family law case under section 10 of the *Court Jurisdiction and Proceedings Transfer Act [SBC 2003] c 28* or section 3 of the *DA*. If the court does have jurisdiction, then the client must find a friend or relative in that country who is willing to serve the respondent. Otherwise, the client must apply to the court for leave to serve the respondent outside BC under Rule 6-4 of the *Supreme Court Family Rules*.

## b) 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 BC also translates marriage certificates. They can be reached by telephone at (604) 684-2940.

## c) 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 proceedings.

Where an amended Notice of Family Claim or Counterclaim is served on an opposing party, that opposing party may amend the Response to Family Claim or Response to Counterclaim, as applicable. The opposing party may only do so if he or she has already delivered a Response to Family Claim or a Response to Counterclaim. In addition, the following conditions apply to the opposing party's amendments:

- the opposing party must amend the Response to Family Claim to Response to Counterclaim only with respect to any matter raised by the amendments to the Notice of Family Claim or Counterclaim; and
- the period for filing and delivering an amended Response to Family Claim or a Response to Counterclaim to an amended Notice of Family Claim or amended Counterclaim 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.

## 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 file a Response to Family Claim regarding access to children without a contested action ensuing, but a support or custody issue would definitely result in a contested action, and a considerable wait for trial.

## "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 a Response to Family Claim. Both parties would then sign a waiver of appeal. However, waiving the waiting period will only speed up the procedure by a few weeks as the waiting period for 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 must 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. The courts tend not to consider pregnancy or ordinary remarriage to be "special circumstances."

# VII. ALTERNATIVES TO DIVORCE

## 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 s 95(2) makes no distinction between the two and Part 5 of the Act applies to both. The *FLA* ss 2122 also does not make any distinction. For purposes other than the *FRA*/*FLA*, the distinction may still be relevant.

A marriage is void *ab initio* if:

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

b) one of the parties did not consent to the marriage;

c) the parties are related within the bonds of consanguinity; or

d) the formal requirements imposed by provincial statute (such as the BC *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:

a) 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 BCCA 417); or

b) 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 *FRA* and s 21 of the *FLA*, the matrimonial regime still applies in this situation.

## 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

## General

The *FRA* only applies to proceedings started prior to March 18, 2013 and to agreements made before the *FLA* came into force.

The division of property on marriage breakdown is dealt with in Part 5 of both the *FRA* and the *FLA*. The *FRA* 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 *FRA* do not apply to common law relationships, although common law partners could 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 *FLA* significantly changes the property law regime in British Columbia, and reduces judicial discretion. It is a simpler model that is designed to help parties achieve resolutions out of Court. It operates on the presumption that spouses are equally entitled to family property that is proper and equally responsible for family debt (s 81). It also provides that unmarried spouses (who have lived together in a marriage-like relationship for at least two years) may avail themselves of the property and liability provisions of the Act in Part 5 and 6.

## Legislation

### a) Divorce Act [DA]

The *DA* does not deal with property division.

### b) Family Law Act [FLA]

Section 81 of the *FLA* outlines that each spouse is entitled to an undivided, one half interest of family property and is equally responsible for debt upon separation (*Stonehouse v Stonehouse*, 2014 BCSC 1057; *Joffres v Joffres*, 2014 BCSC 1778). However, the *FLA* substantially changes what is considered to be family property, essentially allowing spouses to keep property they bring into a relationship and share only in the increase in value of that property and the net value of new property obtained after cohabitation.

The *FLA* carves out a category of *excluded property* under section 85. Section 85 (1) of the *FLA* reads as follows:

The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

(b) inheritances to a spouse;

(b.1) gifts to a spouse from a third party;

(c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;

(f) a spouse's beneficial interest in property held in a discretionary trust

(i) to which the spouse did not contribute, and

(ii) that is settled by a person other than the spouse;

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division. The spouse claiming that the property in question qualifies as *excluded property* is responsible for demonstrating that it fits the definition under s 85(1) (*Bressette v Henderson*, 2013 BCSC 1661).

This property division regime applies to all married spouses as well as all unmarried common law spouses who have lived in a marriage-like relationship for at least two years. The date of separation will be the relevant date used to identify the pool of family property to be divided. However, it is the date of the hearing or agreement which determines the date of valuation of property. Spouses may choose to opt out of these property division rules but must make these different arrangements through an agreement.

Family property, is defined at s 84(1):

(a) on the date the spouses separate,

(i) property that is owned by at least one spouse, or

(ii) a beneficial interest of at least one spouse in property;

(b) after separation,

(i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

## Types of Assets

### c) Family Assets/ Family Property

Under sections 84 – 85 of the *FLA*, family property includes all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. It is no longer relevant whether an asset was ordinarily used for a family purpose in deciding if it is family property.

A spouse can choose to prove that property falls under one of the following exclusions:

- Property acquired before or after the relationship, except for property derived from family property;
- Gifts (from a third party) or inheritances to one spouse, unless the gift or inheritance was transferred into the parties' joint name or the other spouse's sole name;
- Most damage awards and insurance proceeds, except those intended to compensate both spouses and loss of income of one spouse;
- Some kinds of trust property;

    o Under s 85(e), property must be held in trust for the benefit of a spouse o A spouse's beneficial interest in property held in a discretionary trust to which the spouse did not not

contribute, and that is settled by a person other than the spouse are also excluded from family property under s 85 (f)

Family property is presumptively divided equally unless it would be significantly unfair to do so (ss 81 and 95 of the *FLA*).

Family debt, which is new in the *FLA*, is divided equally, unless equal division would be significantly unfair to one spouse. The value of all property is calculated at either an agreed date, or at the date of a court hearing. Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division.

## d) Savings

Under the *FLA*, all money held by one spouse in a financial institution is considered family property and equally divisible, unless that spouse can prove that it is excluded property.

## e) Pensions and RRSPs

Rights under an annuity, pension, home ownership, or registered retirement savings plan are considered family property, including each party's Canadian Pension Plan (CPP) credits.

The division of pensions is clarified in the *FLA*. Unless the pension is proven to be excluded property, it will be divisible. The presumption is equal division unless it would be significantly unfair based on the considerations in s 95 of the *FLA*. If a spouse is to receive benefits at a later date, they may become a limited member of the plan. They cease to be a limited member then their share is transferred. A spouse can generally either choose to have a lump-sum payment of their share, to have a separate pension payment issued to them (s 115) or a hybrid of both (s 116). This decision may be made at any time (either before or after the pension commences) but the division will only occur after the pension has commenced (s 115).

If an agreement or order regarding the benefits of a pension provides that the benefits are not divisible or is silent on entitlement to benefits, a member and a spouse may agree to have benefits divided before the earliest of:

1) Benefits are divided under the original agreement or order

2) The member or spouse dies

3) Benefits are terminated under the plan

If an agreement or order provides that the member must pay the spouse a proportionate share of benefits under a plan where the member's pension commences and the member's pension has not commenced, the member and spouse may agree, by the spouse giving notice to Division 2 of Part 6 of the *FLA*, to divide the benefits in accordance with the Part, and unless the member and spouse agree otherwise, the original agreement or order must be administered in accordance with the regulations.

**NOTE:** BC 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 CPP

## f) Real Property

It is often necessary to take early steps to secure the title to real property when there is a separation. In fact, it is recommended for clients to file as soon as possible to avoid missing any limitation dates and preserve their claim. 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 section 91 of the *FLA* and Rules 12-1 and 12-4 of the Supreme Court Family Rules, one may request an automatic restraining order to prevent the sale or disposal of family property including real property. There are several ways of protecting a spouse's interest.

### 1. 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*, RSBC 1996, c250 and *Annotated Land Title Act* by Gregory and Gregory for the procedure and forms. Note that Caveats have an expiry date and are therefore a temporary measure to protect a party's interest.

### 2. Land (Spouse Protection) Act, RSBC 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 one is legally married to his or her spouse, one may file against the property without the other spouse's notice or consent, in order to prevent the transfer of the property.

### 3. 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 Law Act, s 99). This applies to married spouses and common law spouses who have lived in a marriagelike relationship for at least two years.

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 this notice also extends to mobile homes.

### 4. 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.

### 5. Limitation Period

A former spouse is considered a "spouse" within the meaning of the FRA(s 1), *FLA* (s 3) 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 (BCS.C.) and *Tatlock v Tatlock* (1992), 71 BCLR (2d) 194 (SC). The Supreme Court of Canada partially addressed the issue in *Stein v Stein*, [2008] 2 SCR 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".

**The FLA allows common law spouses only two years to apply for property division and spousal support after the separation date (s 198). The limitation period may be suspended for both married and unmarried spouses if they were engaged in family dispute resolution with a family dispute resolution professional.**

Under s 198(3), a spouse may make an application to set aside an order or agreement for property division no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

**The FLA allows common law spouses only two years to apply for property division and spousal support after separation date (s 198). The limitation period may be suspended for both married and unmarried spouses if they were engaged in family dispute resolution with a family dispute resolution professional.**

Under the *Limitations Act*, there is no limitation date for claims on arrears of spousal and child support payments. Once a distribution scheme for family property is set, either by the Court or by agreement, it is always enforceable subject to the relevant case law.

### 6. Interim Relief

A court may order temporary exclusive occupation and possession of the family residence by just one spouse (*FLA* s 90).

### 7. Business Assets

Under the *FLA*, business property is no longer singled out as it was in the *FRA*. Business property is family property unless it is excluded property under the *FLA*.

## 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.

## Unmarried Couples

Under the *FLA*, unmarried couples who have lived in a marriage-like relationship for at least two years are treated the same way as married couples. Unless an action was started under the *FRA*, the *FLA* now applies (as long as the time limit has not expired) and may apply even if proceedings have already been commenced.

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 WWR 337, 77 BCLR (2d) 1, in which the Court found a constructive trust arising from the contributions made by homemaking and childcare services, which allowed for the retention 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. Because common law constructive trusts are relief granted by a court, spouses can make use of both the *FLA* requirements for equal division and common law constructive trust principles when seeking relief for unfair division of property.

# IX. SPOUSAL AND CHILD SUPPORT

## General

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

An application for support may be made under the *FLA* or *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 support 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 support, 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] SCJ No25 (SCC), 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" support 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 support is made or denied at the time of divorce, within a reasonable time thereafter. Under the *FLA*, the time limit is 2 years for both married and unmarried couples who have lived together in a marriage-like relationship for at least two years (s 198; *Meseryy v Field*, 2013 BCSC 2378). The exception to this rule is if the couple have a child(ren) together (s 3(1); *CAM v MDQ*, 2014 BCPC 110).

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. There is an exception to the strict application of the Guidelines in cases where the parties share parenting responsibilities (i.e. where one parent has at least 40% of the time with the child(ren)). In those cases, there is not simply a payor spouse and a recipient, rather the support is typically calculated based on a set-off approach whereby each parent's support obligation is calculated and one is set-off against the other.

The Court will not grant a divorce if there are not reasonable arrangements made for child support (*DA*, s11). 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.

Under the *FLA*, the most important changes are in wording. The following are some examples of new vocabulary from the *FRA*→ *FLA*:

- Custody → Guardianship/Parenting Time
- Access →Parenting Time/Contact
- Maintenance → Support

## Courts

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

### g) Provincial Court

The Provincial (Family) Court is often the most accessible court to self represented litigants. It can deal with applications for support made under the *FLA*, 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.

### h) Supreme Court

The Supreme Court can order interim relief under the *DA* or *FLA* or make an order for support upon the granting of a divorce order. If a Supreme Court order for support 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).

## Enforcement

### i) Family Maintenance Enforcement Act (RSBC 1996, c 127) [FMEA]

This Act, passed in 1988, gives the provincial government extensive powers to collect support 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.

The program can only enforce support orders if the payor is in its jurisdiction or sister jurisdictions that will assist in enforcing the order. For a complete list of sister jurisdictions see https://www.fmep.gov.bc.ca/paying-or-receiving-maintenance/out-of-province-orders/otherjurisdictions/.

Any person, who receives a support order or separation agreement that has been filed in court, may voluntarily register with the program. Soon, there will be a change in this collection method. It will no longer be the case that the provincial government will help people track down people not paying the required support orders. Under this new scheme, any support received by a person will not be deducted from any benefits that the person might also be receiving. This change is only for people who are on income assistance, but they can opt in so that the Family Maintenance Program will pursue support on their behalf.

### j) Reciprocal Enforcement

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

### k) 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), *FLA* s 167). The Court may also reduce the amount of support to a spouse where it finds that the spouse or former spouse "is not making reasonable efforts" to become self-sufficient. Note that for a variation application to be successful the applicant must demonstrate that there has been a "material change in circumstances" which means circumstances that, if known at the time of the agreement or Order, would have resulted in a different outcome.

There may also be a variation in child support levels provided there is a change in circumstances as provided in the Child Support Guidelines, which includes a change in the payor parent's income (*DA*, s 17(4), *FLA* s 152). If the payor's income has changed, a variation of the child support order 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*, SBC 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 sections 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 BC 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.

### l) Agreements

The Court can enforce written agreements that provide for the payment of child or spousal support. 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.

## Spousal Support

The first thing that a spouse must determine regarding spousal support is whether or not they are entitled to receive it. After that, the amount and duration of spousal support can be determined. The fundamental question in determining spousal support is whether the objectives of spousal support under the Spousal Support Advisory Guidelines *[SSAG]* are met. The division of assets in the divorce will impact whether or not the spouse is entitled to spousal support and will be taken into account when the court decides how much spousal support to order. Although it should be noted that if a party is entitled to compensatory support arising from the relationship, the receipt of significant assets in the division of assets may not result in a loss of entitlement to support (See *Chutter v. Chutter*, 2009 BCCA 177).

### m) Legislation

#### 1. 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 support in any application for child and spousal support under the *DA*. The entire gross income (Guideline income) is used to calculate child support and then any Net Disposable Income that remains (as calculated based on the incomes of both parties and taking into account taxes and other charges) is apportioned between the parties based on the length of marriage. It may be that the result of the payment of child support reduces the Net Disposable Income to very little and in those cases child support takes priority over the sharing of the NDI and there would be little to no spousal support payable. There is no limitation date under the *DA*.

### 2. Family Law Act [FLA]

The *FLA* aligns support considerations with the *DA,* permits periodic reviews to allow for changing circumstances, and provides guidelines for when a deceased spouse's estate is obligated to continue payments. Considerations for posthumous support payments include the size of the estate and the need of the payee (s 171). Additionally, child support is to be prioritized over spousal support where a paying spouse has limited resources. (s 173). The *Spousal Support Advisory Guidelines* are not referred to in the Act and remain advisory, although Courts in British Columbia give them much deference.

### 3. 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).

While the SSAG have no regulatory effect and are merely "informal", and "advisory", they are nevertheless being used by the courts and the bar and the ranges provided by the SSAG are given strong consideration by the Court after the entitlement analysis is complete (see *Yemchuk v. Yemchuk*, 2005 BCCA 406 and *Redpath v. Redpath,* 2006 BCCA 338).

## n) Principles of Spousal Support

### 1. General

There are three bases for entitlement to spousal support: (1) Compensatory (to compensate one spouse who was economically disadvantaged as a result of the role that spouse took on during the relationship) (*Moge v Moge*, [1992] 3 S.C.R. 813); (2) Non-compensatory (need based) (*Bracklow v Bracklow*, [1999] 1 S.C.R. 420); and (3) Contractual (i.e. if there was a marriage or cohabitation agreement setting out terms for support) (*Miglin v Miglin*, 2003 SCC 24). Once a party has met the requirement of demonstrating entitlement, you move to the calculation of quantum. When determining quantum of support one factor to be considered is whether the needs of the recipient spouse have been met by the division of assets however if support is compensation based then even if the recipient receives significant assets that is not a basis to reduce support (See *Chutter v Chutter,* [2009] CarswellBC 1028 (BCCA)). Typically the way this is addressed is to determine what income a party can reasonably earn from the assets received on division and to take that into account in calculating the quantum of support.

2. Factors **C**onsidered:

Section 15.2(6) of the *DA* and section 161 of ethe *FLA* directs courts to consider the following objectives in determining entitlement to spousal support:

- To recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

- to relieve any economic hardship of the spouses arising from the care of the child, beyond the duty to provide support for the child; and
- as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Section 15.2(4) of the *Divorce Act* and section 162 of the *FLA* directs courts to consider the same factors in determining the amount and duration of spousal support, namely, the conditions, means, needs and other circumstances of each spouse, including:

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

## o) Issues Related to Spousal Support

### 1. Employment and Income Assistance and Spousal Support

People can opt into this program so that the FMEP can continue to assist in collecting the support, but people can keep their support rather than having it deducted from other government support they are receiving, if any.

### 2. 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. Lump payments of support are not taxable. There are free online child support and spousal support calculators on the Internet (e.g. child support: http://www.justice.gc.ca/eng/fldf/child-enfant/look-rech.asp; spousal support: http://www.mysupportcalculator.ca/Calculator.aspx, http://www.justice.gc.ca/eng/fldf/spousal-epoux/ssag-ldfpae.html). 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. Parties are permitted to enter into retroactive agreements which set out the amount paid and received in prior years for the purposes of claiming income tax relief. However any such agreement must be entered into before the end of the calendar year immediately following the year in question (i.e. if payments were made in 2012, a retroactive agreement would need to be entered into before December 31, 2013)

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).

# Child Support

## p) Definition of "Child"

The definition of "child" varies slightly between the *Divorce Act* (s 2) and the *Family Law Act*.

Under the *Divorce Act*, the definition of "child" is someone who is under the age of majority (19 years in B.C.) **and** who has not withdrawn from the parent's charge, or who is at or over the age of majority but unable, by reason of illness, disability or other cause, to withdraw from parental charge or to obtain necessaries of life. Therefore, under the *Divorce Act*, there may not be an obligation to pay child support to a child under 19, if the child has already withdrawn from the parent's charge.

Under the *Family Law Act*, the definition of "child" is a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians.

## q) General

Child support is intended to be used to pay most of a child's day-to-day expenses. The amount of child support payable is determined under the *Federal Child Support Guidelines*, which set support levels based on the payor's income and the number of children to be supported and the parenting arrangements in place. Several web sites, including J.P. Boyd's helpful site, offer online child support calculators (see **Section I.B: Resources on the Internet**, above).If the paying parent lives in B.C., the child support is determined by the B.C. Child Support Tables; the appropriate table is for the province where the paying parent lives, not where the child lives.

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 RFL (4th) 418 (Sask. QB)), extraordinary educational expenses for primary and secondary education, expenses for post-secondary education, 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.

## r) Legislation

### 1. Divorce Act [DA]

The *Divorce Act* provides for support orders as a corollary to divorce under s 15.1, with the discretion to extend support for a child who is over the age of majority and is unable, by reason of illness, disability or other cause, to withdraw from their charge. If the majority-age child is otherwise unable to obtain the necessaries of life – for example, if the child is a university student – support orders may also be extended (s 2(1)).

An order for child support 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 support under the *DA*. Child support will be assessed in light of the biological parents' support obligation.

### 2. Family Law Act [FLA]

Generally, sections 153 – 159 of the *FLA* replace section 93.3 of the FRA, but do not substantively change the provisions. The *FLA* continues to provide authority for the child support service and the recalculation project.

Under section 147 of the *FLA*, each parent and guardian of a child has a duty to provide support for the child unless the child is a spouse or is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were considered intolerable. For example, a child who has been incarcerated for more than one year is considered to have voluntarily withdrawn (*MA v FA*, 2013 BCSC 1077). If the child was removed from the family

by the state (*DZM v SM*, 2014 BCPC 198) or refuses to visit, this is not considered voluntary withdrawal (*Henderson v Bal*, 2014 BCSC 1347). However, if this child returns to his or her parents' or guardians' charge, their duty to provide support to the child resumes. Additionally, section 147 of the *FLA* also states that a child's stepparent does not have a duty to provide support for the child unless the stepparent contributed to the support of the child for at least one year and a proceeding for an order under this part is started within one year after the date the stepparent last contributed to the support of the child. Qualifying step-parents have a duty to provide child support (*CLP v ND*, 2014 BCPC 154). A step-parent may also be ordered to provide support if the parents are not able to provide the child with consistent and reasonable standards of living (*CB v MB*, 2014 BCPC 75).

If parentage is at issue, section 151 of the *FLA* states that the Court may make an order respecting the child's parentage in accordance to s 31 of the *FLA* or make an order under s 33(2) of the *FLA*.

### 3. Child Support Guidelines

The *Federal 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 the resources listed at the end of the chapter. See www.bclawfamilyresource.com for more information on child support tables.

### 4. Other Legislation

Section 215 of the *Criminal Code* places a legal duty on parents to provide their children with the necessaries of life until they reach the age of 16, unless the child is able to provide the necessaries of life independently.

## X. INTERJURISDICTIONAL SUPPORT ORDERS

Parents living in different provinces or countries can apply for or enforce support orders without needing to travel to the other jurisdiction. Under the *Interjurisdictional Support Orders Act*, SBC 2002, c 29, many jurisdictions have agreed to recognize family support (maintenance) orders and agreements made elsewhere. British Columbia has reciprocal agreements with all Canadian provinces and territories and with several foreign countries.

For a list of all reciprocating jurisdictions, see the Schedule in the *Interjurisdictional Support Orders Regulations*, BC Reg 15/2003 at www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/10_15_2003.

Appeals of decisions made under this Act must be made within 90 days of the ruling (s 36(5)) but, despite this, the Court to which an appeal is made may extend the appeal period before or after the appeal period has expired (s 36(6)). The website www.isoforms.bc.ca provides a questionnaire under the heading "forms select" to determine which application forms are required for a client's specific situation. Forms can be accessed online or be mailed to you. A guide to filling out the forms can be found at www.isoforms.bc.ca/shared/pdfs/GuideIntroInstructions.pdf. Completed forms can be submitted to:

**Reciprocals Office**

Vancouver Main Office Boxes

P.O. Box 2074

Vancouver, B.C. V6B 3S3

In BC, Family Justice Counsellors have the ability to track the status of Interjurisdictional Support Order (ISO) applications. If an applicant has questions on the status of their ISO application, they can talk to a Family Justice Counsellor at their local Family Justice Centre. To find the nearest Centre, call Enquiry B.C. at (604) 660-2421 between 8:00 a.m. and 5:00 p.m., Monday to Friday, and ask the operator to transfer you to a Family Justice Centre.

# XI. CUSTODY, GUARDIANSHIP, AND ACCESS

## General

Disputes over custody of minor children are often the most difficult issues to resolve during the breakdown of a marriage or other relationship. Custody decisions can always be changed, however, courts rarely make such changes. Thus, the decision about who gets interim custody is particularly important. 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.

The best interests of the child is the **only** consideration in determining custody and access and parenting arrangements.

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] BCJ 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. This distinction is impacted somewhat by the *FLA* as the term "Guardianship" subsumes all the rights and responsibilities of a parent and there is no longer reference to "Custody".

The case law on custody and guardianship has developed to the point where there is a presumption in favour of joint custody (defined on pg. 51) 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, and in the last case, the Court may explore other options such as Parenting Coordination or parcelling out decision making and responsibilities to address the communication issue instead of granting sole custody to one parent.

## Legislation

### a) 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 *FLA* 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.

### b) Family Law Act

Among a plethora of changes to the general family law in BC, the Act makes the following changes to the law surrounding guardianship:

- Replace the terms "custody" and "access" with "guardianship", "parenting time", and "contact".
- 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.

Under the *FLA*, the terms custody and access are no longer used – only guardianship will be considered. Additionally, the "best interests of the child" is no longer the paramount consideration under the *FLA*; it is the **only** consideration.

## Courts

### c) 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 *FLA,* and the *CFCSA*. The Court almost never deals with the CFCSA unless there is the matter of adoption to be considered. The Supreme Court also has jurisdiction over 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 drafting orders that best represent the best interests of the child.

A written agreement about custody or guardianship may be given the force of a court order under section 44 of the *FLA*. Under the *FRA*, the relevant sections were 121 and 122. Any orders made under the *FRA* are still in force.

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

### d) Provincial Court

The Provincial Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, 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, or s 44 of the *FLA*, if it is filed in court.

## Custody

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the Family Law Act is in force, do not need special transition sections. Section 4 of the Interpretation Act provides a default rule that the Act will be used upon it becoming effective, so cases started under the Family Relations Act will be determined under the Family Law Act. 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. 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.

### e) Factors in Awarding Custody

The factors that the Court must consider in determining the "best interests of the child" are set out in, s 37 of the *FLA*:

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's

life; (d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

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

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

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

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

and at s 16(8-10) of the *DA*:

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

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

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

It is important to note that these factors should not be viewed like a checklist or a firm "rubric" with solid weights for each point. Rather, the discretionary, contextual, and complex nature of custody cases makes it more appropriate for the factors to be viewed holistically. Similarly, these factors do not necessarily form an exhaustive list of the factors to be considered. The best interests argument is often expansive, considering a range of factors illuminated at both the statutory and common-law level.

The Court will generally consider 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 (BCCA), *Alexander v Alexander* (1988), 15 R.F.L. (3d) 363 (BCCA)).

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 (AH) v P (AC),* 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 (SCC)). 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 (BCCA)).

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 (CR) v H. (BA),* 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] BCJ No 2144 (QL) (SC)).

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*, [1996] 2 SCR 27).

Section 211 of the *FLA* 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 an *FLA* Section 211 report (*Gupta v Gupta*, 2001 BCSC 649).

## f) Types of Custody Orders

**Note:** "Custody" is a term that only appears in the *DA* and so only applies to claims that t are proceeding in Supreme Court under the *DA*.

### 1. 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 presumption toward stability can give an interim order substantial weight in determining a final custody order.

### 2. 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.

**Note:** The concept of "full custody" does not exist. A parent using this term is most likely referring to sole custody.

### 3. 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. In British Columbia, there is a presumption toward joint custody.

### 4. Shared Custody

"Shared custody" is a term used by the Federal Child Support Guidelines, but not by either the *DA* or the *FLA*. Shared custody is a form of joint custody in which the child spends an almost equal time with each parent. Typically, the child would switching homes on a frequent basis, such as every few days or once a week. This usually requires that the parents live near one another and have good communication skill. It also requires that the child is able to adapt to living in two homes. Any agreement for shared custody will affect child support.

### 5. Split Custody

"Split custody" is a term used by the Federal Child Support Guidelines, and not by either the *DA* and the *FLA*. On rare occasions, courts will order siblings to live with separate parents. This is usually a drastic solution, ordered only after a *FLA* section 211 report (a court-ordered report respecting the needs of a child, the views of a child, and the ability and willingness of one of the parents to satisfy the needs of a child) is submitted to the Court. A split custody order will affect child support.

## g) Other Custody Issues

### 1. Consent Orders

Where there is agreement on the terms of support or custody provisions, but no written agreement, a consent order may be made by the Court under s 219 of the *FLA* 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.

### 2. 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 (*FLA*, s 183).

Under the *FLA,* police officer enforcement clauses can only be granted when there has been a breach of an order (s 231).

A child abducted and taken elsewhere within the province will be returned to their rightful custodian. Abduction is an offence under the *FLA*, s 188 that carries a possibility of criminal proceedings (*Criminal Code*, RSC 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.

### 3. Parental Mobility (Under the FLA, this is referred to as Relocation which has separate considerations from that of Mobility under the DA)

Relocation is defined and explained under Division 6 of the *FLA*. It considers relocation of a child that can reasonably be expected to have a significant impact on the child's relationship with his/her guardian(s) or other adults with which the child has a significant relationship (s 65). The guardian intending to relocate with the child must provide 60 day written notice to all other guardians and persons having contact with the child (s 66). The notice must include the date of the relocation, and the name of the proposed location. Exemptions to these requirements can be granted by the Court if they are satisfied that the notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child (s 66(2)).

The child's other guardian(s) can object to the relocation within 30 days of receiving the notice. If an objection is made, the guardian requesting the relocation must satisfy the court that (s 69(4)(a)):

(i) the proposed relocation is made in good faith, and

(ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life

When considering the good faith requirement, the Court must consider (s 69(6)):

(a) the reasons for the proposed relocation;

(b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;

(c) whether notice was given under section 66 [notice of relocation];

(d) any restrictions on relocation contained in a written agreement or an order.

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 WWR 457 (SCC), the Supreme Court of Canada set out the basic principles for the *DA*. 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, also a *DA* case, identifies the following list of factors to be considered in determining whether a proposed move is in a child's best interests:

1. the parenting capabilities of and the child's relationship with parents and their new partners;
2. employment, security and prospects of the parents and, where appropriate, their partners;
3. access to and support of extended family;
4. the difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed;
5. the effect of the move on the child's academic situation;
6. the psychological and emotional well-being of the child;
7. the disruption of the child's existing social and community support and routine;
8. the desirability of the proposed new family unit for the child;
9. the relative parenting capabilities of either parent and the respective ability to discharge parenting responsibilities;
10. the child's relationship with both parents;
11. the separation of siblings;
12. the retraining or educational opportunities for the moving parent.

## a. Access

"Access" is the term under the *DA*. Under the *FLA*, it is called "Parenting Time" for guardians, or "Contact" for non-guardians.

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the Family Law Act is in force, do not need special transition sections. Section 4 of the Interpretation Act provides a default rule that the Act will be used upon it becoming effective, so cases started under the Family Relations Act will be determined under the Family Law Act.

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 support. **Denial of access is not grounds to withhold support; nor is a failure to pay support grounds for withholding access.**

## a) 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, although the child's views can be a powerful factor. When the *FLA* came into force, it introduced an overarching consideration "**to ensure the greatest possible protection of the child's physical, psychological, and emotional safety."** It can be argued that this consideration is functionally in place already, however. 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;

## b) Types of Access Orders

### 1. 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.

### 2. 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.

### 3. 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.

### 4. 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.

> **NOTE**: There are no filing fees nor does a person need legal representation in Provincial Court, making it a more accessible option for many clients.

## c) Extra-provincial Custody and Access Orders

Under the *FLA*, the Court may exercise its jurisdiction to make custody and access orders if one of the following conditions is met:

1. The child was "habitually resident" in BC (s 74(2)(a)).
2. If the child is not habitually resident in B.C., the Court must at the commencement of the application order be satisfied that (s 74(2)(b)):
    i. the child is physically present in British Columbia when the application is filed,

ii. substantial evidence concerning the best interests of the child is available in British Columbia, iii. no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,

iv. no extraprovincial order has been recognized by a court in British Columbia,

v. the child has a real and substantial connection with British Columbia, and

vi. on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;

3. The child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to (s 74(2)(c)):

   i. remain with, or be returned to, the child's guardian, or

   ii. be removed from British Columbia.

B.C. courts are required to enforce extra-provincial orders (s 75) with certain exceptions (s 76). Such exceptions include the child would suffer serious harm if he/she was returned to the guardian or leaving British Columbia (s 76(1)(a)).

If one spouse is not in B.C., the only B.C. Court that the B.C. residing spouse can proceed in is the B.C. Supreme Court, because the Provincial Court has no jurisdiction outside of the province.

## b. 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 section 39 of the *FLA*, which defines whether someone is a guardian.

Under the *FLA*, guardianship is primarily governed by sections 39, 41, and 42.

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.

While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian (s 39). However, an agreement may be made to provide that a parent is not the child's guardian. A parent who has never resided with a child is not the child's guardian unless there is an agreement made under section 30 of the *FLA*, the parent and all of the child's guardians make an agreement providing that the parent is also a guardian, or the parent regularly cares for the child. Additionally, a person does not become a child's guardian by reason only of marriage or a marriage-like relationship.

Section 41 of the *FLA* lists out the parental responsibilities with respect to a child:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;

(b) making decisions respecting where the child will reside;

(c) making decisions respecting with whom the child will live and associate;

(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;

(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

(j) requesting and receiving from third parties health, education or other information respecting the child;

(k) subject to any applicable provincial legislation,

(i) starting, defending, compromising or settling any proceeding relating to the child, and

(ii) identifying, advancing and protecting the child's legal and financial interests;

(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Section 42 of the *FLA* defines parenting time as time that a child is with a guardian. During this parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child and having dayto-day care, control and supervision of the child.

Additionally, Division 6 of Part 4 of the new *FLA* states that if you are a child's guardian and you want to relocate with the child, you must give any other person who can contact the child 60 days' notice which includes both the date of the relocation and the name of the proposed location. The Court may not grant an exemption to give notice if it is satisfied that notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child. Once notice is given, a child's guardians and persons having contact with the child must use their best efforts to resolve any issues relating to the proposed relocation. The proposed relocation may occur unless another guardian of the child files an application to prohibit the relocation within 30 days of receiving notice. The Court will make its decision based on s 37 of the *FLA* considering what would be in the best interests of the child.

## a) Guardianship

### 1. Sole Guardianship

Sole Guardianship and Joint Guardianship are not terms used in the *FLA*. The parents or a court may decide that one parent should be the sole guardian. This terminates the presumption of guardianship for the other parent. This is an extreme step, taken only when one parent has been shown to be either uninterested in or incapable of proper parenting.

### 2. 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 under the *FLA*, set out below, is known as the Joyce Model, a set of rules frequently incorporated in court orders and separation agreements, despite not being explicitly cited by the new act or its interpretors.

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

1. the parents are to be the joint guardians of the estate of the child;
2. in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the child;

3. 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;

4. 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;

5. 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;

6. 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;

7. 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

8. 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.

Under the *FLA*, the standard Guardianship provisions have changed somewhat to reference the sharing of responsibilities set out at Section 41 of the *FLA* with a decision making clause in the event that the parties cannot agree on how to exercise a particular responsibility.

# XII. CHILDREN AND THE LAW

## 1. RELEVANT AGES

### a) Age of Majority

The *Age of Majority Act*, RSBC 1996, c 7, s 1 provides that the age of majority in B.C. is **19** years. Section 1 also applies to private documents, such as wills. A person's age is determined by the provisions set forth in s 25(8) of the *Interpretation Act*, RSBC 1996, c 238.

### b) Other Relevant Ages

#### 1. Criminal Liability

A person must be 12 years of age or older to be liable for a criminal offence (*Criminal Code*, R.S.C. 1985, c 46, s 13). A person between the ages of 12 and 17, inclusive, can be criminally liable as a young offender under the *Youth Criminal Justice Act* [YCJA].

The YCJA came into force on April 1, 2003. The purpose of the Act is, in part, to repeal and replace the Young Offenders Act, RSC 1985, c Y-1 and to provide principles, procedures, and protections for the prosecution of young persons under criminal and other federal laws. For more information, see **Chapter 2: Youth Justice**.

#### 2. Attending Restricted and Adult Films (Without Being Accompanied by a Responsible Adult)

In 1997, the Director of Film Classification revised the classification system for motion pictures. A person under the age of 18 years is classified as a minor (*Motion Picture Act*, RSBC 1996, c 314, s 1). Minors may not view films classified as "Restricted" or "Adult", and may

not view films labelled as "18A" unless accompanied by an adult (*Motion Picture Act Regulations*, BC Reg 260/86, s 3).

### 3. Possession and Consumption of Alcohol

A person must be at least 19 years of age to lawfully possess or consume alcohol in B.C. (*Liquor Control and Licensing Act*, RSBC 1996, c 267, s34).

### 4. Ability to Obtain a Driver's License

An individual must be 19 to qualify for a driver's licence. If an individual is between 16 and 18 years of age, a parent or guardian must submit the application for the driver's licence in the form required by the Insurance Corporation of British Columbia verified by affidavit (*Motor Vehicle Act*, RSBC 1996, c 318, s 32). The Insurance Corporation of British Columbia ("ICBC") will **never** grant a licence to someone under the age of 16. For more information, see Chapter 12, Automobile Insurance (ICBC).

### 5. Ability to Work

Any person aged 15 years or over may work. A child between the ages of 12 and 14 needs written permission from their parent or guardian prior to working. A child under the age of 12 must have both the written consent of the parent or guardian and the written permission of the
Director of Employment Standards prior to working. For more information, see **Chapter 6, Employment Law**.

### 6. Sexual Consent

As of 1890, the age of consent for sexual activity was set at 14 years. Recently, the age of consent in Canada has been changed from 14 to **16 years** (Tackling Violent Crime Act, Bill C2, An Act to amend the Criminal Code and to make consequential amendments to other Acts, 39th Parliament, 2nd Session, October 2007, effective May 1st, 2008). However, if the sexual activity involves exploitative activity, such as prostitution, pornography or where there is a relationship of trust, authority or dependency, the age of consent is 18 years.

Section 150.1(3) of the *Criminal Code* provides what is often referred to as a "close in age" or "peer group" exception: a 12 or 13 year old can consent to engage in sexual activity with another person who is less than two years older and with whom there is no relationship of trust, authority or dependency. A 14 or 15 year old can consent to engage in sexual activity with a partner who is less than five years older with whom there is no relationship of trust, authority or dependency. An exception is also available for pre-existing marriages and equivalent relationships.

### 7. Marriage

Both parties to the marriage must be at least 19 years old. However, the *Marriage Act*, RSBC 1996, c 282, provides that individuals between the ages of 16 and 19 may marry without the consent of anyone if they are a widower or widow (s 28(1)), and that other persons between the ages of 16 and 19 may marry **if they have the consent of**:

a) both parents or of the parent having sole guardianship, or the surviving parent (s 28(1)(a);

b) a lawfully appointed guardian of that person (s 28(1)(b));

c) the Public Guardian if both parents are dead and there is no lawfully appointed guardian (s 28(1)(c)); or

d) a judge of the Supreme Court (usually only where the parent's consent is unreasonably withheld) (s 28(2)).

No person under the age of 16 can marry unless the marriage is shown to a Supreme Court judge to be expedient and in the interest of the parties (s 29). If the parent or guardian "unreasonably or from undue motives refuses or withholds consent to the marriage," a minor may apply to court for a declaration to allow the marriage (s 28(2)).

Section 28(6) provides that a marriage of a minor must not be solemnized, and a license must not be issued, unless a birth certificate or other satisfactory proof of age has been produced to the issuer of marriage licenses or to the religious representative.

However, s 30 provides that failure to comply with ss 28 or 29 will not invalidate a marriage that has taken place. In other words, if someone manages to get married at 15 and obtains a valid marriage license, the marriage is valid.

#### 1. Ability to Make a Will

Under s 36 of the Wills, Estates and Succession Act, RSBC 2009, c 13, a will made by a person under the age of 16 is not valid unless he or she is on active service with the Canadian Armed Forces or any armed forces of the British Commonwealth of Nations or any ally of Canada. For more information, see **Chapter 16, Wills and Estates.**

## 2. 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 DLR (2d) 328 (BCCA).

### 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:

1. to discover the whereabouts of the child;

2. to take precautions to prevent harm to the child;

3. to encourage voluntary return of the child or some other agreeable arrangement;

4. to facilitate administrative processes; and

5. 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, BC. The contact number is (604) 775-3203.

## 3. DISCIPLINE

The *Criminal Code* (s 43) allows a parent, a person standing in the place of a parent, or a schoolteacher to discipline a child, by way of correction, provided that only reasonable force is used. However, section 76(3) of the *School Act*, RSBC 1996, c 412 requires that teachers ensure the discipline is similar to that of a kind, firm, and judicious parent, and must not include the use of corporal punishment.

The Supreme Court of Canada examined s 43 in *Canadian Foundation for Children, Youth and the Law v. Canada,* [2004] SCC 4, 16 C.R. (6th) 203. The Court held that section 43 does not violate the constitutional rights of children. The discipline must be "by way of correction" meaning "only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour" (para 24). Furthermore, the Court provided a comprehensive definition of "reasonable force":

Generally, section 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered.

## 4. CHILD PROTECTION

Under the *Child, Family and Community Service Act* [CFCSA], 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.

## a) Principles

The CFCSA codifies child protection remedies available in B.C. It also gives specific rights to children in care under the Act (section 70). The *Representative for Children and Youth Ac*t, SBC 2006, c 29 s 6 provides that it is the responsibility of the Representative to:

- support, assist, inform and advise children and their families respecting designated services;
- monitor, review, audit and conduct research on the provision of a designated service by a public body or director for the purpose of making recommendations to improve the effectiveness and responsiveness of that service, and comment publicly on any of these functions
- review, investigate and report on the critical injuries and deaths of children as set out in Part 4

The guiding principles in section 2 of the CFCSA provide that:

1. children are entitled to be protected from abuse, neglect, harm, or threat of harm;
2. the family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
3. if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
4. the child's views should be considered when decisions relating to that child are made;
5. kinship ties to extended family should be maintained;
6. the cultural identity of Aboriginal children should be preserved; and
7. decisions relating to children should be made and implemented in a timely manner.

*B.C. Children and Youth Review: An Independent Review of B.C.'s Child Protection System* (April 7, 2006) recommends a number of changes to the sections discussed in this chapter, including the appointment of a Representative for Children and Youth. The full report can be viewed online at www.cecw-cepb.ca/publications/946.

## b) Best Interests of the Child

Section 4 of the *Child, Family and Community Service Act* [CFCSA] defines "best interests of the child" somewhat differently than does the *Family Relations Act* and the *FLA*. Factors that must be considered under the CFCSA include:

1. the child's safety;
2. the child's physical and emotional needs and level of development;
3. continuity in child care;
4. the quality of relationships with parents;
5. the child's cultural, racial, linguistic and religious heritage;
6. the child's views; and
7. the effect on the child of any delays in making a decision.

Section 4(2) mandates that, in assessing the best interests of Aboriginal children, the importance of preserving the child's cultural identity must be considered.

The CFCSA definition of when a child needs protection includes the following (s 13):

1. situations where there is a risk of physical or sexual abuse, harm, or exploitation;
2. emotional harm by a parent's conduct;
3. deprivation of necessary health care;
4. situations where the parent is unable or unwilling to care for the child and has not made adequate provision for the child's care; and
5. where the child has been abandoned and adequate provision has not been made for the child's care.

See s 13 for a complete enumeration of circumstances where children need protection.

## c) Duty to Report Need for Protection

The *Child, Family and Community Service Act* [CFCSA] (s 14(1)) requires someone who believes a child is being or is likely to be physically harmed, sexually abused, or exploited to report the matter to the Ministry of Children and Family Development. The Helpline for Children (3101234) provides 24-hour access to social workers in case of an emergency.

Reports to the Ministry are anonymous. No action lies against a person making a report unless it is made maliciously or without reasonable grounds. Failure to report cases of abuse or exploitation constitutes an offence (s 14(3)), even when the information was confidential or privileged, **except** for when the information was obtained through a solicitor-client relationship (s 14(2)). The Director under the CFCSA must assess the information reported (s 16). Case law has demonstrated that the duty of the director to act is actually broader than the legislated duty: see *BS v British Columbia (Director of Children, Family, and Community Services),* [1998] 8 WWR 1 (BCCA).

## d) Removal

Under the *Child, Family and Community Service Act* [CFCSA], the Ministry for Children and Families has different options to deal with an unattended child (s 25), or a lost or runaway child (s 26). Pursuant to these sections, the Ministry can take the child for up to 72 hours without formally removing the child from his or her parents. Furthermore, the Ministry can take a child away to provide essential health care without legally removing the child, provided that the Ministry first obtains a court order under s 29 of the CFCSA. In situations where there are reasonable grounds to believe that the child's health or safety are in immediate danger, a police officer may take charge of the child (s 27).

## e) Removal Procedure

Under the CFCSA, Directors are appointed to enforce the Act. A Director may, without a court order, remove a child if there are reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger, or no other less disruptive measure that is available is adequate to protect the child (s 30). When removing a child, a Director must make all reasonable efforts to notify each parent of the child's removal (s 31). Practically speaking, the Director delegates his or her duty to social workers who then carry out the removal procedure.

## f) Presentation Hearing

The Director must attend the Court within seven days of the removal for a presentation hearing (CFCSA, s 34) and present to the Court a written report that includes:

1. the circumstances of the removal;
2. information about less disruptive measures considered before removal; and
3. an interim plan of care for the child, including, in the case of an Aboriginal child, the steps to be taken to preserve the child's aboriginal identity (s 35).

A child who is removed under the CFCSA is put under the care of the Director until the Court makes an interim order about the child, the child is returned, or until the Court makes a custody or supervision order (s 32). A presentation hearing is a summary hearing and must be concluded as soon as possible (normally within 30 days) (s 33.3).

If the parents consent to the interim removal, an order will be made that the child remain in the custody of the Director pending a protection hearing (see below).If the parent(s) disagree with the removal, a presentation hearing will be scheduled as soon as possible (s 33.3) to determine where the child should live pending the full protection hearing. The presentation hearing may proceed by way of affidavits or *viva voce* evidence. At the conclusion of the presentation hearing, the child may stay in the custody of the Director, may be returned to his or her parent(s) or may be returned to his or her parent(s) under supervision(s 35(2)). It is important to note that the notice of the presentation hearing need not be formally served, and informal notice is adequate.

## g) Protection Hearing

A protection hearing must start within 45 days after the conclusion of the presentation hearing (CFCSA, s 37(2)). The purpose of the protection hearing is to determine whether the child needs protection (s 40(1)). The Director must return the child to the parent(s) as soon as possible if it is determined that the child does not need protection (s 40(2)). A child can be returned and still be under minimum supervision of the Director, or returned without supervision. If the child is returned without supervision, the proceedings are at an end (s 37(1)).

## h) Orders

Section 41 of the CFCSA outlines orders that can be made at a protection hearing:

1. an order to return the child to the custody of the parents while being under the Director's supervision for a period of up to six months;
2. an order that the child be placed in the custody of a person other than the parent (e.g. a relative) with the consent of that other person and under the Director's supervision for a specified period of time;
3. an order that the child remain or be placed in the custody of the Director for a specified period of time; or
4. an order that the child be placed in the continuing (permanent) custody of the Director. Continuing (permanent) orders should be made under s 49.
    1. The parents may consent to or oppose the order. If the parents oppose the order, a Rule 2 case conference is scheduled as soon as possible and a judge will attempt to resolve any issues in dispute (see *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95 for a complete description). If the matter is not settled at the case conference, a date is scheduled to determine whether the child needs protection.
    2. The content of supervision orders is outlined in the CFCSA, section 41.1. Terms and conditions that may be attached to a supervision order include:
5. services for the child's parent(s);
6. day-care or respite care;
7. the Director's right to visit the child; and
8. the Director's duty to remove the child if the person with custody does not comply with the order.

Section 43 outlines the time limits for temporary custody orders and s 47 outlines the rights and responsibilities of a Director who has custody of a child either under an interim or temporary custody order. These rights and responsibilities include:

1. consenting to health care for the child;
2. making decisions about the child's education and religious upbringing; and
3. exercising any other rights to carry out any other responsibilities as guardian of the child, except consent to adoption.

Temporary orders can be extended under section 44.

When a continuing custody order is made, the Director becomes the sole guardian of the person of the child and the natural parents' legal rights to the child are extinguished. The Director may then consent to the child's adoption. The Public Guardian becomes the sole guardian of the estate of the child. The order, however, does not affect the child's rights with respect to inheritance or succession of property (s 50(1)). In certain cases, the Director can seek a last chance order of up to six months (s 49(7)).

Parents can apply to set aside both temporary and continuing (permanent) orders under s 54. They are also entitled to full disclosure under s 64. For more information, see *British Columbia (Director of Family and Child Services) v K(TL)*, [1996] BCJ No. 2554 (Prov Ct FD) (QL).

**Note:** Bill 13, Miscellaneous Statutes Amendment Act (No.2), 2011 was introduced on Thursday, May 19, 2011 and contains amendments to or related to the Child, Family and Community Service Act in Part 3, sections 12 – 30. The Bill is available at www.leg.bc.ca/39th3rd/1st_read/gov13-1.htm. If the Bill passes, temporary custody orders could be extended where a permanent transfer of custody is planned.

## i) Access and Consent Orders

Section 55 of the *Child, Family and Community Service Act* [CFCSA] allows parents, or other persons, to apply for an access order at the time, or after, an interim or temporary custody order is made. Section 56 provides for applications for access by parents or other persons after a continuing custody order is made. This entitles parents to apply for access visits during any apprehension, whether interim or permanent, if the Director opposes access.

Consent orders under the CFCSA may be an advisable option for parents. A consent order is outlined in s 60, which provides that the Court may make any custody or supervision order without a finding of fact that their child actually needed protection, and without an admission of any of the grounds alleged by the Director for removing the child (ss 60(4) and (5)).

A consent order requires the written consent of:

a) the Director;

b) the child, if 12 years of age or older;

c) each parent of the child; and

d) any person with whom the Director may be placing the child in temporary custody.

Children 12 years of age or older must be given notice of the hearings, report copies, etc.

## j) Rights of Children in Care of the Director

Section 70 of the *Child, Family and Community Service Act* [CFCSA] sets out the rights to which children are entitled while in care of the Director. Children in care have the right to be fed, clothed, and nurtured according to community standards; be informed about plans regarding their care; be consulted with respect to decisions affecting them; reasonable privacy and possession of their personal belongings; be

free from corporal punishment; and receive medical and dental care when required. For a complete list of enumerated rights, see s 70.

### k) Priority in Placing Children with a Relative

When deciding where to place a child, the Director must consider the child's best interests (s 71(1)). The Director must give priority to placing the child with a relative before considering a foster parent, unless that is inconsistent with the child's best interests (s 71(2)).

Children under protection can be placed in the custody of extended family or other concerned parties (s 8). This is known as a "kith and kin" agreement. The Director may also refer the matter to a family conference co-ordinator to allow the family to reach an agreement on a 'plan of care' that serves the best interests of the child (ss 20, 21).

Until March 31, 2010 a relative caring for a child residing in his or her home may have been eligible to receive monthly Child in the Home of a Relative ("CIHR") benefits from the Ministry of Social Development (previously the Ministry of Employment and Income Assistance). As of April 1, 2010, these benefits are no longer available to new applicants. In the absence of the CIHR benefits, relatives looking after a child in their home may be eligible for the child tax benefit, the B.C. family bonus, the universal child care benefit, and/or the child disability benefit. For more information, see: www.gov.bc.ca/meia/online_resource/verification_and_eligibility/cihr. An alternative (but not a substitute) for relatives to consider is the Extended Family Program benefits available through the Ministry of Children and Family Development (see www.mcf.gov.bc.ca/alternativestofostercare/extended_family.htm). These benefits are intended to be temporary and the relative is not eligible if they have a guardianship order. The application for benefits must be initiated by the child's parent.

### l) Priority in Placing Aboriginal Children with an Aboriginal Family

The Director must give priority to placing an Aboriginal child with the child's extended family within the child's Aboriginal community or with another Aboriginal family (s 71(3)). Section 39(1) mandates notification of the band. See also ss 2(f), 3(b) and (c), and 4(2) of the CFCSA. If a child is of mixed heritage, the Ministry will generally treat the child as an Aboriginal child and notify the band accordingly.

Certain additional considerations are provided throughout the Act for an Aboriginal, Nisga'a or treaty First Nations child.

## 5. CHILD LEAVING HOME OR PARENT GIVING UP CUSTODY OF A CHILD

Children may leave home before the age of majority, or alternatively, parents may voluntary give up legal custody of their children. Please note that "emancipation"(a legal mechanism by which a person may be legally separated from his or her parents before the age of majority) is not a legal remedy for children in B.C. as it is in some parts of the United States.

### a) Rights of the Child

Children may leave home as soon as they are able to support themselves. The following considerations should be kept in mind:

a) under the *School Act*, a child must attend school until age 16 (s 3(1)(b)). It would be extremely difficult for the child to go to school and maintain a job to support him or herself sufficiently at a younger age than this;

b) a child under 15 needs written permission from their parent or guardian prior to working (*Employment Standards Act*, RSBC 1996, c113, s 9(1)). Additionally, a child under 12 needs the written permission of the Director of Employment Standards prior to working (s 9(2));

c) pursuant to s 26(1) of the *Child, Family and Community Service Act* [CFCSA], a Director may take charge of a child for a period of up to 72 hours if it appears that the child is lost or has run away. If the person responsible for the child is not located by the end of the 72-hour period, the Director no longer has charge of the child (s

26(5)). (Note that "child" is defined in the CFCSA as a person under the age of 19 years, and includes a youth.); d) a child under 19 may qualify for social assistance if he or she does not live with a parent or guardian, and if the ministry is convinced that no parental support is being provided; and

e) pursuant to s 91 of the *Family Relations Act* a child may be eligible for child support payments from their parents. However, children have been found to have withdrawn from their parents' care and control when they live with a boyfriend or girlfriend who provides for their needs, have moved out of their parents' home and refuse to return, or live on their own and have demonstrated they are capable of independently supporting themselves financially.

### b) Giving Up Custody of a Child

There are four basic ways that a parent can voluntarily give up legal custody of a child. This is done by transferring the rights that the parent possessed through one of the following mechanisms:

a) by a custody and guardianship order under the *Family Relations Act* (s 30);

b) by making a will (which would take effect only on the death of the parent), if the parent has sole guardianship (*Infants Act*, s 50);

c) by the parent(s) consenting to the adoption of the child by other persons (*Adoption Act*, RSBC 1996, c 5, s 13(1)); or

d) by a written agreement between the parent and the Director of Child, Family and Community Service where the parent transfers his or her rights to the Director (*Child, Family and Community Service Act*[CFCSA], ss 6 and
7)

## 6. CHILD BENEFITS

### a) Child Disability Benefit

The Child Disability Benefit (CDB) is a non-taxable supplement to the Canada Child Tax Benefit (CCTB) and Children's Special Allowance. To receive the CDB, a child must be eligible to receive the CCTB and must also qualify for the Disability Tax Credit (DTC). Not all children with disabilities qualify. For more information about eligibility visit the Canada Revenue Agency website at www.cra-arc.gc.ca/bnfts/dsblty-eng.htmlor call 1800-387-1193.

The CDB provides up to $2,455 per year, per child who qualifies for the disability amount, for low- and modestincome families caring for children under the age of 18 who have a severe and prolonged mental or physical impairment.

### b) Universal Childcare Benefit

In July 2006, the Government launched the Universal Childcare Benefit (UCCB), a new benefit paid monthly to help eligible families provide child care for their children less than 6 years of age. The UCCB will provide families a $100 monthly payment (up to $1,200 annually) for each child less than six years of age. It is paid separately from the Canada Child Tax Benefit (CCTB). The UCCB is taxable. One must apply for UCCB through Canada Revenue Agency.

For more information on eligibility, the application process and access to an online application, visit the Canada Revenue Agency web site at: www.cra-arc.gc.ca/bnfts/uccb-puge/menu-eng.html or call 1-800-387-1193.

For general information on UCCB, see the web site: www.universalchildcare.ca or call 1-800-622-6232.

# XIII. ADOPTION

## 1. Legislation

### a) Adoption Act, RSBC 1996, c 5

The *Adoption Act* governs adoptions in BC. The Act provides for the licensing of adoption agencies. These agencies, in addition to the Director of Adoption, have exclusive authority for facilitating adoptions, matching birth families with adoptive parents, adoption planning, pre-placement assessment, placement services, and postplacement counselling and assessments for non relative adoptions in BC.

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.

The *Adoption Act* says that a child may be placed for adoption by the Director of Child, Family and Community Service; an adoption agency; a parent or guardian of a child by direct placement; or a parent or guardian of a child, if the child is placed with a relative of the child. A direct placement means the placing of a child by a parent or other guardian with one or 2 adults who are not a relative of the child.

Section 37 of the *Adoption Act* states the effect of the adoption order. For all purposes, an adopted child becomes the child of the adopting parent(s) and the biological parents cease to have any parental rights or obligations with respect to the child.

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).

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.

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

Part 4 of the Adoption Act deals with interprovincial and intercountry adoptions. Before a person brings a child into the province for adoption they must obtain the approval of a director or an adoption agency. Part 4 Division 2 deals with intercountry adoption of children from countries that are signatories to the Hague Convention on Intercountry Adoption. To complete an adoption from a foreign country, whether that country is a "Hague Country" or not, a person needs the approval of the British Columbia Central Authority.

Under the *Adoption Act*, ss 63(1) and 64(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).

## 2. Procedure

### a) 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 and a report must be filed with the court;
- the child's parents, the birth mother can not sign consents until the child is at least 10 days old. The consent of the biological father, who is not presumed to be the child's biological father under s. 26 of the *Family Law Act,* is not required unless the biological father acknowledges he is the father and is named as the father by the child's birth mother;
- the child's guardians;
- where a child is a permanent ward of the Director of Child, Family, and Community Service, the Director, 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)).

A person's consent must be in the form of an affidavit sworn in front of a notary or a lawyer. 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.

How and when a person can revoke their consent is set out below in section 6.

### b) Notifying the Director of Adoption

Within 14 days after receiving a child into their home for the purposes of adoption, the prospective adoptive parents must notify, in writing the Director of Adoptions or an adoption agency (s 12).

A person wishing to apply to adopt must notify the Director of Adoption in writing of his or her intention (s 31) at least 30 days 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. At least 30 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 Director or licensed adoption agency.

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

In cases of a "direct placement", potential adoptive parents must notify either the Director of Adoption or an 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 birth 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 an adoption agency, providing a recommendation on whether the adoption should be made or not, or whether insufficient information is available to make the determination.

## c) Adoption by the Child's Blood Relatives or Stepparents

The Director of Adoption does not need to be notified or make a report where one adult may apply to the court

to become a parent of a child jointly with another parent, or where a blood relative of a child applies to adopt the child.

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 Director. Where a report from the Director is not necessary, the material filed in support of the application should inform the court:

- in whose care the child has been under since birth;
- if the parents have consented 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.

## d) 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 *BC 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".

## e) 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 s 11 of the *Adoption Act* dispensing with notice of a proposed adoption to a birth father and an application under s 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: 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.

## f) 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 (s 18). The birth mother may revoke her consent 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).

A person who consents to an adoption may revoke his consent prior to the child being placed if the revocation is in writing and received by the director or agency before placement.

### g) Checklist for Filing an Adoption

The necessary documents for an adoption application can be found on the BC Supreme Court website at **http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/info_packages.aspx**

The applicant should include:

- the petitioners' affidavit;
- Petition to the Court (Form F73);
- affidavit of parent's consent to adoption;
- paternity affidavit of birth mother if no father named;
- birth parent expense affidavit, sworn by the adoptive parents;
- requisition to have adoption heard in chambers, if necessary;
- Notice of Hearing of petition (Form F75), if necessary;
- Requisition re: Desk Order for Adoption, if the adoption is uncontested and the necessary consents have been obtained; and
- Desk Order for Adoption (no hearing necessary); and/or order after hearing in chambers.

# XIV. NAME CHANGES

## 1. Legislation: Name Act, RSBC 1996, c 328

The instructions for changing a surname are outlined in the *Name Act*. It can be skipped if the change occurs during the marriage ceremony or divorce. 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 SCR 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.

## 2. Changing a Surname

### a) General

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

**1. 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.

### 2. 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 l2 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 support 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.

### 3. 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.

### 4. A Divorced Person

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

## b) Eligiblity

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

- an adult; or
- if a minor, must be a parent having custody of his or her children; **and:**
- must have lived in BC for at least three months; **or:**
- must have resided in the province for at least three months immediately prior to the date of application (s 3).

## c) 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.

### 1. 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".

### 2. 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.

### 3. 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: 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.

## 3. Changing a First Name

### a) 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.

### b) 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.

# XV. COURT PROCEDURES

## 1. Limitation Dates

Spousal support can be claimed under the *Divorce Act* in a divorce proceeding or in a proceeding for corollary relief alone (ss 3, 4 and 15.2). There is no limitation period within which spouses or divorced spouses must bring a spousal support application.

Under FLA, unmarried spouses have two years to bring an application for division of assets or support after the separation, and married spouses have two years to do so after the divorce or declaration of nullity. Despite this, a spouse may make an application after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

The limitation period for setting aside an agreement is delayed in that it does not run until the spouse discovers or ought to have discovered grounds for the application.

## 2. Supreme Court

The Supreme Court is the only court that hears actions under the *DA*. Under the *FRA* and *FLA*, the Supreme Court has both statutory and inherent jurisdiction to decide all support, division of property, custody, and access matters. Therefore, all *FRA* and *FLA* 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.

## 3. 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.

## 4. Provincial (Family) Court

### a) Jurisdiction

Provincial (Family) Court has jurisdiction under the *FLA* over matters of custody, access, support and guardianship, subject to the jurisdiction of the superior courts and the federal government. The *FLA* provides greater powers for the enforcement of Orders which are available to the Provincial Court. Provincial (Family) Court has jurisdiction over the enforcement of support orders whether made in Supreme Court or Provincial (Family) Court (*Butler v Butler* (1981), 27 BCLR 268 (BCCA)) and has original jurisdiction to make support 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* [1979] BCJ No 58 (QL)). Where the Supreme Court has made an order respecting custody, access, support, 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.

### b) 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 22: Referrals**.

### c) 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 support 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.

## d) Provincial (Family) Court Proceedings

### 1. Application to Obtain an Order

a. 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.

b. 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:

   i. a blank reply form (Form 3);

   ii. a blank financial statement form (Form 4), if the applicant is seeking an order for child, spousal or parental support or a variation of child, spousal or parental support; and

   iii. a filed copy of the applicant's financial statement and applicable documentation under Rule 4 (2), if applicable.

### 2. Reply

a. 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.

b. The respondent must:

i. complete a reply in Form 3, following the instructions on the form;

ii. file that reply, together with three copies of it, in the registry where the application was filed; and

iii. if applicable, file the original and three copies of the respondent's financial statement and applicable documentation referred to in Rule 4 (2)(b).

c. In the reply, the respondent may:

i. consent to one or more of the orders in the application;

ii. disagree with anything claimed in the application, stating the reasons for the disagreement;

iii. apply to the Court for child access, spousal support, or a restraining order prohibiting interference under the *Family Relations Act*; and/or iv. apply to the Court for an order to change existing orders or agreements.

**3. Family Justice Registries**

a. 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.

i. For more information, see the website: www.ag.gov.bc.ca/familyjustice/help/counsellors/index.htm.

**4. Parenting After Separation Program**

a. 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.

b. 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: www.ag.gov.bc.ca/familyjustice/help/pas/index.htm.

**5. First Appearance**

a. 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.

**6. Pre-Trial Conferences**

a. 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.

**7. Family Case Conference**

a. 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.

**8. Witnesses**

a. 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.

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

**9. Affidavit Evidence**

a. 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.

**10. Notices of Motion**

a. 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:

i. an interim order to be made (*FLA* s216);

ii. to file documents in another registry;

iii. to have a pre-trial conference; iv. to cancel a subpoena;

v. an order to produce documents;

vi. an order requiring that paternity tests be taken;

vii. to use another method of service (no notice required);

viii. to settle the terms of an order;

ix. to extend a time limit;

x. to change or cancel an *ex parte* order;

xi. to have a file transferred;

xii. to have disclosure; or

xiii. to obtain directions on procedures not in the *Provincial (Family) Court Rules*.

**NOTE:** Different Provincial Court Registries have different procedures regarding evidence at interim hearings. Some allow Affidavits and others require leave to produce and file an Affidavit and prefer viva voce evidence. Be sure to check the procedure at the Registry in question before filing materials.

**11. Trial**

a. 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.

**12. Procedure for Enforcement of Custody Orders**

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

**13. Procedure for Enforcement of Support Orders**

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

**14. Orders**

a. 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.

b. 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.

**15. Compliance with Provincial Court (Family) Rules**

a. 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. Please check the Cumulative Regulation Bulletin 2014 for any non-consolidated amendments to this regulation that may be in effect

# 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 Law Act*, *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 necessaries of life".

Under the *Family Law Act*: "a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians.

Under 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.The Family Law Act states that a person cannot become a child's guardian by agreement except if the person is the child's parent or as provided under the *FLA*, *Adoption Act* or Child, Family and Community Service Act. Please note that the definition of guardianship varies between the *FLA* 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.

### 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.

**NOTICE OF FAMILY CLAIM**

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

**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.

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

*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 or 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.

**ALTERNATE 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).