CAUTION

The Professional Legal Training Course provides the Practice Material to users as an aid to developing entry level competence, with the understanding that neither the contributors nor the Professional Legal Training Course are providing legal or other professional advice.

Practice Material users must exercise their professional judgement about the accuracy, utility and applicability of the material. In addition, the users must refer to the relevant legislation, case law, administrative guidelines, rules, and other primary sources.

Forms and precedents are provided throughout the Practice Material. The users also must consider carefully their applicability to the client's circumstances and their consistency with the client's instructions.

The Law Society of British Columbia and the Professional Legal Training Course can accept no responsibility for any errors or omissions in the Practice Material and expressly disclaim such responsibility.
Professional Legal Training Course 2015

Practice Material

Family

contributors:
Scott Booth: Jenkins Marzban Logan LLP
John-Paul E. Boyd: Aaron Gordon Daykin Nordlinger
Sandra L. Dick: Heath Law LLP
Trudy A. Macdonald: Peterson Stark Scott

practice material editor:
Alexis Kazanowski
FAMILY

CONTENTS

PRELIMINARY MATTERS

[§1.01] Introduction to Family Law Practice 1

[§1.02] Initial Considerations 1
1. First Client Meeting 2
2. Urgent Matters 2
3. Preservation of the Status Quo 2
4. Limitation Periods and Time Limits 3
5. Conflicts of Interest 3
6. Obtaining Instructions 3

[§1.03] Financial Disclosure 3

[§1.04] Special Duties of Counsel 4

[§1.05] An Introduction to Mediation 4
1. The Process 5
2. When to Consider Mediation 5
3. Independent Legal Advice 5
4. Qualifications of Mediators 5
   (a) Lawyers as mediators 5
   (b) Non-lawyer mediators 6

[§1.06] An Introduction to Collaborative Law 6

[§1.07] An Introduction to Arbitration 6

[§1.08] An Introduction to Parenting Coordination 7

[§1.09] References 8

APPENDICES

Appendix 1 — Sample Client Intake Questionnaire 10

FAMILY LAW PROCEEDINGS

[§2.01] Which Statute to Apply? 16

[§2.02] Choice of Court – Supreme Court vs. Provincial Court 16
1. Jurisdiction 16
2. Disclosure and Discovery 17
3. Enforcement 17

[§2.03] Initiating Court Proceedings 17
1. Supreme Court 17
   (a) Starting family law cases 17
   (b) Applications for non-final orders 18
   (c) Final orders 18
   (d) Form F8 financial statements 18
2. Provincial Court (Family)
   (a) Family Justice Registries (Rule 5) 20
   (b) Parenting After Separation Program Registries (Rule 21) 21
   (c) Interim applications 21
   (d) Consent orders 21

[$\S 2.04$] Urgent Matters 21
1. Status of Litigation 21
2. Preservation of Property 22
3. Protection of Persons 22
4. Applying for Restraining Orders 22

[$\S 2.05$] Variation Proceedings 22
1. Supreme Court 23
2. Provincial Court (Family) 23

[$\S 2.06$] Divorce Proceedings 23

[$\S 2.07$] Guardianship 24

[$\S 2.08$] Custody 25
1. Factors Governing Determination of Custody 25
2. Joint Custody 26

[$\S 2.09$] Access, Parenting Time, and Contact 26

[$\S 2.10$] Spousal Support 26
1. Tax Impact 26
2. Jurisdiction and Limitation Periods 27
   (a) Divorce Act 27
   (b) Family Law Act 27
3. The Spousal Support Advisory Guidelines 27
4. Principles 28
   (a) Divorce Act 28
   (b) Family Law Act 28
   (c) Case law 29

[$\S 2.11$] Child Support 29
1. Tax Impact 30
2. Governing Legislation 30
   (a) Divorce Act 30
   (b) Family Law Act 30
3. Eligible Children 30
4. Liable Parties 30
   (a) Divorce Act 30
   (b) Family Law Act 30
   (c) Step-parents 31
   (d) Parentage 31
5. The Child Support Guidelines 31

[$\S 2.12$] Variation of Custody or Support Orders 32
1. Variation or Change of Spousal Support 32
   (a) Divorce Act 32
   (b) Family Law Act 32
   (c) Principles 33
2. Variation of Child Support 33
3. Variation of Custody, Guardianship, Parenting Time
   (a) Divorce Act
   (b) Family Law Act
   (c) Principles under Divorce Act
   (d) Relocation/Mobility

§2.13 Dividing Property and Debt
1. The Family Relations Act
2. The Family Law Act
3. Unequal Division
4. Specific Assets
   (a) Pensions and RRSPs
   (b) Property on Reserve Lands
5. Property Agreements
6. Canada Pension Plan

APPENDIX
Appendix 2 — Jurisdiction

INTERIM APPLICATIONS IN FAMILY LAW MATTERS

§3.01 Introduction
§3.02 Application Procedures
§3.03 Applications without Notice or on Short Notice
§3.04 Types of Interim Applications in Family Law Cases
1. Interim Custody and Access (Divorce Act, s. 16(2)) and/or Guardianship and Parenting Time (Family Law Act, s. 45, 51, 216)
2. Interim Support for Spouse or Child: Family Law Act, ss. 149, 165 and 216; Divorce Act, ss. 15.1, 15.2 and 15.3
3. Appointment of Expert
4. Protection Orders: Family Law Act, s. 183
5. Exclusive Occupancy: Family Law Act, s. 90
6. Restricting Communications: Family Law Act, s. 225
7. Orders Respecting a Residence: Family Law Act, s. 226
8. Restraining the Use, Disposition or Encumbrance of Property: Family Law Act, s. 91; Land Title Act, ss. 213 and 215
9. Interim Distribution of Assets and Sale of Property: Family Law Act, s. 89; Supreme Court Family Rule 15-8
10. Pre-Trial Examination of Witnesses: Supreme Court Family Rule 9-4
11. Appointment of Receiver or Receiver Manager: Supreme Court Family Rule 12-2
12. Security for Costs: Supreme Court Family Rule 22-1(6)
13. Applications for Findings of Contempt: Supreme Court Family Rule 21-7

APPENDIX
Appendix 3A — Affidavit Guidelines
PRE-TRIAL INVESTIGATION AND PREPARATION

[§4.01] Discovery 55
[§4.02] Orders Respecting Disclosure 56
[§4.03] Property and Financial Experts 56
[§4.04] Needs of the Child Assessments 56
[§4.05] Identifying and Interviewing Witness 57
[§4.06] Interrogatories 57
[§4.07] Schedule of Assets 58

CASE MANAGEMENT CONFERENCES, SETTLEMENT CONFERENCES AND ALTERNATIVES TO TRIAL

[§5.01] Judicial Case Conference 59
[§5.02] Trial Management Conference 59
[§5.03] Settlement Conference 60
[§5.04] Summary Trial 60
[§5.05] Offers to Settle 60

JUDGMENTS & ENFORCEMENT OF ORDERS AND AGREEMENTS

[§6.01] Judgments and Orders 61
[§6.02] Effective Date of Orders 62
[§6.03] Enforcement of Restraining Orders 62
[§6.04] Enforcement of Support Orders 62
1. Extraprovincial Support Orders 62
2. Family Maintenance Enforcement Act 63
3. Family Law Act 64
4. Contempt Proceedings 64
[§6.05] Enforcement of Agreements 64

UNDEFENDED FAMILY LAW CASES

[§7.01] Undefended Family Law Cases 65
1. Other Proceedings 65
2. Definition (SCFR 1-1(1)) 65
3. Certificate of Pleadings 65
4. What to File 66
5. The Order 66
[§7.02] Child Support in Undefended Family Law Cases 66
OTHER PROCEEDINGS

[§8.01] Child, Family and Community Service Act 67
[§8.02] Adoption Act 70

FAMILY LAW AGREEMENTS

[§9.01] Introduction to Family Law Agreements 72
[§9.02] Statutory Framework – the Family Relations Act 73
  1. Marriage Agreements 73
  2. Ante-Nuptial or Post-Nuptial Settlements 73
  3. Separation Agreements 73
  4. Cohabitation or Separation Agreements between Unmarried Persons 73
[§9.04] Varying or Settling Aside Agreements 75
  1. Procedural Fairness 75
  2. Substantive Fairness 76
[§9.05] Limitation Periods 77
[§9.06] Transitional Provisions 78
[§9.07] Wills and Estates Considerations 78
[§9.08] Minutes of Settlement and Consent Orders 79
Chapter 1

Preliminary Matters

§1.01 Introduction to Family Law Practice

As a family law lawyer, you will be advising clients about their legal rights and obligations upon the breakdown of their casual or spousal relationship. Most often, you will be asked to provide advice on issues such as:

(a) custody and access (Divorce Act);
(b) guardianship, parenting arrangements and contact (Family Law Act);
(c) division of family property, excluded property and family debt (FLA);
(d) entitlement to an interest in assets under equitable principles and the law of trusts;
(e) divorce (Divorce Act);
(f) interim and permanent spousal support (FLA or Divorce Act);
(g) parentage (FLA);
(h) preservation of family property (FRA, rules of court);
(i) protection of a party or a child (FLA, rules of court);
(j) setting aside or enforcement of agreements (FLA);
(l) removal or protection of a child (Child, Family and Community Service Act).

Other relevant legislation, rules and documents include:
- Child Support Guidelines
- Family Maintenance Enforcement Act
- Child, Family and Community Service Act
- Adoption Act
- Indian Act
- Interjurisdictional Support Orders Act
- Land Title Act
- Land (Spouse Protection) Act
- Supreme Court Family Rules
- Provincial Court (Family) Rules
- Spousal Support Advisory Guidelines

Family law has enjoyed an unusual degree of legislative attention over the past several years and it is especially important to verify that your source materials and knowledge of the law are current. For example:

the Family Relations Act, the cornerstone legislation in the provincial law on domestic relations since 1972, was replaced by the Family Law Act on March 18, 2013;

the Supreme Court Family Rules, introduced in July 2010, and the Provincial Court (Family) Rules have been amended to accommodate the Family Law Act; and

the child support tables to the Child Support Guidelines were updated on December 31, 2011.

§1.02 Initial Considerations

Clients typically consult a lawyer during an emotionally difficult time in their lives. In family law matters, clients are family members who may end up on opposite sides of litigation. If there are children involved, clients will probably continue to have a relationship with each other after any litigation has been resolved. It may also be the client’s first exposure to the legal system.

As a lawyer, your role is to protect and advance your client’s legal rights. While advising your client, you may refer your client to other resources and services, including counsellors, educational resources about parenting after separation, resources for emotional support for the client and children, and experts such as accountants and business valuators. To give your client a sense of some basic issues that arise in family law, you could refer the client to the Ministry of Justice’s JusticeBC website, www.justicebc.ca/en/fam/index.html, the Legal Services Society’s family law website, www.familylaw.lss.bc.ca, or John-Paul Boyd’s public legal education wikibook, wiki.clicklaw.bc.ca/index.php/JP_Boyd.

1. First Client Meeting

Clients often come to a lawyer’s office with misconceptions about what the law is and how it might apply to their situation. When meeting with a client, particularly the first time, it is important that the lawyer be alert to these misunderstandings. Common misconceptions include:

- The “legal separation.” There is no such thing as a “legal separation”, and non-lawyers often use the term when they mean a separation agreement, or because they expect that there is some process that will make spouses “officially separated.” Clients should be told that anyone is entitled to separate without first speaking to a lawyer or judge. What lawyers assist with is the settlement of legal issues.
- The “common-law marriage.” People who are living together are not married and do not need to get a divorce to end their relationship.
- Parenting schedules and child support. Some clients believe that support is a fee paid in exchange for time with a child, or, conversely, that a right to spend time with a child only exists so long as child support is paid. These are independent rights and obligations.
- Settlement during litigation. Some people are unaware that commencing a court action does not preclude settlement without trial.
- Effect of misconduct. It is frequently assumed that fault attaches to adultery and that support and issues about the care of children or division of property may be used to punish an adulterous or abusive spouse.

It will be your job to disabuse your client of such misunderstandings and to provide the client with an overview of the applicable law, legal principles and dispute resolution processes in accessible language suitable to the client.

Few people are aware of how long it may take to resolve matters by litigation or how costly litigation may be. Let the client know that it will be at least a year or more before their family law case will get to trial, if it goes to trial, and that even when resolving family law problems out of court, it can still take a number of months to reach a final settlement. In your first meeting outline your fee arrangement clearly and the sorts of expenses, like photocopying and agents’ fees the client can expect to pay. Follow this up with a retainer letter (see example at the end of this chapter).

It is important for your client to understand the steps that will be necessary as a file proceeds, as well as dispute resolution processes other than litigation. It is also important for you to find out the result the client hopes to achieve and help the client evaluate whether or not his or her goals are realistic, reasonable or desirable. Consider also how the law might differ regarding the issues involved if one or both of the parties has Indian status, is a member of a First Nation or has assets located on reserve land (see Indian Act, s. 88).

Whatever your client’s goals are, you will require basic information in order to commence negotiation, mediation, a collaborative settlement process, arbitration or litigation.

Using a standard client information form can help you ensure that most relevant information about the file is obtained in an organized and easily referable way. A completed form will also help when you draft pleadings, if necessary. Appendix I contains a sample first interview questionnaire. See also the family law interview checklist from the Law Society’s Practice Checklist Manual at www.lawsociety.bc.ca/docs/practice/checklists/D-1.pdf

When the health of a client is a relevant issue, obtain authorizations for the release of medical records at the initial interview. You might also want to get written authorizations from your client to allow you to speak to, and obtain records from, the Canada Revenue Agency, accountants, bankers or financial advisors.

2. Urgent Matters

At your first meeting with the client canvass whether there are any issues that need to be addressed immediately. When steps must be taken to protect property or persons, litigation must commence immediately. Orders that address urgent problems include orders restraining the disposition or dissipation of property, protection orders preventing the harassment of a party or a child of the parties, and orders to prevent the removal of a child from the jurisdiction. (See §2.04 and §3.04 for more about these applications.)

Restrainting orders and protection orders can be obtained without notice or on short leave to the respondent. (See §3.04 regarding applications for orders without notice.)

While commencing litigation in this manner does not preclude settlement through negotiation or mediation, serious settlement discussions may be delayed if a restrained party feels aggrieved by an order obtained on short or no notice.

3. Preservation of the Status Quo

At your initial interview with the client you should also canvass any immediate plans the client might have that would alter the status quo or be prejudicial to his or her interests. For example, is the client about to leave the children with the other party, leave the family home, or leave the country? Is the client planning on selling or moving any assets?
Such actions may affect the outcome of the case substantially.

4. Limitation Periods and Time Limits

Review any applicable limitation periods and time limits at or immediately following the initial interview. Take any necessary steps to prevent expiry, usually the commencement of litigation, or to mitigate the impact of an expired limitation period.

In family law, the time limit to be most cautious of concerns the ability of spouses to make claims for spousal support and the division of property and debt. Under s. 198 of the FLA, such claims must be brought within two years of the date of separation, for unmarried spouses, and within two years of the date of divorce or declaration of nullity for married spouses. Other limitations apply where child support is sought from a stepparent.

5. Conflicts of Interest

A conflict of interest will disqualify you from acting. A conflict of interest may arise where the lawyer, or a partner, or an associate in the lawyer’s firm, has represented either of the parties in the past or acted as a mediator or arbitrator for them. If a lawyer joins a new firm, the firm may act against a former client only if “a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur” (MacDonald Estate v. Martin (1990), 77 D.L.R. (4th) 249 at 270). See also Bell v. Nash, [1992] B.C.D. Civ. 2401-04 (S.C.), in which a firm was disqualified from acting after the wife had a brief telephone conversation with a family law lawyer who, unknown to both of them, had previously been retained by the husband.

A conflict of interest will also result if a lawyer in a firm acts on behalf of a company whose shares are family property and a spouse consults another lawyer in the firm about the family law issues arising from the breakdown of the spousal relationship.

Refer to Chapter 2 of the British Columbia Family Practice Manual (Vancouver: CLEBC) for more guidance about conflicts of interest.

6. Obtaining Instructions

A lawyer has a duty to recommend an appropriate and sensible course of action to a client who wants to litigate a family law issue more vigorously than the matter warrants. A lawyer has an obligation not to promote frivolous and vexatious claims.

If you are concerned about the instructions that you are receiving, it is good practice to confirm those instructions in writing before taking any further steps. If your client refuses to give you reasonable instructions and cannot be swayed from those instructions, you may wish to consider terminating the retainer (Code of Professional Conduct for British Columbia (the “BC Code”), Section 3.7).

If you are writing a letter on your client’s behalf—particularly demand letters or letters proposing settlement—you should provide your client with a copy of the letter for review and approval before you send the letter so that there can be no mistake about your instructions and the client's approval of the approach being taken.

You should provide your client with copies of all correspondence and pleadings to keep the client current on the status of his or her file.

§1.03 Financial Disclosure

Financial disclosure is vital to the resolution of all claims involving the division of property and debt or a claim for support, whether in court or out of court. When the parties are litigating their dispute, or not, the obligation to disclose financial information continues beyond the initial exchange of information.

Your client will sometimes be misinformed about the family finances. Have the client obtain copies of any documents relating to the family finances, such as bank account statements and credit card statements. If the client does not have access to the full particulars of accounts held by the other spouse, the client should, at a minimum, record the name of the financial institutions corresponding with his or her spouse.

Ask the client to produce income tax returns for at least the last three years and, if the returns are not available, have the client write to the Canada Revenue Agency to obtain copies. This takes some time, so you should recommend it at an early stage. The client should also produce all CRA Notices of Assessment and Notices of Reassessment issued in connection with those tax years. Remember that however the matter proceeds, whether by negotiation, mediation, arbitration or litigation, financial information must be exchanged whenever property and debt or support is at issue.

After obtaining disclosure from the client, you should verify the sufficiency of the information provided. Consider asking for additional documents where the documents produced do not fully explain the client’s financial situation. Conduct a title search on any properties described by the client such as the family residence, recreation and investment properties and any company or business properties. Obtain copies of the title and any financial encumbrances registered against it. You may want to conduct a motor vehicle search of all vehicles used by the family (both personal and corporate) to determine in whose name the vehicles are held and whether there are any encumbrances registered against them. When appropriate, you will want to
conduct a corporate search of any companies with which the client or the spouse is involved and searches in other registries such as the Personal Property Registry. Common pitfalls involving family finances include:

- Overlooking assets such as pensions, items in safety deposit boxes, foreign property, shares in closely-held companies and property held in trust.
- Failing to claim, record, or properly appraise assets. This is a recurring complaint made against family law practitioners in negligence actions.
- Failing to consider the effect tax issues will have on the net distribution of property. Taxes, especially capital gains issues, may material impact on the parties’ positions after property is divided. Always access appropriate expertise when dealing with tax issues.

[§1.04] Special Duties of Counsel

Section 9 of the DA requires that every lawyer who acts in a divorce proceeding must: draw to the attention of his or her client the provisions of the DA that have as their object the reconciliation of the spouses; discuss the possibility of reconciliation with the client; and, inform the client of the counseling facilities available to assist in efforts at reconciliation.

The same section also requires that counsel discuss with the client the advisability of negotiating (as opposed to litigating) custody and support issues, and inform the client of any facilities which can assist the parties in negotiation.

Both of these duties are mandatory, however they are not unduly onerous and can be disposed of in one or two sentences in a retainer letter. Note that before you may file a notice of family claim, you must sign a declaration that you have complied with s. 9 of the DA; the declaration is included in the court forms.

Under s. 8 of the FLA, counsel must: assess whether family violence is present and, if so, the extent to which the family violence may impact the safety of the client, or a family member of the client, and the capacity of the client to negotiate a fair settlement; in light of the assessment, discuss with the client the advisability of different dispute resolution processes and the availability of resources to assist in the resolution of the dispute; and, advise the party that agreements and orders concerning children must be made in the best interests of the child only.

Although your duties under FLA, s. 8 could be dealt with in the same perfunctory manner as your duties under DA, s. 9, the gravity of issues concerning family violence is substantial and warrant a more attentive approach.

Note that before you may file a notice of family claim, you must sign a declaration that you have discussed with the client the advisability of different dispute resolution processes and the availability of resources to assist in the resolution of the dispute.

[§1.05] An Introduction to Mediation

Family law disputes are frequently resolved using methods other than litigation. Mediation is a family dispute resolution process that uses a neutral professional to manage a process in which the parties themselves create the solution. Mediation is available whether court proceedings have commenced or not.

Mediation is particularly important in family law matters, where the costs of prolonged litigation are often beyond the parties’ means and legal disputes tend to involve parties who will have an ongoing relationship with one another long after the dispute is resolved. The key benefits of mediation in family law are these:

- Mediation is cheaper than litigation and usually resolves matters a great deal more quickly than litigation.
- Techniques are available to focus the mediation process more squarely on the needs and the interests of the children than is possible in court.
- The persons who have decision-making power in mediation are the parties themselves rather than the judge, a stranger who won’t know any more about the parties, their relationship and their children than can be revealed on the stand.
- Since it is the parties themselves who craft the terms of their settlement, mediated agreements tend to be more durable than decisions that are imposed by the court.
- Mediation leaves parents with the best chance of maintaining a cooperative parenting relationship with each other into the future.
- Parties who resolve the issues arising from their separation by mediation tend to return to mediation when future disputes arise.
- The terms of settlement can be precisely tailored to the particular circumstances of the parties and their children, in ways that are often not available to the court.

Be aware that there may be cultural differences that will impact the way in which your client approaches dispute resolution. For example, in some Aboriginal communities, circles are used as a mechanism for working through conflicts. Some Muslim clients may want to seek resolution by applying Sharia law, and orthodox Jews may wish to resolve matters through a rabbinical tribunal called a Beth Din.
Finally, be aware that mediation will not be suitable for all clients. For some clients the wounds from the separation may be too fresh to allow them the objectivity necessary to bargain; others are simply unwilling to contemplate any compromise and are completely intractable and inflexible. Some lawyers also believe it is inappropriate to attempt mediation where allegations of family violence have been raised or where their clients allege that the relationship involved a power imbalance, however mediation can succeed even in circumstances like these using mediators with special training.

1. The Process

A mediator, who may or may not be a lawyer, will assist the parties in negotiating the resolution of issues such as the care of children, support, and division of property and debt. The mediator has no binding decision-making power. Since complete disclosure and confidentiality are essential to the mediation process, mediation sessions are without prejudice; if the mediation does not result in agreement and the parties proceed with litigation, information disclosed and offers made in the mediation are not admissible as evidence in subsequent court proceedings.

(In the Supreme Court, a party to a family law proceeding may compel mediation by delivering a notice to the other party and the Dispute Resolution Office, pursuant to the Notice to Mediate (Family) Regulation. The regulation describes how the process is commenced and the mediator is chosen and prescribes certain pre-mediation steps, and should be read carefully.)

The mediation process does not displace the role of counsel. Not only do lawyers routinely participate in the mediation process with the client, they critically evaluate any resulting agreement with the client and advise the client as to his or her individual legal rights and the positive and adverse consequences of any settlement.

Once agreement has been reached, it will be reduced to writing by the mediator or counsel for one of the parties. This first draft is frequently modified to ensure that all matters have been addressed. It may even be necessary to return to mediation to resolve an issue that became apparent as a result of the legal advice a party has received. When all remaining issues have been ironed out, the parties will execute the final agreement, usually witnessed by their respective lawyers.

2. When to Consider Mediation

Some clients and issues are more likely to succeed in mediation than others. Clients best suited to mediation are generally able to evaluate their options with a pragmatic, cost-benefit analysis and are flexible in how their own interests may be met. The issues most susceptible to mediation are fairly clear-cut from a legal perspective (like the payment of child support) or offer at least some room to move (like determining the exact amount of a party’s interest in an asset).

3. Independent Legal Advice

People will often seek advice about an agreement reached through mediation. You will be required to offer your opinion about whether the agreement is fair, and how it compares to the results that might be achieved through litigation or another dispute resolution process. You will also need to explain how the agreement affects the client’s rights and obligations, in both the short- and long-term, and provide your opinion about whether the obligations imposed on the client by the agreement are practical, manageable, and appropriate in the circumstances.

When giving this advice, called “independent legal advice” to reflect that the client is visiting a lawyer with loyalty only to the client’s interests, it is important to respect the mediation process through which the agreement was reached. Every effort must be made to respect the rights of the individuals to settle their dispute, including to compromise their positions and potentially accept an unreasonable result; however, you must still be alert to, and advise the client of, any unfairness.

You will run into agreements that are so one-sided and so obviously unfair that you cannot recommend the agreement to the client and in fact vigorously recommend that the agreement should be abandoned. If your client insists on signing such an agreement you should send the client a letter summarizing your opinion of the agreement and confirming your client’s instructions. You may also refuse to witness the client’s signature on the agreement.

4. Qualifications of Mediators

(a) Lawyers as mediators

The Law Society oversees the accreditation of lawyers who wish to act as family law mediators. New qualifications for these roles came into effect on March 18, 2013 along with the new Family Law Act. The qualification requirements are as follows:

(1) the lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

(2) the lawyer must have a minimum of 80 hours of approved mediation skills training, which must include theory and skills training, drafting, how to conduct a
mediation, the statutory framework of mediation, family dynamics and a minimum of 10 hours of role playing scenarios; and,

(3) the lawyer must have a minimum of 14 hours of approved training in family violence, which must include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Lawyers who wish to hold themselves out as family law mediators may request accreditation through the Law Society after completing the above requirements. (See Law Society Rule 3-20 and http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Family-law-alternate-dispute-resolution-qualification-requirements for more information.)

Appendix B, Item 2 of the BC Code sets very specific limitations on lawyers who may mediate, as well as on who may be legal counsel for a party participating in mediation. In addition to being qualified to mediate, the family law mediator may not be in a position in relation to the parties that could limit his or her impartiality. The mediator may not have had a prior mediator relationship with either of the parties, and the mediator must not be in a position where confidential information received previously may be disclosed. These prohibitions extend to partners and associates of the family law mediator.

A family law mediator must enter into a written agreement to mediate with the parties before mediation starts. Appendix B Item 4 of the BC Code prescribes the minimum requirements for that agreement. The agreement must provide for full disclosure and state that all communications are “without prejudice”. It must state that the family law mediator is not acting as legal counsel. The parties must be reminded of the duty of the mediator to report instances of child abuse to the Director of Family and Child Services. Finally, the agreement must contain the terms of remuneration, including the rate of remuneration and the circumstances under which the mediation will terminate. As counsel for a party, warn your client of the need to enter into this agreement and be prepared to explain the legal ramifications of the agreement to your client. When requested, a family law mediator will provide counsel with a draft agreement for review.

(b) Non-lawyer mediators

Anyone may offer their services as a mediator who meets the minimum experience and training thresholds prescribed in the regulations to the FLA.

[§1.06] An Introduction to Collaborative Law

Collaborative law is a negotiation-based dispute resolution process. It is a more structured process than mediation and is intentionally interdisciplinary, involving multiple professionals with expertise in dispute resolution, family breakdown, adult and child psychology, and financial matters. As well as lawyers, the collaborative process may include counsellors, financial advisors and child specialists. The object of the collaborative process is to reach an interests-based settlement with a minimum of emotional trauma to the parties and their children.

Family law lawyers who are prepared to engage in the collaborative process usually have specialized training in collaborative law and are usually also qualified family law mediators. At the beginning of the process, the parties and lawyers sign a special retainer agreement called a “Participation Agreement”, which includes a term obliging the lawyers to withdraw in the event that the process fails and litigation is to be undertaken.

The collaborative process consists of multiple, carefully managed four-way meetings between counsel and their clients, and concludes with the execution of a separation agreement if successful. The lawyers and the parties are expected to work with one another to make whatever production and investigations may be necessary, manage conflict between the parties as they emerge, and may recruit the assistance of such third-party professionals as may be necessary to move negotiations forward.

[§1.07] An Introduction to Arbitration

Arbitration is a dispute resolution process in which the parties agree to submit their dispute to a neutral third-party, an arbitrator, for resolution and agree to be bound by his or her decision, called an award. The arbitrator serves in a judge-like capacity and must observe the rules of natural justice and due process, as well as the procedural requirements of the provincial Arbitration Act.

Arbitration offers a number of advantages compared to litigation and mediation processes:

- It is private and offers a certain amount of discretion – hearings are conducted in camera, no public records are kept and arbitral awards are not published.
- It is flexible and adaptable to the needs of the parties and their disputes – arbitration hearings can be conducted with varying degrees of formality, using the procedural rules and rules of evidence selected by the parties and their arbitrator.

Family
Family

- It provides parties their choice of arbitrator – the parties can select the arbitrator whose skills are best suited to the matters in dispute, such as a particular expertise in tax law, corporate law or childhood developmental issues.

- It resolves family law disputes with the same finality and certainty as litigation – arbitral awards may varied on the same grounds as court orders and may be appealed on any question of law or of mixed law and fact.

- It is relatively speedy – conferences and hearings can be scheduled at the convenience of counsel, the parties and the arbitrator.

Any family law issue can be conclusively resolved through arbitration except for divorce. Only the court may make a divorce order.

1. The Process

The arbitration process begins with the execution of an arbitration agreement appointing the arbitrator, setting out the terms of his or her service and submitting the parties and their dispute to the jurisdiction of the arbitrator. A meeting of all parties and the mediator is then held to define the matters to be resolved through arbitration, designate a party as the claimant or respondent for purposes of the arbitration process, select the governing rules, which might be the rules of court, the rules of the BC Arbitration and Mediation Institute or another set of rules altogether, and set dates for the hearing and the exchange of documents and arguments.

Arbitration hearings are generally formal in nature, although less so than court hearings, but use the same order of proceedings. The party nominated as the claimant proceeds first and presents his or her case, the respondent follows with his or her case and the hearing concludes with closing arguments. The arbitrator may give an oral award immediately or may reserve; reserved awards are commonplace.

2. Qualifications of Arbitrators

(a) Lawyers as arbitrators

The Law Society oversees the accreditation of lawyers who wish to act as family law arbitrators. New qualifications for these roles came into effect on March 18, 2013 along with the new Family Law Act. The qualification requirements are as follows:

(1) a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or as a judge or master;

(2) sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

(3) 40 hours of training in how to conduct an arbitration, which must include theory and skills training, drafting, how to conduct an arbitration, the statutory framework of arbitration, family dynamics and administrative law principles governing arbitrations; and,

(4) 14 hours of approved training in family violence, which must include, skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Lawyers who wish to hold themselves out as family law arbitrators may request accreditation through the Law Society after completing the above requirements. (See Law Society Rule 3-20.1 and http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Family-law-alternate-dispute-resolution-qualification-requirements for more information.)

(b) Non-lawyer arbitrators

Anyone may offer their services as an arbitrator who meets the minimum experience and training thresholds prescribed in the regulations to the FLA.

[§1.08] An Introduction to Parenting Coordination

Parenting coordination is a child-centred, hybrid dispute resolution process that combines elements of mediation and arbitration to resolve disputes about the care and control of children where the parties have a final order or separation agreement in place. Parenting coordinators are family law lawyers, psychologists, registered clinical counselors, social workers and mediators who have taken special interdisciplinary training on childhood developmental issues, attachment and family systems theories, conflict resolution, mediation and arbitration.

Parenting coordinators are appointed by agreement or court order and may be appointed under s. 15 of the FLA over the objection of a party. Parenting coordinators are appointed for renewable terms of up to two years.

1. The Process

The parenting coordination process begins after the order or agreement appointing the parenting coordinator is made with the execution of a parenting coordination agreement. The parenting coordination agreement sets out the terms of the parenting coordinator’s service, defines the scope of the matters to be addressed and submits the parties to the authority of the parenting coordinator.

Parenting coordinators resolve parenting disputes as they may arise during the period of their appointment. When a party raises a dispute with the
parenting coordinator, the parenting coordinator first attempts to resolve the dispute by building consensus between the parties and trying to find compromise. Failing agreement, and in the event of urgency that precludes the possibility of significant negotiations, the parenting coordinator may resolve the dispute by making a determination of the dispute that is binding on the parties.

In addition to this dispute resolution function, parenting coordinators have the long-term goal of improving the parties’ capacity to co-parent by working with them to improve communication skills and conflict management.

2. Qualifications of Parenting Coordinators

(a) Lawyers as parenting coordinators

The Law Society oversees the accreditation of lawyers who wish to act as parenting coordinators. New qualifications for these roles came into effect on March 18, 2013 along with the new Family Law Act. The qualification requirements are as follows:

1. a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or as a judge or master;

2. sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner this must include considerable experience dealing with high conflict families with children;

3. 40 hours of training in how to conduct an arbitration, which must include, theory and skills training, drafting, how to conduct an arbitration, the statutory framework of arbitration, family dynamics and administrative law principles governing arbitrations;

4. 80 hours of approved mediation skills training, which must include, theory and skills training, drafting, how to conduct a mediation, the statutory framework of mediation, family dynamics and a minimum of 10 hours of role playing scenarios;

5. 40 hours of approved parenting coordination training, which must include, parent coordination skills training and theory, dealing with high conflict families and individuals, child development, interviewing children and the effects of separation and divorce on children, the effects of separation and divorce on adults; and,

6. 14 hours of approved training in family violence, which must include, skills for identifying, evaluating and managing family violence issues of power dynamics in particular relation to the dispute resolution process.

Lawyers who wish to hold themselves out as family law arbitrators may request accreditation through the Law Society after completing the above requirements. (See Law Society Rule 3-20.2 and http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Family-law-alternate-dispute-resolution-qualification-requirements for more information.)

(b) Non-lawyer parenting coordinators

Anyone may offer their services as a parenting coordinator who meets the minimum experience and training thresholds prescribed in the regulations to the FLA.

[§1.09] References

The Law Society of British Columbia’s Practice Checklists Manual is a very useful and frequently updated resource, and is available from the law society’s website, www.lawsociety.bc.ca, on the Practice Support and Resources page. The manual includes checklists for conducting family law client interviews, preparing marriage, cohabitation and separation agreements, and managing court proceedings.

There are several publications from the Continuing Legal Education Society of BC that are available to assist you with family law matters:

(a) Family Law Sourcebook for British Columbia (loose-leaf with online access). The Sourcebook is updated annually and provides authoritative guidance on substantive family law matters. Topics include: custody and access; guardianship, parenting arrangements and contact; support; injunctive relief and protection orders; financial disclosure and valuation; experts and expert evidence; property, debt and pension division; costs; child protection; adoption; and, testamentary issues.

(b) British Columbia Family Practice Manual (loose-leaf with forms and precedents on disk, and online access). The Practice Manual is updated annually and provides practical advice on all aspects of a family law practice. Topics include: family practice organization; initial interviews; negotiation, mediation, arbitration and parenting coordination; family law
agreements; management of court proceedings, including case conferences, chambers applications and discovery; preparation for and conduct of trials; appeals; enforcement of orders; child protection; adoption; naming and name changes; and, aboriginal family law issues.

(d) **Annual Review of Law and Practice** (softcover). An annual publication summarizing the law in thirty-three practice areas, from administrative law to wills and estates. The *Annual Review* covers major developments in family law, legislation and procedure, and provides annotated versions of the Supreme Court Rules and the full text of the forms for the Supreme Court and Court of Appeal.

(e) **Annotated Family Practice** (softcover). An annual publication that includes provincial and federal legislation and regulation on family law subjects, including the rules of court for the Provincial Court and Supreme Court, practice directions and case annotations. This book provides annotated versions of the *Family Relations Act* and the Child Support Guidelines.

(f) **Desk Order Divorce: An Annotated Guide** (loose-leaf with forms and precedents on disk, and online access). A frequently updated publication that covers the desk-order divorce process in detail. Includes the rules and forms, relevant legislation, and strategic commentary.

(g) **Family Law Agreements: Annotated Precedents** (loose-leaf with precedents on disk and online access). This is a frequently updated and essential reference for drafting marriage, cohabitation and separation agreements. Topics include: minutes of settlement and consent orders; recitals, operative clauses and general clauses; terms relating to the care of children, support, property and debt, pensions; and, tax issues. Sample clauses are provided for each topic.

The *Sourcebook*, the *Practice Manual* and *Family Law Agreements* are critical reference tools for all family law practitioners. The *Annotated Family Practice* is essential for practitioners who do any work in the Provincial Court and for those involved in child protection matters.
APPENDIX 1 – **SAMPLE CLIENT INTAKE QUESTIONNAIRE**

File No.: _____________________________

Client Name: __________________________

Date Information Taken: _____________

Client Referred By: ____________________

**A. PARTY A**

1. Full Name ________________________________________________

2. A) Surname at Birth: _______________________________________

   B) Surname at Marriage: _____________________________________
   (if applicable)

3. Address: ________________________________________________
   Former Address if less than 1 year: _____________________________

4. Telephone: ______________________________________________

5. Date of Birth: ____________________________________________
   Place of Birth: ____________________________________________

6. Domicile: ________________________________________________
   (a) Date arrived in Canada: _________________________________
   (b) Date became resident in B.C.: ____________________________
   (c) Period of residence in B.C.: ______________________________
   (d) Citizenship: __________________________________________
   (e) Is B.C. your permanent home? ___________________________
   If not, do you intend to make B.C. your permanent home? ______

7. Education and vocational training: __________________________

8. Work History: ___________________________________________

9. Present Employment: ______________________________________
   (a) Date of commencement: ________________________________
   (b) Address of employer: _________________________________
   (c) Telephone: __________________________________________
   (d) Description of job: ____________________________________
   (e) Salary: ______________________________________________
   Gross: $ ___________________________ Net: $ ____________________

Family
10. Other income from any source (dividends, pension, child tax benefits, support): 

__________________________________________________________________________

11. Significant medical history: ________________________________________________

12. Name, address and telephone numbers of physicians: ___________________________

B. PARTY B

1. Full Name: _________________________________

2. A) Surname at Birth: ________________________
   B) Surname at Marriage: ________________________
      (if applicable)

3. Address: __________________________________

   Former Address, if less than 1 year: _________________________________

4. Telephone: ________________________________

5. Date of Birth: ______________________________
   Place of Birth: ______________________________

6. Domicile: __________________________________
   (a) Date arrived in Canada: _________________________
   (b) Date became resident in B.C. _______________________
   (c) Period of residence in B.C.: _______________________
   (d) Citizenship: _________________________________
   (e) Is B.C. your permanent home? _______________________
      If not, do you intend to make B.C. your permanent home? _____________________

7. Education and vocational training: _________________________________

8. Work History: ______________________________

9. Present Employment: __________________________
   (a) Date of commencement: _______________________
   (b) Address of employer: _________________________
   (c) Telephone: _________________________________
   (d) Description of job: __________________________
   (e) Salary: _________________________________
      Gross: $ ____________________     Net: $ ____________________

10. Other Income from any source: (dividends, pension, child tax benefits, support): 

_________________________________________

Family
11. Significant medical history: __________________________________________________________

12. Name, address and telephone numbers of physicians: ________________________________

C. RELATIONSHIP

1. Date of cohabitation commenced: ____________________________________________________

2. Place and date of marriage, if applicable: _____________________________________________

3. Particulars of previous marriage(s) of either party: ___________________________________

4. Particulars of divorce(s) or death(s) of previous spouse(s) (date and location): __________

5. If married, is a current marriage certificate available? ________________________________

   Is a translation of the marriage certificate required? ________________________________

6. Date of Separation: _______________________________________________________________

7. Was a marriage or cohabitation agreement entered into at time the relationship began? __

8. Was a separation agreement entered into at time of separation? _______________________

   Is a copy available? _____________________________________________________________

D. FAMILY VIOLENCE

If you believe that any of the following apply to you or your children, please indicate by circling
yes or no. The lawyer will discuss the detail and implications at your meeting.

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical, sexual, psychological and emotional abuse, including attempted abuse</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Forced confinement and/or being deprived of the necessities of life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Restrictions on your financial and/or personal freedom</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intimidation, harassment, coercion or threats, including to other people, property</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and pets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Being stalked or followed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intentional damage to property</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exposure of children to family violence, either directly or indirectly</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

E. CHILDREN

1. Full name(s)                                                                Date of Birth
   __________________________________________________________________________
   __________________________________________________________________________
   __________________________________________________________________________

2. Citizenship: ____________________________

3. Location of child’s passport: ____________________________

4. Residence history of children in previous year: _____________________________

Family
5. School and grade: ____________________________________________________________

6. Is there (likely) a dispute about parenting? _____________________________________

7. Daycare arrangements and costs: ______________________________________________

8. Significant medical history of children: __________________________________________

9. Name, address, telephone number of physician and counsellors: ____________________

10. Do children have any assets, trust property, bank accounts, etc. Please describe: ______

F. ASSETS

1. House (address, date of purchase, title, mortgage, market value): ______________________

   Legal description: ____________________________________________________________________

   In whose name(s) is property registered: _______________________________________________

   Mortgage holder(s): ___________________________________________________________________

   Amount of mortgage owing: __________________________________________________________________

   Mortgage payments: __________________________________________________________________

   Annual taxes, water rates, etc.: __________________________________________________________________

   Name of tenants: __________________________________________________________________

   Rental income: __________________________________________________________________

2. Recreational property (address, date of purchase, title, mortgage, market value): ______

   Legal description: ____________________________________________________________________

   In whose name(s) is property registered: _______________________________________________

   Annual taxes, water rates, etc.: __________________________________________________________________

3. Car(s) – description and registration: __________________________________________________________________

4. Substantial personal property (house contents, antique collections, jewelry, etc.): ______

5. Is copy of current household insurance policy available (if so, please attach): __________

6. Investments (stocks, bonds, receivables): __________________________________________________________________

7. Name of broker: __________________________________________________________________
8. Savings / bank arrangements: ________________________________
   In whose name(s) are accounts: ________________________________
   Name of Bank: ________________________________
   Branch: ________________________________
   Type of account: ________________________________
   Account number: ________________________________
   Approximate balance: ________________________________

9. Life insurance (particulars): ________________________________
   Term or whole life: ________________________________
   Premium payments: ________________________________
   Are copies of life insurance policies available (If so, please attach): ________________________________
   Who is beneficiary: ________________________________

10. Details of RRSPs: ________________________________

11. Details of pensions, approximate value: ________________________________

12. Safety deposit box: ________________________________
   Location: ________________________________
   Contents: ________________________________
   In whose name(s): ________________________________
   Who has key(s): ________________________________

13. Hospital and medical coverage: ________________________________

14. Businesses and Companies: ________________________________
   (a) Name of business: ________________________________
   (b) Location: ________________________________
   (c) Address of registered and records office: ________________________________
   (d) Shareholders’ names: ________________________________
   (e) Approximate value of business, if known: ________________________________
   (f) Name of corporate solicitor and accountant: ________________________________
   (g) Are income tax returns available? ________________________________
G. LIABILITIES

1. Loans payable (particulars – dates, amounts, interest rates):

2. Other significant debts, Including personal guarantees and loans for which you have co-signed:

   Are copies available (If so, please attach)?

3. List credit cards, charge accounts (give account number(s) and indicate if joint or individual and amounts owing):

4. Have retailers and financial institutions been advised of separation?
   Date:
   Is copy of letter or notice available?

H. OTHER PROCEEDINGS

1. Dates and durations of previous separations:

2. Other legal proceedings (court, date, action numbers). Please provide copies of any court documents, if available and name(s) of prior lawyers:

3. Existing separation agreement (date of execution and jurisdiction where executed):
   Is copy available (if so, please attach)?

4. Present financial arrangements between spouses:

I. WILLS AND ESTATES

   Particulars of will:
   Date:
   Location:
   Executor:
   Major beneficiaries:
Chapter 2

Family Law Case Procedures¹

This chapter provides an overview of the family law case procedures in the Supreme Court and Provincial Court of British Columbia, as well as the substantive law that forms the foundation of particular claims in family law cases.

The Supreme Court Family Rules, B.C. Reg. 169/2009, (the “SCFR”) govern family law procedures in the Supreme Court. The Provincial Court (Family) Rules (the “FCFR”) govern family matters in that court. Both sets of rules have been amended as a result of the coming into force of the Family Law Act.

Child protection, adoption, and enforcement of support orders are beyond the scope of this chapter. See Practice Material: Family, Chapters 6 and 8.

[§2.01] Which Statute to Apply?

In British Columbia the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25 (the “FLA”) govern most family law matters. The FLA came into force on March 18, 2013, repealing and replacing the Family Relations Act (the “FRA”). However, pursuant to s. 252 of the FLA, the FRA will continue to apply to property disputes under that act that were commenced prior to the coming into force of the FLA and to disputes over property agreements between married spouses made when the FRA was in force.

The marital status of the parties, the nature of the issues to be resolved and the court selected to hear any litigation, will influence which legislation the litigants rely upon. Only married spouses or formerly married spouses may invoke the Divorce Act, although the Supreme Court may grant leave for someone who is not a spouse to apply for custody of or access to a child of married parents (Divorce Act, s. 16(3)). Both married and unmarried parties may invoke the FLA. The Provincial Court can hear claims about the care and control of children and the payment of child support and spousal support, but can only do so under the FLA.

The Divorce Act alone governs divorce and the recognition of foreign divorce orders. The FLA alone governs the division of property and debt between spouses and guardianship of children. Both the Divorce Act and the FLA deal with the care of children and the time parents spend with children, child support and spousal support.

The property division provisions of the FLA generally do not apply to real property situate on First Nations’ reserve lands as a result of the division of powers in ss. 91 and 92 of the Constitution Act, 1867, except where the First Nation is a treaty First Nation and has the ability to alienate its land, in which case the First Nation will have standing in the proceeding under FLA s. 210. Many First Nations have enacted policies and by-laws or have entered into agreements or treaties that may affect family law issues and you should consult those when appropriate. Note that s. 210 also directs the court to consider certain evidence and submissions from the treaty First Nation.

[§2.02] Choice of Court – Supreme Court vs. Provincial Court

The criteria governing the choice of the court in which to commence a family law case include: the court’s jurisdiction, its rules about disclosure and its ability to enforce its own orders, the subject matter of the litigation, and the legislation under which the litigation is brought.

Before commencing a proceeding, you must determine whether the court has jurisdiction to grant the remedy sought. The discussion in this chapter is limited to choice of forum as between the British Columbia Supreme or Provincial Courts. Note that Division 6, Part 5, of the FLA allows the Supreme Court to take jurisdiction and make orders affecting extraprovincial property in certain circumstances. However, the issue of whether British Columbia courts ought to take jurisdiction over foreign property in a particular case, is beyond the scope of this chapter.

1. Jurisdiction

The Supreme Court of British Columbia has jurisdiction to resolve all matters in a family law case. The Provincial Court has jurisdiction only over those matters specifically assigned to it by statute. Most notably, the Provincial Court lacks jurisdiction to determine property issues under Part Parts 5 and 6 of the FLA.

For constitutional reasons, only a justice of a superior court may make orders under the Divorce Act or respecting property, including division of family property and family debt. However, s. 4 of
the *Provincial Court Act* permits certain provincial court registries to be designated registries of the Supreme Court so that a provincial court judge at that location can make interim orders for custody, access or support under the *Divorce Act*. At present, the only such registries are those in Fort Nelson and Port Hardy.

Both levels of court can make orders under the *FLA* respecting children and support. However, only the Supreme Court has inherent jurisdiction, including the *parens patriae* jurisdiction to make an order in the best interests of persons under a legal disability on an issue not governed by any legislation.

See the jurisdiction chart at Appendix 2.

2. Disclosure and Discovery

The SCFR include mechanisms for disclosure not ordinarily available in the Provincial Court under the PCFR, including the examination for discovery of a party before trial, the examination of witnesses out of province, and the pre-trial examination of witnesses. These disclosure mechanisms are often essential for the determination of property disputes and may be essential for the determination of a party’s income for the purposes of payment of support. In such cases, counsel must carefully consider whether the additional discovery mechanisms available in Supreme Court make that court the better choice.

3. Enforcement

Orders for child support, spousal support, custody or access pronounced under the *Divorce Act* have effect throughout Canada (*Divorce Act*, s. 20) and may be registered in the Supreme Court for enforcement purposes (SCFR 15-3(4)). Most provinces have legislation allowing the registration of similar orders made under the *FLA*.

The Provincial Court may enforce orders respecting support and the care and control of children made by or registered with the Supreme Court as it enforces its own orders for support and the care and control of children (*FLA*, s. 195).

The Director of Maintenance Enforcement may enforce *Divorce Act*, *FRA*, and *FLA* support orders in both the Provincial Court and the Supreme Court under the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, s. 127 (“FMEA”). *FMEA* proceedings are usually brought in the Provincial Court.

Orders for spousal support or child support made outside of British Columbia pursuant to provincial legislation may be registered and enforced in both the Provincial Court and the Supreme Court under the *Interjurisdictional Support Orders Act*.

The power to punish for contempt of a court for breach of an order is restricted to the Supreme Court of British Columbia. The Provincial Court can only punish contempt that occurs in the presence of the judge; see *Provincial Court Act*, s. 27.1. However, the enforcement mechanisms available under the *FLA* are available to both courts.

[§2.03] Initiating Court Proceedings in Family Law Cases

1. Supreme Court

(a) Starting family law cases

The Supreme Court Family Rules govern “family law cases,” which are defined to include proceedings in which a party seeks an order under the *Divorce Act* or the *FLA*, seeks relief in relation to a family law agreement, seeks an annulment, the recognition and enforcement of foreign orders, and any other proceeding in which a party seeks relief arising out of a marriage-like relationship (SCFR 1-1(1)).

Most family law cases start when a party files a notice of family claim in Form F3 (SCFR 4-1(1)). A few relatively uncommon actions will be brought as petition proceedings, which start when a party files a petition in Form F73 under SCFR Part 17 (SCFR Rule 3-1(2) to (4)). A person who starts an action with a notice of family claim is a *claimant*; a person who starts an action with a petition is a *petitioner*. Supreme Court Family Rules 3-1(5) and 21-3(1) allow other claims, such as claims in tort, equity or under the law of trusts, to be brought in a family law case providing the claims are related to or connected with any relief sought in the family law case. Similarly, under SCFR 3-1(5) and 21-3(2) other parties may be joined to a family law case when there is a common question of law or fact, or when the claims against the third parties are related to or connected with any relief sought in the family law case.

A notice of family claim must be personally served on all named *respondents*; petitions must be personally served on all named *petition respondents* (SCFRs 4-1(2), 17-1(3)). Notices of family claim and petitions may be served outside of British Columbia without leave in limited circumstances, including when the court has jurisdiction under:

- s. 10 of the *Court Proceedings and Jurisdiction Transfer Act* (the circumstances in which a real and
substantial connection with British Columbia is presumed); 
- *FLA*, s. 74 (extraprovincial orders for guardianship, parenting arrangements or contact); or, 
- *Divorce Act*, ss. 3 or 4 (divorce proceedings and corollary relief proceedings).

Once served, respondents and petition respondents may contest jurisdiction without attorning by filing a jurisdictional response in Form F78 (SCFR 18-2(1)).

Absent a jurisdictional challenge, a respondent may file a response to family claim in Form F4 (SCFR 4-3(1)), within 30 days after being served with a notice of claim. A respondent who wants to advance a claim of his or her own may file a counterclaim in Form F5 within the same time period (SCFR 4-4(2)). Petition respondents may file a response to petition in Form F74 (SCFR 17-1(4)); the time for responding to a petition varies depending on the residence of the petition respondent: residents of Canada within 21 days, residents of United States within 35 days, and elsewhere within 49 days of being served with a copy of the filed petition.

Filed responses to family claims and counterclaims, and responses to petitions are served on claimants and petitioners by ordinary service under SCFR 6-2, which includes by leaving the document at the person’s address for service, by mailing to the address for service, by faxing to the fax number for service, and by emailing to the email address for service.

(b) Applications for non-final orders

Parties may seek non-final (interim) orders relating to the care of children and support, to restrain dealings with property, for protection orders and so on, in Supreme Court chambers. See *Practice Material: Family*, Chapter 3 for chambers procedures in family law cases. In particular, for a description of the common types of applications for non-final orders in family law cases, see §3.04.

It is important to remember that a party to a family law case cannot apply for a non-final order without first attending a judicial case conference (SCFR 7-1(2)), unless the court waives the requirement for a judicial case conference (SCFR 7-1(4)) or the subject matter of the application falls within the narrow range of exemptions set out in SCFR 7-1(3), which include applications without notice and applications by consent.

See *Practice Material: Family*, Chapter 5, §5.01 for a description of the judicial case conference under SCFR Rule 7-1.

(c) Final orders

When a family law case is undefended (usually when a respondent fails to file a response to family claim) a party may apply through the court registry for a final order by desk order (see §2.06) or apply for the order at trial (SCFR 10-10(1)).

If the proceeding is contested, a party may obtain a final order following trial or may apply for the order in chambers by summary trial under SCFR 11-3 (SCFR 10-11(1)).

(d) Form F8 Financial Statements

(i) General

Supreme Court Family Rule 5-1 requires disclosure of financial information in contested family law cases in which a party seeks an order for support under the *Divorce Act* or the *FLA*, property division under Part 5 of the *FLA*, or the review or variation of a support order (SCFR 5-1(2)).

(ii) Timing and procedure

When SCFR 5-1 applies, each party must serve a financial statement in Form F8 by the following deadlines (SCFR 5-1(11)):

- a party making a claim requiring a financial statement must serve the statement within 30 days of serving the document in which the claim is made; and,
- a party served with a claim requiring a financial statement must serve the statement within 30 days of service of the document in which the claim is made (60 days if the party lives outside Canada and the USA).

The information in and documents attached to a financial statement must be updated if circumstances subsequently render the information or documents inaccurate or incomplete (SCFR 5-1(15) to (17)).
An updated financial statement must be served when the party’s most recent statement will be more than 13 weeks old at the start of the hearing or trial at which the statement will be relied upon (SCFR 5-1(18)).

(iii) Content
Form F8 contains 6 parts:
- Part 1: Income
- Part 2: Expenses
- Part 3: Property (Assets/Debts)
- Part 4: Special or Extraordinary Expenses
- Part 5: Undue Hardship
- Part 6: Income of Other Persons in Household
The parties must complete the parts of the Form F8 relevant to the claim they are advancing or defending and the form includes a table that identifies which parts must be completed.

(iv) Attachments
A party who serves a Form F8 must attach the relevant “applicable income documents” defined at SCFR 5-1(1). These documents include income tax returns and CRA notices of assessment and reassessment, property assessments, corporate financial statements and tax returns, pay stubs and other documents relevant to establishing a party’s income or the value of an asset. The attachments required by the SCFR include the documents specifically required to be disclosed by s. 21 of the Child Support Guidelines (the “CSG”).

(v) Enforcement and disclosure
Supreme Court Family Rule 5-1(28) lists the specific enforcement mechanisms available when a party fails to comply with a requirement under SCFR 5-1, including dismissing an application, striking out a responding document, drawing an adverse inference against the party, punishing for contempt of court, attributing income in an amount the court considers appropriate.

Pursuant to the FLA, s. 5, a party to a family law dispute must make “full and true” disclosure of information required to resolve the dispute. The FLA also contains provisions which permit the Court to make disclosure orders (s. 212) and to penalize incomplete, false or misleading disclosure in a number of ways, including fines and the drawing of adverse inferences (s. 213).

The Child Support Guidelines have independent disclosure requirements, set out at CSG s. 21, and include a variety of mechanisms to compel the required disclosure at ss. 22, 23 and 24.

(vi) Agreement on income
Where the only issue is child support, financial disclosure under the SCFR or the Child Support Guidelines will not be required when the parties are able to agree on the payor’s income and sign an agreement to that effect in Form F9 (SCFR 5-1(8)).

(vii) Particulars
When a financial statement lacks sufficient information, the other party may demand that particulars be provided (SCFR 5-1(13)). If further details are not provided within 7 days, the complaining party may apply for an order that particulars be provided or a new Form F8 be prepared and served within a specified time (SCFR 15-1(14)).

(viii) Disclosure of business interests
Sometimes disclosure of business or corporate interests is required to verify a party’s income or the value of a party’s interest in a corporation, partnership or proprietorship. Supreme Court Family Rules 5-1(19) to (26) provide mechanisms to compel production directly from a third-party, including businesses, when a party fails to make sufficient disclosure.

(ix) Practice tips for completing financial statements
While the formal and content requirements of a Form F8 financial statement must be given deference, the court form may be amended as necessary to add supplemental information, figures and calculations and explanatory notes where the information will assist the court and the opposing party.
income and expenses

- Expenses may be estimated, with prudence. Pay attention to any shortfall between the party’s reported annual income and his or her reported annual expenses.
- If an expense will vary or will be incurred in the future, then say so. Reported expenses are otherwise presumed to reflect the party’s current expenses.
- Income should be broken down and listed by source of income in as much detail as possible.
- Income should reflect the party’s current income and may be estimated, with prudence.

value of assets

- The value of a non-monetary asset is rarely certain. If the value is not known, then it is best to report that the value is an estimate or approximation; list the value as “unknown” as a last resort only.
- It is customary to use the assessment authority’s value of property pending a proper appraisal, and the appraised value when known. The source of the value reported should be identified.
- If current values of bank accounts, investments, and RRSPs are not available, then use the most recent written statement and reference the date of the statement.
- The value of a defined benefit pension plan is usually unknown, unless an actuary or the plan administrator has valued it. The value of defined contribution plans can be drawn from the party’s most recent statement.
- The value of a private business interest is usually unknown unless it was just purchased, there is a buy-out price fixed by a contract, or the business has been valued. The value of the business interest should be reported as “unknown” until a valuation is obtained.

debts

- List the entire amount of any joint debts and personal debts, taking care to distinguish between the two.
- Take care to distinguish between those debts brought into the relationship, incurred during the relationship and incurred after separation.

2. Provincial Court (Family)

The Provincial Court (Family) Rules (PCFR) are not lengthy and a close reading is the simplest way to gain an understanding of provincial court procedure. The rules can be found at: [www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/417_98_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/417_98_00).

A Provincial Court proceeding begins by filing an application to obtain an order in PCFR Form 1 or an application respecting existing orders or agreements in Form 2, together with a financial statement in Form 4 where there is a claim for support, and by personally serving those documents on the other party. A person commencing an action is an applicant.

The respondent must file a reply in PCFR Form 3 within 30 days of service, failing which he or she will not be entitled to notice of any part of the proceedings.

The court registry will send a notice of the date of the first appearance when the applicant files an affidavit of service, or the respondent files a reply, and the requirements of PCFR 5 and 21, where applicable, have been met. (See the discussion of PCFR 5 and 21 below.) Be aware that while the notice may indicate that the date set is for trial, it is in fact the date for a first appearance.

Although the judge at the first appearance may make interim or final orders (PCFR 6) the volume of matters before the court will rarely allow the judge to spend significant time on any one case and most often the parties are referred to the judicial case manager to set dates for interim applications, a family case conference, or trial.

(a) Family Justice Registries (Rule 5)

Pursuant to PCFR 1, the registries at Kelowna, Surrey, Nanaimo and Vancouver are designated as “family justice registries” subject to PCFR 5. Under PCFR 5 the parties to a contested proceeding must meet with a family justice counsellor before a first appearance.

---

2 The registry of Port Coquitlam treats itself as a family justice registry and will apply PCFR Rule 5 to proceedings commenced in that court.
appearance date can be set, except in case of emergency. Either party may then request an appearance before a judge by filing a PCFR Form 6.

(b) Parenting After Separation Program Registries (Rule 21)

Pursuant to PCFR 21, when the parties have children and the proceeding is commenced in the registries at Abbotsford, Campbell River, Chilliwack, Courtenay, Kamloops, Kelowna, Nanaimo, New Westminster, Penticton, Port Coquitlam, Prince George, Richmond, Surrey, Vancouver, Vernon or Victoria, the parties to a contested proceeding involving the care of children or child support must attend the Parenting After Separation program (PAS). There are some general and some special exemptions to attendance in the program, see PCFR 21(4) to (7).

When attendance at a PAS program is required, at least one of the parties must attend the program before a first appearance date can be set (PCFR 21(8)). If PCFR 21 applies, both parties must attend before the first court appearance (PCFR 21(9)). As with PCFR 5, a party may be exempt from this rule in emergencies.

The PAS program is brief, free, and offers valuable information for separating parents and should be recommended to clients whether their proceeding has commenced at a participating registry or not. The PAS program is now available online from the Justice Education Society at: http://parenting.familieschange.ca/

c) Interim applications

Interim applications are brought by notice of motion in PCFR Form 16. Evidence on interim applications may be given orally or by affidavit (PCFR 12(3)); it is usually faster to present evidence by affidavit than by oral testimony. If affidavit evidence is to be relied on, the applicant must serve a filed copy of the affidavit on the other party together with his or notice of motion (PCFR 12(1)). The Provincial Court (Family) Rules do not provide a specific form for reply to an application; however a reply in PCFR Form 3 may be used if necessary.

d) Consent orders

Parties can apply for a consent order at any point in the process (PCFR 14) by filing a draft of the order sought, in Form 20, signed by both parties or their counsel, together with a request in Form 18 signed by one of the parties or the party’s counsel and a consent in Form 19 with the witnessed signatures of both parties. A consent order obtained without meeting these formal requirements may be invalid (Amanat v. Markazi, 2011 BCSC 249).

§2.04 Urgent Matters

Matters that must be addressed more quickly than the rules of court normally permit may arise before or after proceedings have commenced. In family law cases, urgent matters typically involve the protection of persons or property, and the urgency will be apparent at the initial client meeting. However, when property is at issue, a lawyer may be negligent if he or she fails to secure the client’s interest in the family property, even if a cause for urgency is not evident.

1. Status of Litigation

When a family law case has already been commenced, immediate action may be necessary to prevent default judgment, to set aside or vary without notice orders obtained by the opposing party, or to defend pending applications for which short leave has been granted.

2. Preservation of Property

Typically, the client will want to ensure that property is not dissipated, encumbered or sold pending trial or settlement, whether the assets are held jointly or in the other party’s name alone. Such property may include bank accounts and investments, the contents of safety deposit boxes, chattels and other movables as well as real property.

There are several simple and relatively inexpensive steps that can be taken to preserve real property:

- file a certificate of pending litigation under s. 215 of the Land Title Act (married and unmarried parties);
- obtain an order under restraining the use, sale or encumbrance of property. In proceedings under part 5 of the FRA this is available pursuant to s. 67 (married parties only). In proceedings under part 5 of the FLA this is available pursuant to s. 91 (married or unmarried spouses) which essentially duplicates the terms of FRA, s. 67;
- obtain an order protecting and preserving property under SCFR 12-1 and 12-4, or under s. 39 of the Law and Equity Act (married and unmarried spouses); or,
- file an entry under the Land (Spouse Protection) Act (married and unmarried spouses).
Entries under the *Land (Spouse Protection) Act* are obtained through an administrative process and may be obtained without the necessity of commencing proceedings. Applications to protect property are discussed in *Practice Material: Family*, Chapter 3.

3. **Protection of Persons**

The client or the parties’ children may need to be protected in a variety of circumstances including when there is a history or threat of family violence, a threat that the children will be removed from the jurisdiction, evidence of child neglect, or when one party has been threatening or harassing the other.

The *FLA* provides for a number of restraining and protection orders. This includes:

- Under s. 183, an “at-risk family member” who is or is likely at risk of family violence may obtain on their own application, an application brought on their behalf, or on the court’s own initiative, a variety of protective orders designed to protect the at-risk family member from harm. This includes limits on physical contact and communication, possession of weapons, and directions to a police officer to remove the other family member from a residence (s. 183(3)(c)(i)) or seize weapons (s. 183(3)(c)(iii)).
- Under ss. 225 to 227, even where a protection order is not made, the court may make orders:
  - restricting or governing the form of communication between spouses (s. 225).
  - prohibiting a party from terminating utilities for a residence (s. 226).
  - requiring a person to supervise the removal of belongings of a spouse (s. 226).
  - restraining a person from conduct which might frustrate the resolution of a family law dispute or abuse or misuse the process of the court (s. 227).

The Supreme Court may also issue general injunctive relief pursuant to SCFR 12-4.

Applications to protect persons are discussed in *Practice Material: Family*, Chapter 3.

4. **Applying for Restraining Orders**

Urgent applications can be brought *without notice* to the other party (SCFR 10-9(6); PCFR 20(3)) or on *short notice* to the other party (SCFR10-9(2), Form F17; PCFR 20(2)). Note that in proceedings without notice, counsel have a duty to disclose all facts known to them which are may affect the granting of the relief sought, regardless of whether those facts are favourable to their clients’ application or not.

Restraining orders can also be sought by an interim application brought in the ordinary course under SCFR 10-6 or PCFR 12.

Applications are discussed in more detail in *Practice Material: Family*, Chapter 3.

[§2.05] **Variation Proceedings**

Applications to vary non-final or final orders are brought when there has been a change in circumstances since the making of the order such that the original order is no longer appropriate.

The test to vary an order depends on the legislation the order was made under and on the subject matter of the order:

- s. 17 of the *Divorce Act* provides for the variation of support and custody orders made under that Act;
- s. 47 of the *FLA* provides that a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstance of the child including a change brought about because of a change in circumstances of another person.
- s. 60 of the *FLA* provides that a court may change, suspend, or terminate an order respecting contact with a child if there has been a change in the needs or circumstances of the child.
- ss. 152 and 167 of the *FLA* provide that a court may change, suspend or terminate orders for child or spousal support in specified circumstances.
- s. 215 of the *FLA* provides generally that a court may, on application by a party, change, suspend or terminate an order if there has been a change in circumstances since the order was made. Note that s. 215(2) precludes a court from varying orders made under part 5 (property) or 6 (pensions) except as is specifically set out in those parts.

Pursuant to s. 254 of the *FLA*, the coming into force of the Act is not a change of circumstances for the purposes of applications to change or suspend orders.

Variation or change proceedings are not to be used as a means to appeal an order with which the client is unhappy. There must always be a material change in the
circumstances of the parties or their children before an application is brought to vary an earlier order.

1. Supreme Court

An application to vary an order of the Supreme Court is brought by notice of application, in Form F31 in the proceeding in which the order was made (SCFRs 10-1(1), 10-5(1)(a) and 10-6(2)). The application is served with supporting affidavit material and, if applicable, a financial statement in Form F8.

An application to vary an order for access, custody, or support made under the Divorce Act by a superior court of another province is brought by petition, unless there is an existing family law proceeding within which it is appropriate to bring the application (SCFR 3-1(2)). If a party applies to vary a Divorce Act support order made outside British Columbia and the other party lives in another province, the resulting order will be provisional in nature and of no force or effect until confirmed by a court in that province (Divorce Act, ss. 17-19).

2. Provincial Court

An application to vary a Provincial Court order is brought in the case of interim orders by filing a notice of motion in PCFR Form 16, or in the case of final orders by filing an application respecting existing orders or agreements in Form 2. In either case, the document is filed in the registry where the order was made (PCFR 2(2)), along with a financial statement in Form 4 where appropriate. The procedure for commencing a proceeding by application respecting existing orders or agreements is identical to that for commencing a proceeding by application to obtain an order.

Applications to vary support orders of a provincial court of another province or reciprocating jurisdiction are made under the Interjurisdictional Support Orders Act, which requires the applicant to submit certain prescribed forms to the central authority of British Columbia, known as the reciprocals office, which forwards those forms to the central authority in the originating jurisdiction. The application will be heard in the originating court in the absence of the applicant, based on the forms supplied to that court, the law of the originating jurisdiction and the evidence of the respondent.

§2.06 Divorce Proceedings

The Supreme Court of British Columbia has jurisdiction to grant a divorce if either spouse has been ordinarily resident in British Columbia for at least one year immediately before the action was commenced (Divorce Act, s. 3(1)). The ground for divorce is marriage breakdown, which may be established on proof of one of three circumstances (Divorce Act, s. 8):

(a) separation in excess of one year, although the spouses can resume cohabitation for the purpose of attempting reconciliation for no more than a total of 90 days during that year without having to start the one year period afresh;

(b) adultery, being sexual intercourse occurring during the marriage with a person who is not the other spouse; or

(c) physical or mental cruelty of such a kind as to render the continued cohabitation of the spouses intolerable.

In order to grant a divorce, the court must be satisfied that there is no collusion in relation to the application for divorce and will dismiss the application if it finds there was collusion (Divorce Act, s. 11(1)(a)). Collusion is defined as an agreement or conspiracy to which an application for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence to deceive the court (s. 11(4)).

Adultery or cruelty may not be used to establish marriage breakdown if the misbehaviour has been condoned (forgiven) or was connived at (conspired towards) by the innocent spouse (Divorce Act, s. 11(1) (a) and (c)). Only the innocent spouse may pursue a divorce on these grounds.

To obtain a divorce order, the applicant must prove the existence of the marriage (by filing a certificate of the marriage or a certificate of the registration of the marriage), prove the reason for marriage breakdown, and prove that reasonable arrangements are in place for support of any children of the marriage (s. 11(1)(b)). “Reasonable arrangements” are presumed to be child support paid in accordance with the Child Support Guidelines.

The notice of family claim in a divorce proceeding must be personally served on the respondent by someone other than the claimant (SCFR 6-3(2)(a)) and service may be effected by the claimant’s lawyer, the lawyer’s agent or employee, or a process server. An affidavit of personal service in Form F15 will usually be required to prove service (SCFR 6-6(1)(a)).

The affidavit of service must show the means by which the person effecting service identified the respondent. If the respondent is not known to the person effecting service, the respondent’s identity may be confirmed by examining his or her driver’s licence or other photographic identification; if the respondent is unlikely to be cooperative, the server should be provided with a photograph of the respondent to confirm identity, which
Family will then be attached as an exhibit to the affidavit of service.

If the claimant cannot serve the notice of family claim, usually because the respondent’s whereabouts are unknown or the respondent is avoiding service, the claimant may apply for an order for substituted service (SCFR 6-4(1)).

See also Practice Material: Family, Chapter 7 regarding undefended family cases.

[§2.07] Guardianship and Parental Responsibilities

Part 4 of the FLA governs guardianship of a child and determines who is a child’s guardian. The Divorce Act does not address guardianship.

The Family Law Act establishes a new scheme governing the care of and time spent with children, based on the core principle that any order made in relation to care of a child must be in the child’s best interests (s. 37). The FLA addresses those who may exercise guardianship and the allocation of rights and obligations that go along with guardianship, called “parental responsibilities.” A guardian’s time with children is referred to as “parenting time” and a non-guardian’s time is referred to as “contact”. Together, parental responsibilities and parenting time are referred to as “parenting arrangements”.

Parties who have custody or guardianship of a child under an order or agreement made prior to the coming into force of the FLA, are automatically guardians under the FLA. Parties who have access to a child, but not custody or guardianship, are not guardians and have contact with the child as specified in the order or agreement (FLA s. 251).

Under s. 39 of the FLA, parents who cohabit with one another and their children are presumed to be guardians during their relationship and after separation. A parent who has never lived with their child is presumed not to be a guardian unless they are appointed as such by an agreement made between all of the child’s guardians, they are appointed by court order, or they “regularly care” for the child (s. 39(3)).

A person who is not presumed to be a guardian under s. 39, including parents who are not guardians, grandparents, and other caregivers, may apply to be appointed as a guardian of a child (s. 51), on notice to each parent and guardian of the child and each adult with whom the child lives and who cares for the child (s. 52). If the child is a Nisga’a or other treaty first nation child, notice must be given to the first nation government pursuant to ss. 208 and 209. If the application is to be made in the provincial court, the applicant must comply with PCFR 18.1 and complete a special affidavit in Form 34. In the supreme court, the applicant must comply with SCFR 15-2.1 and complete an affidavit in Form F101.

Both affidavits require information relating to the applicant’s relationship with the child, the applicant’s history of care for other children and any civil or criminal proceedings relevant to the safety of the child. Recent police, protection order registry and child protection records checks must be provided with the affidavit.

Under s. 40 of the FLA, unless an order or agreement provides otherwise, each guardian of a child is presumed to exercise all of the following parental responsibilities in relation to the child (s. 41):

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
(b) making decisions respecting where the child will reside;
(c) making decisions respecting with whom the child will live and associate;
(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
(f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
(h) giving, refusing or withdrawing consent for the child, if consent is required;
(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
(j) requesting and receiving from third parties health, education or other information respecting the child;
(k) subject to any applicable provincial legislation,
   i. starting, defending, compromising or settling any proceeding relating to the child, and
   ii. identifying, advancing and protecting the child's legal and financial interests;
(l) exercising any other responsibilities
reasonably necessary to nurture the child's development.

These responsibilities may be exercised by more than one guardian or allocated between one or more guardians. There is no presumption of equal or shared allocation of these responsibilities (s. 40(4)) and a guardian must exercise parental responsibilities in the best interests of a child (s. 43).

Under s. 211 of the FLA, the court may appoint a person to assess and report on the needs and views of a child and the ability of a person to meet those needs. These reports are usually prepared by a psychologist, psychiatrist, or clinical counsellor who conducts a fairly broad study, interviewing each parent, the children with each parent, and sometimes collateral witnesses, such as teachers and care providers, and the parents’ new partners. These reports are often very useful in negotiating an agreement on parenting arrangements and contact, and, failing settlement, will be presented as expert evidence at trial. See Practice Material: Family, §4.04 for more information about s. 211 reports.

Non-evaluative views of the child reports may be agreed to by the parties or ordered by the court pursuant to ss. 37(2)(b) and 202. These reports are limited to reporting what the child has told a neutral, third party interviewer and may address any aspect of a child’s experience of the parties’ separation, including the child’s preferred residential arrangements and parenting schedule. Because these reports do not offer any opinion or analysis, they may be prepared by anyone with special training in interviewing children, including lawyers, social workers, family justice counsellors and psychologists. The website of the BC Hear the Child Society, at http://hearthechild.ca, has a roster of professionals that meet its training requirements for preparing views of the child reports.

[§2.08] Custody

Under the Divorce Act, the care of children is managed by orders for “custody” and “access”.

Under the Divorce Act, a “child of the marriage” is a child of two spouses or former spouses who, at the material time, is under the age of majority or is over the age of majority but unable to withdraw from the parents’ charge (s. 2(1)). Adult children will typically continue to qualify as children of the marriage if they unable to support themselves by reason of illness or disability, or are in full-time attendance at university or college. Stepchildren may also qualify as children of the marriage (s. 2(2) and Chartier v. Chartier, [1999] 1 S.C.R. 242).

Although any person may apply for an order respecting custody of a child of the marriage, an applicant who is not one of the spouses may not apply without leave of the court (s. 16 (3)).

The Supreme Court of British Columbia has jurisdiction to determine custody in a divorce proceeding commenced in British Columbia. If the divorce has already been granted, a former spouse can start a corollary relief proceeding for custody in the province where either former spouse ordinarily resides or to which both parties consent (s. 4). When a claim for custody is made concerning a child more substantially connected to another province, the court may transfer the divorce proceeding to that province (s. 6).

Section 16 sets out the factors to be considered on a custody application. The court will consider the best interests of the child as determined by reference to the condition, means, needs and other circumstances of the child (s. 16(8)) and the principle that a child should have as much contact with each parent as it consistent with the best interests of the child (s. 16(10)). The court may not consider a parent’s past conduct unless the conduct is relevant to the parent’s ability to care for the child (s. 16(9)).

1. Factors Governing the Determination of Custody

In most cases, the parent who was the child’s primary caregiver during the parties’ relationship will have the child’s primary residence, at least on an interim basis. Unless it is otherwise not in the best interests of a child, the court is generally hesitant to alter established parenting arrangements where the children are in a stable and secure setting (Spencer v. Spencer (1980), 20 R.F.L. (2d) 91 (B.C.C.A.)).

Alcoholism, drug addiction, poor parenting skills and mental health issues can be considered in determining the best interests of a child and are the factors most likely to result in a parent having sole custody of a child. The court may take into account the personality, character, stability and conduct of a parent when these factors are relevant to the parent’s ability to care for the child or capacity to cooperate with the other parent.

The best interest of the child is not determined solely on the basis of the physical comfort and material advantages that may be available at one parent’s home. The psychological, spiritual and emotional environment will also be considered when the relative merits of the parents’ households are at issue.

It is normally considered to be in the best interests of siblings to keep them together, in appropriate circumstances, however, the court can make an order for divided custody, called “split custody.” The supporting opinion of an expert will usually be required before the court will make an order for split custody.
The court also will consider the aboriginal or cultural heritage of a child when determining what is in the best interests of the child. The extent to which this factor will influence the determination of custody depends on the facts of a particular case. For a review of appropriate evidence to lead on this factor, see L.(A.) v. K.(D.), 2000 BCSC 480, affirmed 2000 BCCA 455.

The court will usually give the wishes of children over the age of 11 or 12 a certain amount of weight in determining residence and access arrangements, unless the parent with whom the child wishes to live is manifestly unfit. The court will also give consideration to, but not be bound by the wishes of younger children. Although the Divorce Act is silent on the point of whether to take into account the views of a child, Canada is a signatory to the U.N. Convention on the Rights of the Child and the court is therefore required to ensure that children are afforded the opportunity to be heard in any judicial proceeding affecting their interests (art. 12(2)).

2. Joint Custody

The Divorce Act provides for joint custody (s. 16(4)). The courts are generally inclined to grant joint custody over sole custody, and will usually only order sole custody in situations where the relationship between the parents is toxic, uncooperative and conflict-laden, a parent is demonstrably unfit, or a parent has been absent from the child’s life. Joint custody does not mean or require the equal sharing of the children’s time between parents.


§2.09 Access, Parenting Time, and Contact

The allocation of children’s time between their parents under the Divorce Act is referred to as access. Although both parents have access, access usually refers to the parenting schedule of the parent without the child’s primary residence.

Access is the right of the child, not a right of the parent, and maximum contact with both parents is presumed to be beneficial to a child (Divorce Act, s. 16(10)). Access is not mere visitation with a child, it is part of maintaining a meaningful relationship between the parent and child after separation (Young v. Young (1993), 84 B.C.L.R. (2d) 1 (S.C.C.)).

The FLA describes the time a guardian spends with a child as “parenting time”. A guardian with parenting time has the responsibility of making day to day decisions for the child during their parenting time, subject to any order or agreement which may allocate the responsibility for certain decisions to another guardian.

“Contact” is the time someone who is not a guardian has with a child. A person with contact does not have decision making authority.

The amount of access, parenting time, or contact that a person has is governed by the best interests of the child, and thus can be as generous or parsimonious as the circumstances warrant. Some consideration will also be paid to the ability of very young children to be apart from their primary caregiver, and, when infants are involved, prudent counsel will seek to establish long-range parenting plans that provide for on-going reviews of the parenting schedule as the child grows older and increasingly independent.

The amount of time each person will have with a child is dependent on the child’s best interests and the parties’ circumstances. Some people manage a schedule of week-on/week-off access quite well; others prefer to have the children every other weekend, plus perhaps one or more overnight visits during the week. There is no limit to the parenting schedules that can be devised save the creativity of counsel, the flexibility of the parties and the child’s schedule of school and extracurricular activities.

When there are concerns about a party’s parenting skills, the person’s parenting schedule can be made conditional on the fulfilment of one or more conditions, such as completion of a parenting course, refraining from the consumption of alcohol before and during a visit, or refraining from driving with the child.

In extreme situations, a court may require that a party’s time with the child be supervised by a third party, such as a relative, social worker or a professional supervisor. This is onerous and ordinarily requires evidence that to do otherwise would put the child at risk of harm.

§2.10 Spousal Support

The general principles governing spousal support are consistent between the Divorce Act and the FLA.

1. Tax Impact

Periodic spousal support payable as a result of a written agreement or order is tax deductible by the payor and taxable in the payee’s hands. Lump-sum spousal support payments are neither deductible nor
taxable. When representing aboriginal clients who are either liable to pay or claiming spousal support, consider each spouse’s tax status.

2. Jurisdiction and Limitation Periods

(a) Divorce Act

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.

A party commencing a corollary relief proceeding must already be divorced and at least one of the parties must be ordinarily residence in the province in which the proceeding is brought (s. 4). When Divorce Act proceedings have already been commenced in another province, the local court may lose jurisdiction (ss. 4(2) and (3)), in which case the claimant must proceed in the other province or obtain a provisional order in this province subject to confirmation in the other province (ss. 18 and 19).

(b) Family Law Act

The FLA allows persons qualifying as spouses to claim spousal support. “Spouse” is defined in s. 3 of the Act to include:

- married persons and formerly married persons;
- unmarried persons provided they have lived together in a marriage like relationship for a continuous period of at least 2 years; or
- unmarried persons who have lived together in a marriage-like relationship for a shorter period and have had a child together.

A spouse under the FLA must bring their claim for support within two years of a divorce or declaration of nullity (in the case of married spouses) or within two years of separation (in the case of unmarried spouses).

3. The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines (SSAG) is an paper published by the Department of Justice. The SSAG proposes a number of mathematical formulae for the calculation of the amount and duration of spousal support, once entitlement has been found.

Although the SSAG is not law, and the Department of Justice is not planning on giving it regulatory effect, the SSAG has been embraced by the bench and bar in British Columbia and in many other provinces and territories. Counsel routinely consult the SSAG when negotiating the issue of spousal support and prepare SSAG calculations as a matter of course when arguing support applications in court.

In Yemchuk v. Yemchuk, 2005 BCCA 406, the Court of Appeal held that the SSAG results generally reflect the law on spousal support and are a “starting point” and “a factor” which should be taken into account in determining spousal support. In Redpath v. Redpath, 2006 BCCA 338, the Court of Appeal held the failure to consider the SSAG results when determining spousal support to be an appealable error. Since Yemchuk and Redpath, the Court has become increasingly blunt in its application of the SSAG to determine spousal support where entitlement has been established.

The SSAG proposes two basic formulae, one which is used when there is no child support obligation, and another which is used when there are children for whom child support may be payable, whether child support is being paid or not. Both formulae generate a range of results for quantum (amount) and duration (the length of time for which support will be paid).

The “without child support” formula is fairly straightforward. The amount of support payable is 1.5 to 2.0% of the difference between the parties’ gross incomes per year of cohabitation, with a cap for marriages of 25 years or longer of between 37.5% and the amount which would equalize the parties’ net incomes. Duration is calculated as 0.5 to 1.0 years per year of cohabitation, but will potentially be paid indefinitely in the case of marriages of 20 years or longer or when the length of cohabitation plus the age of the recipient equals 65.

The “with child support” formula varies depending on how parenting has been arranged and is much more complex. In general, the with child support formula divides the parties’ disposable incomes, once statutory income deductions and the effect of government benefits and credits and taxes have been taken into account, including the tax impact of the payment and receipt of spousal support. Under the basic with child support formula, the recipient is intended to be left with 40 to 46% of the difference between the parties’ individual net disposable incomes. Duration is calculated by reference to the dates the youngest child will enter or leave full-time school, and the length of cohabitation. Duration is potentially indefinite when the length of cohabitation plus the age of the recipient equals 65.
The calculations required by the with child support formulae are complicated and demand a detailed knowledge of government benefits and credits, and the income tax and statutory deduction rules applicable to different types of income. Support calculations under the with child support formulae require the use of software designed for the purpose.


4. Principles

Spousal support is generally payable when one spouse is financially disadvantaged as a result of the relationship or the end of the relationship, and the other spouse can afford to pay it. Whether support will be paid, and, if so, how much will be paid, depends entirely on the circumstances of each case. The following are highlights of the legislation and a summary of the primary Supreme Court of Canada jurisprudence.

(a) **Divorce Act**

Section 15.2 of the *Divorce Act* outlines the factors that the court will consider when making an interim or permanent order for spousal support. Section 15.2(4) provides that the court will consider the conditions, means, needs, and other circumstances of each spouse and of any child of the marriage for whom support is sought, including:

(i) the length of time the spouses have cohabited;

(ii) the functions performed by the spouses during their cohabitation; and

(iii) any order, agreement or arrangement relating to the support of the spouse or child.

When making an order for spousal support under the *Divorce Act*, the court may not take into consideration any misconduct of a spouse in relation to the marriage (s. 15.2(5)).

Under s. 15.2(6), an order for spousal support should

(i) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(ii) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(iii) relieve any economic hardship of the spouses arising from breakdown of the marriage; and

(iv) in so far as is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

(b) **Family Law Act**

Part 7 of the *FLA* governs spousal support applications under the *FLA*. It sets out the objectives and factors for consideration:

161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

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

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

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

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

162. The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

(a) the length of time the spouses lived together;

(b) the functions performed by each spouse during the period they lived together;

(c) an agreement between the spouses, or an order, relating to the support of either spouse.
(c) Case law


In Moge and Bracklow the Supreme Court of Canada stressed that all four statutory objectives in s. 15.2(6) of the Divorce Act must be taken into account and that no one factor takes precedence over any other. In Moge, the court rejected the idea that support should end as soon as possible on the basis that marriage entails an economic merger that may visit lifelong consequences upon a financially dependent spouse that may not be adequately addressed by short-term orders for spousal support.

In Bracklow, the court described three conceptual grounds for entitlement to spousal support: compensatory; non-compensatory, based on the recipient’s immediate needs; and, contractual, based on an agreement to pay support. The court found that both the Divorce Act and the FRA accommodated these models.

The Supreme Court of Canada first used the term “compensatory support” in Moge to describe the financial consequences suffered by a spouse as a result of decisions made during marriage. These decisions may have resulted in a spouse leaving the workforce and abandoning a career to raise the children, the loss of opportunities for promotions and advancement, and the diminution of a spouse’s employability. Compensatory support is intended to address a spouse’s immediate economic need and to provide some measure of redress for the adverse economic impact of the marriage. A summary of BC cases respecting compensatory maintenance is in the Family Law Sourcebook of British Columbia, (Vancouver: CLEBC), Chapter 3.

In Bracklow, the court held that where a spouse is financially dependent on the other following separation, support may be payable to address that need even when there are no grounds for a compensatory award. Such non-compensatory awards are more common in short-term marriages, when the parties do not have children, and where the dependant spouse is able-bodied and employable.

The court in Bracklow also recognized that the spouses can create, modify or negate spousal support obligations by contract, as might be the case with a marriage agreement or a separation agreement. In Miglin, the court held that when a party applies for spousal support in a manner inconsistent with a pre-existing agreement, the court should look at the circumstances surrounding the agreement in two stages, first at the time the parties formed the agreement, and second at the time of the application, and give the agreement the greatest weight when:

(a) The agreement was negotiated and signed in circumstances free of oppression, coercion, financial and emotional pressure or other vulnerabilities. The court will not, however, presume an imbalance of power between the spouses and will take into account any professional assistance received by the parties.

(b) The terms of the agreement substantially comply with the objectives for spousal support set out in the Divorce Act. However, note that a determination of noncompliance alone will not necessarily result in the setting aside of the agreement if the agreement reflects the parties’ expectations of their marriage and future circumstances.

(c) The agreement continues to reflect the intentions of the parties and is in substantial compliance with the objectives of the Divorce Act at the time of the application. If the applicant is relying on a change in circumstances to set aside the agreement, he or she must show that the new circumstances were not reasonably anticipated by the parties when the agreement was made. Spouses will be presumed to anticipate reasonably foreseeable changes, such as a change in health, the job market, parental responsibilities, housing markets, and the value of assets.

[§2.11] Child Support

The principles governing child support under the FLA are fairly similar to those under the Divorce Act. The federal Child Support Guidelines, SOR/97-175 (the “Guidelines”) regulate child support under both statutes: the Guidelines have been adopted for provincial purposes by regulation (BC Reg. 347/2012).

The Guidelines set out rules for the calculation of income and child support, and the apportioning of children’s special expenses between parents, and provide a table of the child support payable indexed by the number of children support is paid for and the payor’s income.
1. Tax Impact

Child support paid under an order or agreement made after May 1, 1997 is tax neutral. Child support under orders or agreement made before that date are tax deductible for the payor and taxable for the recipient, unless the parties have filed an election to the contrary with the Canada Revenue Agency.

In general, gross income is used to determine the amount of support payable under the Guidelines, and the income of persons who pay less than usual or no income tax will need to be adjusted upwards, a process called “grossing up,” to reflect the amount of taxable income the payor would have to earn to have the equivalent net income. The income of persons who are self-employed or employed by a closely-held corporation will require further adjustment to reflect the income actually available for the sole proprietorship or corporation and include deductions with personal benefits in the person’s income.

As a result of amendments to the Guidelines effective May 1, 2006, the income of foreign payors will be determined as if the payor was a resident of Canada. Where the payor lives in a jurisdiction with a higher tax rate, his or her income will be grossed down to the Canadian equivalent; where the payor lives in a jurisdiction with a lower tax rate, his or her income will be grossed up.

2. Governing Legislation

(a) Divorce Act

Section 15.1 of the Divorce Act governs original applications for child support between married or formerly married persons, and the amount of child support payable is presumed to be the amount provided for by the Guidelines (s. 15.1(3)). Under s. 15.1(5), the court may make an award of child support in a different amount where special provisions in an order or agreement directly or indirectly benefit a child, such that the Guidelines amount of support would be inequitable. The court may also make an award in a different amount with the consent of both parties under s. 15.1(7), providing that it is satisfied that reasonable arrangements have been made for the support of the child.

(b) Family Law Act

Under s. 150 of the FLA, child support orders are to be determined in accordance with the Guidelines. Under s. 150, the court may make an award of child support in a different amount where:

- the parties agree that the amount should differ and the court is satisfied that reasonable arrangements have been made for the support of the child; or
- an agreement respecting the financial duties of parents or guardians or the transfer or division of property provides benefits for the child, or that special provisions have otherwise been made for the child, such that application of the guidelines would be inequitable.

Under s. 147(3) of the FLA, the child support obligations of a guardian who is not a parent is secondary to that of a parent; under s. 147(5), the obligation of a step-parent is secondary to those of a parent and non-parent guardian.

3. Eligible Children

Under the Divorce Act, a “child of the marriage” is eligible for support. The child must be under 19, or 19 or older but unable to withdraw from the charge or his or her parents because of illness, disability or other cause. “Other cause” has been interpreted to include full-time attendance at a post-secondary educational institution.

Under the Family Law Act, a “child” for the purposes of support is defined under s. 146 in a manner that is consistent with the definition of “child of the marriage” in the Divorce Act. Pursuant to s. 147, each parent and guardian has a duty to provide support for a child. However, where the child is a spouse or is under the age of 19 and has voluntarily withdrawn from the care of his or her parents or guardians, the child may be disentitled from support.

4. Liable Parties

(a) Divorce Act

Section 2(2) imposes liability for child support upon “a child of two spouses or former spouses” and:

- “any child for whom they both stand in the place of parents,” and
- “any child of one spouse for whom the other stands in the place of a parent.”

In most cases, a step-parent will be found to “stand in the place of a parent” without a detailed inquiry into the nature of the party’s relationship with the child.

(b) Family Law Act

Under ss. 146 and 147, persons qualifying as parents or guardians are liable to pay child
support. For the purposes of part 7, the definition of “parent” includes:

- a child’s biological parents
- step-parents, where a step-parent has contributed to the support of the child for at least one year and the application is brought within one year of the step-parent’s last contribution (s. 147(4)), and the parent and step-parent are separated (s. 149(3)).

“Step-parent” is defined as:

- a person who is a spouse of a child’s parent and lived with the child’s parent during the child’s life (s. 146)

(c) Step-parents

The amount of a step-parent’s child support obligation is not necessarily the Guidelines table amount. Under CSG, s.5, the obligation of step-parents can be calculated taking into account “any other parent’s legal duty to support the child.” The court may order that an amount lesser than the tables amount be paid or find that no support is payable at all (Fedoruk v. Jamieson, 2002 BCSC 304). In some cases the court will treat step-parents’ obligations as means of “topping up” the support paid by a biological parent.

Pursuant to ss. 147(3) and (5) of the FLA, guardians who are not a child’s parent and stepparents have a support obligation that is secondary to those of the child’s parents. A stepparent’s duty extends only as appropriate on consideration of standards of living and the length of time the child lived with the stepparent.

(d) Parentage

The Family Law Act discusses parentage in expansive terms in Part 3. It covers the determination of parentage when parties have had a child through assisted reproduction and when paternity is denied. A detailed discussion of this subject is beyond the scope of these materials. The “Family Law Act Transition Guide”, CLEBC 2012 should be consulted.

5. The Child Support Guidelines

A careful reading of the Guidelines is essential for anyone advising a client on a matter relating to child support. In most cases, the following steps will be applied when determining the amount of child support to be paid.

1. Determine the number of eligible children.

2. Determine the income of both parents; see CGS, ss. 15 to 20 and Schedule III.

3. Find the base amount of child support payable. (This is found in the tables at CSG, Schedule I and is often called the “table” or “basic” support amount.)

4. Determine which of the children’s expenses qualify as special and/or extraordinary expenses within the meaning of ss. 7(1) and (1.1) of the Guidelines and typically include:

- child care expenses;
- medical, dental and health related expenses not covered by insurance plans;
- extraordinary extracurricular activities;
- extraordinary educational costs; and,
- post-secondary education costs.

5. Determine the cost of qualifying special and/or extraordinary expenses, net of any third-party subsidies and any contributions made by the children.

6. Allocate the special or extraordinary expenses between the parties in proportion to their respective gross incomes. When the recipient also receives spousal support, the spousal support will be deducted from the payor’s income and included in the recipient’s income.

There are a number of exceptions to this general process. Some of the most common exceptions are as follows:

- CSG s. 3(2)(b) allows the court to make a child support order in an amount different than the table amount where the child for whom support is paid is over the age of majority, 19 in British Columbia.
- CSG s. 4 gives the court discretion to depart from the table amount in cases where the income of the payor is over $150,000 per year, but only when the table amount would be “unsuitable” and there is “clear and compelling evidence” sufficient to rebut the presumption that the table amount is appropriate (Francis v. Baker, (1999), 50 R.F.L. (4th) 228 (S.C.C.), and Metzner v. Metzner (2000), B.C.L.R. (3d) 133 (B.C.C.A.)).
- CSG s. 8 provides that in situations of “split custody,” where each parent has the primary residence of one or more of the children, the amount to be paid is the
differences between the table amount each parent would pay to the other for the care of the children in the other parent’s care.

- CSG s. 9 gives the court discretion to depart from the table amount in situations of “shared custody” where the payor has the children for 40% or more of their time. In such cases the amount of the child support order is usually determined by taking into account:
  
  (a) the amount set out in the application tables for each of the parents;
  
  (b) any increased costs to the payor resulting from the shared custody arrangement; and
  
  (c) the conditions, means, needs and other circumstances of each parent and of any child from whom support is sought.

The payor will not necessarily be relieved of paying the full table amount unless the payor can establish that he or she incurs increased costs as a direct result of the shared custody arrangement (Contino v. Leonelli-Contino, 2005 SCC 63), although some reduction is allowed more often than not.

- CSG s. 10 allows the court to deviate from the table amount where either party establishes that payment of the table amount would cause “undue hardship”, the payor on the ground that the table amount is too high and the recipient on the ground that the table amount is too low. The party claiming undue hardship must demonstrate not only that circumstances giving rise to hardship exist, but also that the resulting hardship is undue (Van Gool v. Van Gool (1998), 44 R.F.L. (4th) 314 B.C.C.A.) and that his or her household has lower standard of living, taking into account all the income available to the household, than the other household of the other party (Reiter v. Reiter (1997), 36 R.F.L. (4th) 102 B.C.S.C.; CSG, Schedule II). Claims brought under this provision rarely succeed.

In addition to the above exceptions, judges have factored in other realities when determining quantum in relation to aboriginal children. When considering the income of an aboriginal payor spouse, Brecknell J., deducted costs for the financial burden of a hereditary chief from the payor’s grossed up income (S.A.M. v. G.J.S., 2006 BCPC 354). The court also factored in the financial assistance available to the child from her First Nation for expenses related to her education and noted the child’s ability to contribute to her own expenses given her age.

[§2.12] Variation of Orders for the Care of Children and Support

Under the Divorce Act, orders for support and custody, and access can rarely be regarded as final. All are subject to variation by the court when there has been a material change in circumstances affecting the best interests of the child. The same is true of orders for the care of children and support under the FLA.

A discussion of the jurisdiction of a court to vary these orders is set out above in s. 2.05 of this chapter.

1. Variation of Spousal Support

(a) Divorce Act

Before making a variation order, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of the spouse since the making of the support order or variation order and must take into consideration that change (s. 17(4.1)). The court must not consider any conduct of the parties in a variation proceeding that could not have been considered when making the original order.

Subsection 17(7) provides that an order varying a spousal support order should:

(i) recognize any economic advantages or disadvantages to the parties arising from the marriage or its breakdown;

(ii) apportion between the parties any financial consequences arising from the care of a child of the marriage beyond any child support obligation;

(iii) relieve any economic hardship of the parties arising from the breakdown of the marriage; and

(iv) promote the economic self-sufficiency of each party.

A spousal support order that is made for a fixed duration cannot be extended unless the extension is necessary to relieve economic hardship caused by a change in circumstances that is related to the marriage and would have existed at the time of the original order (s. 17(10)).

(b) Family Law Act

Pursuant to s. 167(2) of the FLA, a court may change, suspend, or terminate a spousal support order prospectively or retroactively provided at least one of the following exists:

Family
(a) There is a change in the conditions, means, needs or other circumstances of either spouse;

(b) Evidence of a substantial nature was not available at the previous hearing and has since become available;

(c) Evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

Principles

The law developed under the Divorce Act with respect to material change generally applies to determining a material change under s. 167(2)(a) of the FLA. Spousal support may be varied if there is a material change in circumstance such that if known at the time of the original order would likely have resulted in a different order (B. (G.) v. G. (L.) (1995), 15 R.F.L. (4th) 201 (S.C.C.)). See Miglin v. Miglin, [2003] S.C.R. 303 for a discussion of the principles which apply on an application to vary spousal support in the face of an agreement addressing the issue.

2. Variation of Child Support

Variation applications must consider CSG, s. 14 which defines the change in circumstances necessary to justify a variation of child support. Most commonly, the “change of circumstance” is an increase or decrease in the payor’s income or a move of one or more children between homes.

Child support may be varied retroactively, that is, varied with an effective date earlier than the date on which the order is pronounced, possibly a date earlier than the date on which the application to vary was delivered. D.B.S. v. S.R.G., 2006 SCC 37 is the leading case on this issue.

D.B.S. sets out a list of factors the court must consider in deciding whether to make a retroactive award of child support, including the notice given to the payor of the recipient’s intention to seek a variation of support, the explanation for the recipient’s delay in making the variation application, any misconduct on the part of the payor, such as non-disclosure or misleading disclosure, and any hardship suffered by the children.

The court must usually limit the retroactive effect of a retroactive order to the date effective notice of the recipient’s intention to seek a variation of support to a maximum of three years.

3. Variation of Custody and Access, Parenting Arrangements and Contact

(a) Divorce Act

Before a court varies a custody or access order it must be satisfied that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order (s. 17(5)).

Section 17(9) requires the court to give effect to the principle that a child of the marriage should have as much contact with each parent as is consistent with the best interests of the child. For that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court must consider the willingness of that person to facilitate such contact with the former spouse.

(b) Family Law Act

The FLA permits applications to change, suspend or terminate orders respecting parenting arrangements and contact (ss. 47 and 60). This includes the allocation of parental responsibilities and parenting time among guardians and the amount of contact of a person who is not a guardian. In doing so, the court must be satisfied that since making the order there has been a change in the needs or circumstances of the child, including where that change occurs because of a change in the circumstances of another person.

(c) Principles under Divorce Act

Any order respecting custody of a child must be tailored to the specific circumstances of the child, taking into account his or her best interests (Gordon v. Goertz, [1996] 2 S.C.R. 27; Robinson v. Filyk, (1996), 28 B.C.L.R (3d) 21).

In Gordon v. Goertz, the leading case on the variation of custody orders, the court set out a two-stage inquiry when a change is sought:

“First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances.”
“Material change” is defined under the Divorce Act as a “change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child”.

When a material change is not demonstrated, the best interests of the child are presumed to lie in the preservation of the existing arrangements.

When a material change is demonstrated, the custodial arrangements will be reviewed and decided anew, without deference to the existing arrangements or any presumptions in favour of the parent who formerly had the child’s primary residence. Both the original findings of fact as well as the evidence of changes in the circumstances must be considered as well as how the changed circumstances affect all aspects of the child’s life.

Some of the factors relevant to the determination are as follows:

(a) the relationship between the child and the parent with the child’s primary residence;
(b) the relationship between the child and the parent without the child’s primary residence;
(c) the views of the child; and,
(d) any disruption to the child of a change in custody such as removal from family, schools, and the community the child has come to know.

(d) Relocation/Mobility

(i) Divorce Act

The variation analysis above also applies when the variation sought under the Divorce Act is not a change in the child’s primary residence from one parent to another but a change in the place of the child’s primary residence. Even short moves can have a profound effect on the workability of a parenting schedule; more distant moves can force a significant reduction in the non-moving parent’s time with the child.

When the parent with primary residence of the child proposes to move a considerable distance from the other parent and that parent opposes the move, that parent will usually apply for an order restraining the other parent from removing the child to maintain the status quo while the merits of the move are considered.

In cases like this, called mobility cases, the focus of the court’s concern will be how the move will affect the child’s long-term best interests and the extent to which the deleterious effects of the move on the child’s relationship with the non-moving parent can be mitigated. While the courts have articulated a fairly coherent list of factors militating in favour of permitting the move (family connections and support in the new community, unique educational opportunities available only in the new community, better job prospects for the moving parent, and so on), and factors opposing the move (the hazard to the child’s relationship with the non-moving parent, the effect of removing the child from family, friends and community, creating instability in the child’s life, and so on), case law on this subject has not been consistent. Clients with mobility problems must be warned about the ambiguity of the law in this area, and counsel should be especially mindful of the imprudence of making warranties as to outcome.

(ii) Family Law Act

Division 6 of Part 4 of the FLA provides a test to address the relocation of a guardian where there is an order or agreement for parenting arrangements or contact in place. Under s. 66, where a guardian plans to move, with or without the child, and the move will have a “significant impact” on the child’s relationship with a guardian or another person with a significant role in the child’s life, the guardian must give notice of the place and date of the proposed move at least 60 days in advance. Under s. 68, the child’s other guardians have 30 days to file an application in court to prevent the relocation, failing which the guardian will be allowed to move.

Where an objection is filed, if the moving guardian can show that: a) he or she has proposed reasonable and workable arrangements to maintain the child’s relationship with other guardians and persons with contact; and b) the proposed move is made in good faith; the move is presumed to be in the best interests of the child under s. 69(4), unless the objecting guardian can show otherwise.

If the guardians have equal or near-equal parenting time, under s. 69(5) the moving guardian must show that: a) he or she has proposed reasonable and workable arrangements to maintain the child’s relationship with other guardians and persons...
with contact; b) the proposed move is made in good faith; and c) the proposed move is in the best interests of the child.

A non-exhaustive list of factors to be taken into account in assessing good faith are set out in s. 69(9) and include the reasons for the move, whether the move is going to enhance the child’s quality of life, and whether there is an agreement or order that purports to prevent relocation.

§2.13 Dividing Property and Debt

1. The Family Relations Act

Parts 5 and 6 of the FRA govern the division of assets between spouses upon the breakdown of a marriage. Although Parts 5 and 6 of the FRA are repealed with the coming into force of the FLA in March 2013, they will continue to be relevant to cases started under the FRA prior to that date and to challenges to property agreements made between married parties when the FRA was in force.

For cases governed by the FRA, refer to CLEBC and other source material under the FRA property division.

2. The Family Law Act

Unlike the FRA, the statutory property division provided under the FLA applies both to married spouses and to unmarried spouses who have lived together in marriage like relationship for a period of at least 2 years.

Section 84 of the Family Law Act defines “family property,” that is, property which is subject to presumptive equal division under s. 81 of the FLA. “Family property” is broadly defined as all real and personal property which:

a) On the date of separation is owned by spouse or in which a spouse has a beneficial interest (s. 84(1) (a)); or

b) After the date of separation is owned by a spouse or in which the spouse acquires a post-separation interest but which is derived from family property (s. 84(1) (b)).

There is no requirement for the property to have been “ordinarily used for a family purpose,” the test under the FRA. This definition is simpler and more inclusive than the definition of family asset under the FRA. However, s. 84 is subject to s. 85, which excludes pre-relationship property and certain categories of property acquired during the relationship from the otherwise broad “family property” definition in s. 84.

Section 84(2) of the FLA provides specific examples of property that is to be included in the equal division between spouses. Section 84(2)(g) provides that growth in value of excluded property occurring during the spousal relationship is to be shared between spouses.

The categories of excluded property covered by s. 85 are:

- S. 85(1)(a) Property acquired by a spouse before the relationship between the spouses began.
- S. 85(1)(b) Gifts or inheritances received by a spouse.
- S. 85(1)(c) Settlements and damage awards unless the settlement or award represents lost income of a spouse or a loss to both spouses.
- S. 85(1)(d) Money paid under non-property insurance policies.
- S. 85(1)(e) excluded property held in trust for a spouse.
- S. 85(1)(f) Property held in a discretionary trust, provided certain conditions are met.
- S. 85(1)(g) Property acquired with excluded property.

Section 85(2) places the responsibility on the spouse seeking to have property characterized as excluded property to prove that the property is excluded.

Unlike the FRA, the FLA provides for the division of family debt pursuant to s. 86. Debt incurred by a spouse during the relationship or after the relationship ends, if incurred to maintain family property, is subject to presumptive equal sharing of liability as between the spouses. This does not affect the rights of creditors (s. 82).

3. Unequal Division

Under the FLA, the court may divide family property unequally but only where it would be “significantly unfair” not to do so with regard to the following factors (s. 95(2) and (3)):

2) the duration of the relationship between the spouses;

b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

c) a spouse's contribution to the career or career potential of the other spouse;

de) whether family debt was incurred in the normal course of the relationship between the spouses;
(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

4. Specific Assets

(a) Pensions and RRSPs

Specific assets such as pensions and registered retirement savings plans are family property by definition. Pensions in particular can be extremely valuable assets, at times exceeding the value of the family home, and their value is often overlooked.

Although Part 6 of the FLA codifies the methods for dividing pensions and the calculation of the non-owning spouse's entitlement, the division of pensions remains very complex and counsel often obtain expert assistance. Guidance is also available from a number of CLE publications, including Family Law Sourcebook for BC and Family Law Agreements: Annotated Precedents, and course materials such as Pension Division Fundamentals for Family Law Lawyers (April 2008).

There are a number of different mechanisms for dividing pensions, the choice of which depends on the nature of the pension being divided. First, determine whether the pension is a local plan (s.110) or an extraprovincial plan (s. 123). Part 6 applies only to local plans.

(i) Local plans

The location of the head office of the employer or of the pension administrator's office does not determine whether the plan is “local”. A plan is a local plan if:

• the plan is registered with the Federal Pension Benefits Standards Act or in another province and the pension was earned in BC;

• the plan is registered with the BC Pension Benefits Standards Act; or

• the Plan is, by its own terms, subject to Part 6 of the FLA.

When a pension plan is administered outside British Columbia, write to the Pension Administrator and confirm that the plan is bound by Part 6 of the FLA. The administrator should also be consulted about the specific language used to divide a pension in an order or agreement.

(ii) Extraprovincial plans

Extraprovincial plans fall outside Part 6 and are subject to the common-law principles on pension division set out in Rutherford v. Rutherford (1980), 14 R.F.L. (2d) 41 (B.C.S.C.). In general, the benefit split will be administered by the spouse who owns the plan as trustee for the other spouse’s interest in the pension, unless another form of division is authorized by the terms the plan or the plan’s governing legislation.

(iii) Plans exempt from Part 6

When the pension plan of a Federal Government employee has been created by a specific statute, such as the Public Service Superannuation Act, the Canadian Forces Superannuation Act, or the Royal Canadian Mounted Police Superannuation Act, the division may be
governed by the federal *Pension Benefits Division Act*, S.C. 1992, c. 46, Schedule II. This schedule provides a complete code for the division of such pensions on marriage breakdown and does not allow division under provincial property laws.

For particulars about the division of these plans and more information about the Act, see Chapter 5 of the *Family Law Sourcebook* (Vancouver: CLEBC).

(iv) Plans subject to Part 6 FLA Pension Division

Under *FLA* Part 6, the administrator of the pension plan is required to effect the division of the pension between the *member* spouse (the spouse who owns the pension) and the *non-member* spouse (the spouse entitled to an interest in the member’s pension). The mechanism used to divide the plan will division of plans subject to Part 6 will depend on the nature of the pension.

*Defined contribution* plans are like a RRSP account to which the member, employer or both have contributed, and earns interest. The accumulated amount will be available to the member on retirement to purchase an annuity, RRIF account or some other retirement payment vehicle, or to draw from as income.

A *defined contribution* plan is divided by rolling over non-member’s share into another locked-in retirement vehicle, such as a RRSP, LIF or LIRA account. The non-member may begin drawing on these funds when he or she becomes eligible, usually at either age 60 or 65.

*Defined benefit* plans provide a fixed income on retirement determined by a formula, usually a multiple of years of service and a percentage of the plan’s earnings.

A *defined benefit* plan is divided by making the non-member spouse a limited member of the plan and allocating his or her share of the member’s plan to the new plan. The limited member may wait until the member retires and then receive a separate pension. Alternatively, the limited member may direct the plan to transfer his or her share to a locked-in retirement vehicle, such as a RRSP, LIF or LIRA account, at any time after the member becomes eligible to retire.

A *matured pension* (a pension paying benefits as a result of the member’s retirement) is divided by a benefit split administered by the plan, and the non-member spouse becomes a limited member of the plan. The non-member will begin receiving benefits once he or she is registered as limited member.

The Division of Pensions Regulation (BC Reg 348/2012) outlines the formulae for determining the non-member spouse’s share of a local plan. The regulation excludes premarital accruals but the court or parties may by order or agreement include all or part of the pension that accrued before marriage. See *Mailhot v. Mailhot* (1988), 32 B.C.L.R. (2d) 109 (C.A.).

(b) Property on Reserve Lands

Real property located on First Nations reserves is not held in fee simple. Under the *Indian Act*, land on reserves is held by certificate of possession while the underlying title remains vested in the crown. The parties may be registered joint owners of a certificate of possession, or the certificate may be registered in only one party’s name.

In general, the provisions of the *FLA* dealing with ownership and possession of land do not apply to land on reserve on the principle that provincial legislation cannot trench on areas assigned exclusively to federal authority by virtue of s. 91 of the 1867 *Constitution Act* and the doctrine of paramountcy (*Derrickson v. Derrickson* (1996), 50 R.F.L. (2d) 337, and *Darbyshire-Joseph v. Darbyshire-Joseph*, [1998] B.C.J. No. 2765 (B.C.S.C.)). The same analysis prevents the court from issuing an exclusive occupancy order for property on reserves pursuant to s. 124 of the *FRA* or s. 90 of the *FLA* (*Hageman v. Gladstone* (26 March 2004), Vancouver E040753, unreported (B.C.S.C.)).

The *FLA* may apply to reserve lands where the First Nation is a “Treaty First Nation” within the meaning of *Interpretation Act*, s. 29.1 and is entitled to alienate its lands. Where reserve lands are at issue in a proceeding under Part 5 and at least one spouse is a member of a treaty first nation, under *FLA*, s. 210, the first nation has standing in the proceeding and the court
must consider the first nation’s laws concerning the alienation of treaty land.

Where the court cannot divide real property situate on reserve lands, it can require the redistribution of other assets to compensate a spouse for his or her interest in the property. The same principle applies to real property located outside of British Columbia.

If there is a family home on a First Nation reserve, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c.20, provides for the adoption of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of that family home and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.

5. Property Agreements

Under the *Family Law Act*, the court may not make an order dividing family property or family debt where parties have a written agreement respecting the division of property or debt unless the agreement is set aside.

The court cannot make an order regarding property division in the face of an agreement without setting it aside. Section 93 sets out the criteria to set aside: failure to disclose; a spouse taking improper advantage of the other spouses’ vulnerability, ignorance, need or distress; failure to understand the consequences; and common law defences. However, even if the court is satisfied that none of these circumstances exist, it can still set aside an agreement if it is “significantly unfair,” taking into consideration the length of time that has passed since making the agreement; the intention of the spouses in making the agreement to achieve certainty; and the degree to which the spouses relied on the agreement.

6. Canada Pension Plan

Canada Pension Plan credits accruing during the parties’ cohabitation may be equalized between them upon application to the Plan. In British Columbia and a few other provinces, the parties may waive the equalization of their credits (*FLA*, s. 127), however for the waiver to be valid it must specifically enumerate the relevant sections of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. These provisions also apply to unmarried parties who qualify as “common-law partners” within the meaning of the *Canada Pension Plan*, s. 2(1).

For more information respecting the division of employment pensions and Canada Pension Plan benefits, see the *Family Law Sourcebook*, Chapter 5 and *Family Law Agreements: Annotated Precedents*, Chapter 12.
# JURISDICTION

## SUPREME COURT OF B.C.
- Inherent jurisdiction, including *parens patriae* jurisdiction and jurisdiction in equity
- Statutory jurisdiction
- Governed by Supreme Court Family Rules

## PROVINCIAL (FAMILY) COURT OF B.C.
- Statutory jurisdiction only
- Governed by Provincial Court (Family) Rules

### Divorce Act

<table>
<thead>
<tr>
<th>Domestic orders:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
</tr>
<tr>
<td>Custody of children</td>
</tr>
<tr>
<td>Access to children</td>
</tr>
<tr>
<td>Child support</td>
</tr>
<tr>
<td>Spousal support</td>
</tr>
<tr>
<td>Variation and enforcement of orders</td>
</tr>
</tbody>
</table>

### Foreign and extraprovincial orders:
- Validity of foreign divorce orders
- Provisional variation of extraprovincial support orders

### Family Law Act

<table>
<thead>
<tr>
<th>Domestic orders:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determination of parentage</td>
</tr>
<tr>
<td>Guardianship of children</td>
</tr>
<tr>
<td>Parenting arrangements</td>
</tr>
<tr>
<td>Contact with a child</td>
</tr>
<tr>
<td>Relocation of guardians and children</td>
</tr>
<tr>
<td>Child support</td>
</tr>
<tr>
<td>Spousal support</td>
</tr>
<tr>
<td>Family property, family debt and excluded property</td>
</tr>
<tr>
<td>Ownership and division of foreign property</td>
</tr>
<tr>
<td>Care of children’s property</td>
</tr>
<tr>
<td>Protection orders</td>
</tr>
<tr>
<td>Conduct orders and case management orders</td>
</tr>
<tr>
<td>Variation and enforcement of orders</td>
</tr>
<tr>
<td>Setting aside and enforcement of agreements</td>
</tr>
</tbody>
</table>

### Foreign and extraprovincial orders:
- Enforcement and superseding of foreign orders for guardianship, parenting arrangements and contact

### Interjurisdictional Support Orders Act

<table>
<thead>
<tr>
<th>Domestic orders:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child support</td>
</tr>
<tr>
<td>Spousal support</td>
</tr>
<tr>
<td>Variation and enforcement of certain foreign child support and spousal support</td>
</tr>
<tr>
<td>Variation and enforcement of extraprovincial child support and spousal support made under provincial legislation</td>
</tr>
</tbody>
</table>

### Interjurisdictional Support Orders Act

<table>
<thead>
<tr>
<th>Domestic orders:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child support</td>
</tr>
<tr>
<td>Spousal support</td>
</tr>
<tr>
<td>Variation and enforcement of certain foreign child support and spousal support</td>
</tr>
<tr>
<td>Variation and enforcement of extraprovincial child support and spousal support made by provincial courts under provincial legislation</td>
</tr>
<tr>
<td>SUPREME COURT OF B.C.</td>
</tr>
<tr>
<td>-----------------------</td>
</tr>
<tr>
<td><strong>Family Maintenance Enforcement Act</strong></td>
</tr>
<tr>
<td>• Enforcement of domestic, foreign and extraprovincial orders and agreements for child support and spousal support, by creditor or by Family Maintenance Enforcement program</td>
</tr>
<tr>
<td>• Appointment of receiver</td>
</tr>
<tr>
<td>• Order restraining disposal of assets</td>
</tr>
<tr>
<td><strong>Adoption Act</strong></td>
</tr>
<tr>
<td>• Direct placement adoption</td>
</tr>
<tr>
<td>• Adoption through ministry or agency</td>
</tr>
<tr>
<td>• Foreign and extraprovincial adoption</td>
</tr>
<tr>
<td><strong>Child, Family and Community Service Act</strong></td>
</tr>
<tr>
<td>• Protection intervention orders</td>
</tr>
<tr>
<td>• Restraining orders</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Name Act</strong></td>
</tr>
<tr>
<td>• Change of name on divorce or declaration of nullity</td>
</tr>
</tbody>
</table>
Chapter 3

Interim Applications in Family Law Matters

§3.01 Introduction

At the outset and during the course of a family law case, matters may arise that need to be resolved by the court, but that do not finally dispose of the issues between the parties. Applications of this nature are known as interlocutory applications, interim applications, or chambers applications.

The Supreme Court has jurisdiction over all matters in interim applications; the Provincial Court may hear interim applications on only those matters that are within its jurisdiction (see §2.02).

Interim applications are important tools in the management of a family law case. Section 216 of the Family Law Act (“FLA”) and ss. 15.1(3) and 16(2) of the Divorce Act allow either party to apply for interim relief in family law cases.

Interim applications are typically brought to obtain orders for such things as support, care of children, or possession of the family home. While the orders that flow from these applications are interlocutory in nature, they often also influence settlement discussions, trial preparation and final outcomes.

In the Supreme Court, masters and judges in chambers hear applications for interim orders, also called “non-final orders” under the Supreme Court Family Rules. A master has jurisdiction to make interim corollary relief (custody, access, child and spousal support) under the Divorce Act, interim orders under the FLA, interim restraining orders, and orders for exclusive possession of the family home under the FLA. A master does not have inherent jurisdiction, including equitable jurisdiction to grant restraining orders which are not specifically authorized by statute. A judge has jurisdiction over all matters.

§3.02 Application Procedures

Parties to a family law case may seek interim, or non-final, orders for custody and support, to restrain dealings with assets, and so on, in Supreme Court chambers. Supreme Court Family Rules (“SCFR”) 10-1 to 10-9 inclusive govern these applications.

In general, a party to a family law case cannot apply for a non-final order without first attending a judicial case conference (“JCC”)(SCFR 7-1(2)). This restriction does not apply to:

- applications for an order restraining the disposal or encumbrance of assets (FLA, s. 91);
- applications brought without notice;
- applications going by consent; and,
- applications to vary a final order.

In other cases, a judge may waive the requirement for a JCC on application, including on application by requisition (SCFR 7-1(4)).

A party makes an interim application by filing and serving a notice of application, in SCFR Form F31, with supporting affidavit material (Form F30). The notice of application must (SCFR 10-6(3)):

- describe the orders sought or attach a draft order;
- summarize the factual basis of the application;
- set out the statutory provision or rule relied upon and any legal argument on which the orders sought should be granted;
- list the affidavits and other documents relied upon;
- set out the applicant’s time estimate for the hearing;
- set out the date and time for the hearing of the application (subject to the subrules (4) and (5) regarding applications longer than 2 hours and the dates that the court hears particular applications);
- set out the place for the hearing in accordance with Rule 10-2, normally the registry in which the underlying action is brought; and,
- provide the data collection information required in the appendix to the form.

Supreme Court Family Rule 10-6(4) provides that an application must be set for 9:45 am on a date on which the court hears applications. Counsel should consult with the particular registry to find out on what days there will be chambers sittings. Note also that if the applicant’s time estimate for the hearing exceeds 2 hours, the

The timelines for service and the application materials that must be served depend on the type of application. The applicant must serve on each of the parties and on every other person who may be affected by the orders sought: a copy of the filed notice of application; a copy of every affidavit and documents referred to in the notice of application that have not already been served on that person, and if the application is brought under Rule 11-3 (summary trial), any notice that the applicant is required to give under Rule 11-3(9).

The timeline for service for interim applications is at least 8 business days before the date set for the hearing for regular applications, 12 business days in the case of summary trial applications and 21 business days for applications to change a final order. Business days are defined in SCFR 10-6(1).

A party may respond to a notice of application by filing an application response together with the original of every affidavit and of every document the responding person intends to refer to that have not already been served on that person. The responding party must also serve on the applicant, 2 copies of the filed application response, the filed supporting documents, and on a summary trial application, any notice that the application respondent is required to give under Rule 11-3(9).

An application response must be in SCFR Form F32. The application response cannot exceed 10 pages and must:

- set out the application respondent’s position on each order sought;
- summarize the factual and legal basis on which the orders sought should not be granted;
- list the affidavit and other materials relied upon in opposition to the relief sought; and,
- set out the application respondent’s time estimate. (SCFR 10-6(9))

When responding to most applications, the responding person must file and serve within 5 business days after service of the notice of application and affidavit materials (8 business days in the case of a summary trial application).

A party who serves a notice of application is an applicant. A party who files an application response is an application respondent. A party who does not file an application response is not an application respondent and is therefore not entitled to notice of the hearing of the application (SCFR 10-6(1) and (8)).

For any application that is opposed, the applicant must file an application record with the registry no later than 4 p.m. on the business day that is one full business day before the date set for the hearing. An application record combines all of the documents the court will need to refer to in a ring binder or in some other form of secure binding (SCFR 10-6(14)). See SCFR 10-6(14) for a list of contents.

Evidence in chambers proceedings is given by affidavit in Form F30. Supreme Court Family Rule 10-4 sets out the various rules that apply to affidavits in family law cases. Supreme Court Family Rule 10-4 largely mirrors the language contained in Supreme Court Civil Rule 22-2: see Practice Material: Civil Litigation, §3.03 for a discussion of affidavit drafting.

§3.03 Applications without Notice and on Short Notice

Special rules apply to applications that are brought without notice or on short notice: see SCFR 10-8 and 10-9, plus Supreme Court Family Practice Direction, FPD-6. When an application is brought without notice, the application materials can be filed on the same day that the application is heard in chambers; when the application is brought at the commencement of an action, the application can be brought on the same day the pleadings are filed.

When proceeding without notice, the application material should explain why the application is sought to be heard without notice. For example, there may be some urgency involved, or there may be a concern that notice will result in the dissipation of assets. Take care to bring applications without notice only when absolutely necessary.

In proceedings where no notice is given, counsel have a duty to inform the court of all material facts known to them that will enable the court to make an informed decision, even if the facts are adverse to the interests of the client or lessen the likelihood of the order being made.

When the court grants an order on a without notice application, the order will usually be limited in scope and contain either a sunset provision or a term allowing the application respondent to apply to set aside the order on limited notice to the applicant.

Leave is required to have an interim application heard on short notice to the application respondent. An application to proceed on short notice may be made by requisition in Form F17 either without notice or on extremely short notice (SCFR 10-9(2)), or by desk order without an oral hearing using the requisition set out in Family Practice Direction, Short Notice Applications—Family (FPD-6). If leave is granted, the court will impose terms governing the exchange of reply materials and fix the date on which the underlying application will be heard (SCFR 10-9(4)).
Types of Interim Applications in Family Law Cases

The following describes some of the most common applications that parties make in family law cases. Most of these applications may be brought only after a judicial case conference has taken place.

1. Interim Custody and Access (Divorce Act, s. 16(2)) and/or Parental Responsibilities, Parenting Time and Contact (Family Law Act, s. 45, 51, 216):

A non-final order about the care of children may have a profound effect upon the final outcome of a family law proceeding. When the matter finally proceeds to trial, it is sometimes very difficult to alter the arrangements established by an interim order, despite case authority requiring the matter to be considered de novo.

On an application for a non-final order, the court will consider the best interests of the children and the status quo in existence at the time the application is made. As the court rarely hears oral evidence on interim applications, it is very important to ensure that the affidavits relied upon are complete, accurate and coherent. They may include facts such as the following:

(a) a brief history of the parent’s relationship;
(b) the full names and birth dates of the children;
(c) long term history of the child’s care;
(d) any special health or educational problems of the children;
(e) the nature and strength of the relationship between the child and the significant persons in their lives;
(f) the names of the schools attended by the children;
(d) the physical surroundings of the residence where it is intended that the children will reside;
(e) details concerning the children’s day care, their schedules, eating, discipline, etc.;
(f) details concerning the spouse’s schedule either away from home or at work or in the evenings;
(g) any negative aspects of a spouse’s behaviour towards the children that are material to the best interests of the children; and
(h) the views of the children, if the children are mature enough to express their views.
(i) occurrences or a pattern of family violence significant enough to affect the best interests of the children. In this regard, the factors under s. 38 FLA must be considered.

The analysis on such an interim application must be focused on the best interests of the child. Lawyers need to remind their clients of this when preparing evidence. The focus must not be on what is in the best interests of the parent when that is not consistent with the best interests of the child.

It is sometimes advantageous to retain an expert (usually a psychologist) to prepare a report regarding the needs and views of the children and the appropriate parenting arrangements. See Practice Material: Family, §4.04 and “Appointment of Expert to Investigate a Family Matter” below.

2. Interim Support for Spouse or Child: Family Law Act, ss. 149, 165, 216 and Divorce Act, ss. 15.1, 15.2 and 15.3

See Practice Material: Family, §2.10 and §2.11 for a general discussion of support.

The court may make interim orders for child support and spousal support. The general guidelines for child support are the same on interim applications as they are on final applications. Applications for interim spousal support orders tend to rely more heavily on the short-term need of the proposed recipient than is the case on applications for final orders; the basis for the proposed recipient’s entitlement to support is usually scrutinized more thoroughly at trial.

Applications for interim support for a spouse or child are heard in chambers. As a year or more often passes before a matter finally proceeds to trial, the financial effect of an interim support order can be very important. It is essential to obtain as much financial disclosure as possible before proceeding with an interim support application. Without proper financial disclosure, it is impossible to determine the needs and means of the proposed recipient and the capacity of the proposed payor to pay. When a party resists or is delinquent in providing proper financial disclosure, counsel may take advantage of the provisions of s. 213 of the FLA and SCFR 5-1(28).

Counsel must be alert to the disclosure provisions in the Guidelines and SCFR 5-1. See ss. 21-26 of the Guidelines regarding the obligations of the parties to provide ongoing disclosure during and after court proceedings.

v. E.P., 1999 BCCA 393; Kerr v. Baranow, 2011 SCC 10. In D.B.S. v. S.R.G., the Supreme Court of Canada held that if a court makes a retroactive child support order, the order may be retroactive to the date of effective notice to the payor, but generally for not more than three years. However, if the payor has engaged in blameworthy conduct, the court may make an order exceeding this limit. Kerr v. Baranow applied the principles set out in D.B.S. to applications for retroactive spousal support.

It is possible to obtain interim lump sum payments for spousal and child support under s. 170(c) of the FLA, and to recover the costs of prenatal care or costs arising from and incidental to the birth of a child (s. 170(f)).

3. Appointment of an Expert

Section 211 of the FLA provides that the court may appoint a person to assess one or more of the needs of a child, the views of the child, and the ability and willingness of a party to satisfy the needs of a child.

The report must be prepared by a family justice counselor, a social worker, or another person approved by the court (s. 211(2)(a)), typically a psychologist or clinical counsellor. Unless the parties consent otherwise, the author must not have had any prior connection with the family (s. 211(2)(b)). The court has the power to order one party to pay the costs of the report or that the parties pay shares of the costs (s. 211(5)).

Reports under s. 211 of the FLA have great utility in cases where there is serious dispute about the best parenting arrangements, contested allegations of violence or abuse, contested allegations about alienation, and other high conflict parenting relationships.

Supreme Court Family Rule 13-5(8), regarding court appointed experts, states that:

The court, after consultation with the parties, must:
(a) settle the questions to be submitted to any expert appointed by the court under this rule,
(b) give the expert any directions the court considers appropriate, and
(c) give the parties any directions the court considers appropriate to facilitate the expert’s ability to provide the required opinion.

Supreme Court Family Rule 13-5(9) provides that the order appointing an expert must contain the directions referred to in subrule (8) and the court may make such additional orders to enable the expert to carry out the directions including, on application by a party, an order under Rule 9-5 for an examination with respect to the physical or mental condition of a party or inspection of property.

Supreme Court Family Rule 13-5(10) provides:

The remuneration of an expert appointed under this rule
(a) must be fixed by the court and consented to by the expert, and
(b) may include
(i) a fee for the report, and any supplementary reports, required under Rule 13-6, and
(ii) an appropriate sum for each day that the expert’s attendance in court is required.

If clients do not have the resources to obtain an independent expert to provide a report and recommendation to the court concerning custody, s. 211 of the FLA authorizes the court to appoint a family justice counsellor to prepare a report at no cost to the litigants.

Counsel should take care when selecting the investigator who will prepare these reports as they may be very influential or even determinative of settlement discussions or final orders. The quality, accuracy and diligence with which a report is prepared cannot be guaranteed when the report is prepared by someone who is not a psychologist, clinical counsellor or social worker with experience conducting these sorts of investigations. Counsel are strongly encouraged to consult colleagues and other family law practitioners when selecting a person to conduct a such a report.

4. Protection Orders: Family Law Act, s. 183

Section 183 of the FLA authorizes a number of types of orders (the list is non-exhaustive) that the court may make to protect a person from family violence. The applicant must be an “at risk family member”, defined in s. 182 as a person whose safety and security is or is likely at risk from family violence carried out by a family member. “Family violence” is broadly defined in s. 1 of the Act. It includes psychological or emotional abuse and direct or indirect exposure of a child to family violence. It does not include reasonable measures taken in self defence. Section 183(1)(b) provides that an order need not be made in conjunction with any other proceeding or claim for relief under the FLA.
The types of orders expressly included in s. 183 are:

(a) a provision restraining the family member from
   (i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,
   (ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,
   (iii) following the at-risk family member, or
   (iv) possessing a weapon or firearm;
(b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;
(c) directions to a police officer to
   (i) remove the family member from the residence immediately or within a specified period of time,
   (ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or
   (iii) seize from the family member any weapons or firearms and related documents;
(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;
(e) any terms or conditions the court considers necessary to
   (i) protect the safety and security of the at-risk family member, or
   (ii) implement the order.

Orders made under this section, unless the court otherwise orders, automatically expire within one year of their making. In determining whether to grant a protection order under s. 183, the court must consider at least the following factors (s. 184(1)):

(a) any history of family violence by the family member against whom the order is to be made;
(b) whether any family violence is repetitive or escalating;
(c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
(d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
(e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
(f) the at-risk family member's perception of risks to his or her own safety and security;
(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Counsel applying for protection orders should exercise caution when preparing the wording of restraining orders, for three reasons:

1. the impact on the person directly affected by them;
2. the ease of enforcement; and,
3. the impact on the parties' ability to communicate with one another about any children.

Restraining or protection orders obtained without notice may contain a sunset clause or are accompanied by a provision giving the application respondent liberty to apply to set aside or vary the order on short notice to the applicant.

There is a central registry for restraining orders, including protection orders, in the province and once filed they are kept in that central registry. It is prudent to ensure that the client has a certified true copy of the protection order to keep on his or her person and at all locations from where the opposing party is restrained from attending.

5. Exclusive Occupancy: Family Law Act, s. 90

This section provides for the exclusive occupancy of a family residence by one spouse or exclusive use of property stored there by one spouse. This relief is not available in the Provincial Court.

Under the FRA, the test for exclusive occupancy required supporting material to demonstrate that the shared use of the matrimonial home was a practical
impossibility, and that, on the balance of probabilities, the applicant is the preferred occupant. This is likely the test that will apply to the determination of applications under s. 90. The principles for FRA applications are set out below.

The applicant bears the onus of proof. The practical impossibility test is an objective one, not subjective (see Dennis v. Regehr [1996] Civ L.D. 120 (BCSC)). Clear evidence that the parties cannot live under the same roof is required, especially when children are involved who would otherwise benefit from contact with both parents.

Examples of relevant factors that are weighed in these applications are as follows:

(a) the conduct of the parties, such as the presence or absence of a serious dispute complicated by such matters as violence, alcoholism or drug abuse;
(b) the presence of children, and their best interests;
(c) the respective economic positions of the parties;
(d) the availability of alternative living arrangements in the home to modify or minimize contact between the parties; and,
(e) the parties’ past acquiescence to sharing the home despite the tensions between them.

Counsel should bring applications for exclusive occupancy of the family residence early on in a proceeding. Delay may cause the court to draw an adverse inference against the applicant as to the necessity of the order.

Note that s. 90 is inapplicable to homes situate on First Nations reserve lands because of the division of powers set out in ss. 91 and 92 of the 1867 Constitution Act (Hageman v. Gladstone (26 March 2004), Vancouver E040753, unreported (B.C.S.C.), and Paul v. Paul, [1986] 1 S.C.R. 306)).

When bringing an application for exclusive use of chattels, you must clearly set out why the applicant needs exclusive use of the chattels at present. For example, a spouse might need a motor vehicle for work, or to drive the children to and from school or their recreational activities. List any similar chattels that might be available to the other spouse as a substitute.

6. Restricting Communications: Family Law Act, s. 225

This section allows courts to make conduct orders that impose restrictions or conditions on communications between the spouses. For example, in order to minimize excessive conflict in communications, a court might order parties to communicate only via email. This provision is not to be used where there is a safety concern and a s. 183 protection order is more appropriate.


This section of the FLA permits the court to make conduct orders requiring a person to maintain expenses for a residence and to manage disputes over personal belongings pending resolution of the dispute. The section provides:

A court may make an order to do one or more of the following:

(a) require a party to make payments respecting rent, mortgage, specified utilities, taxes, insurance and other expenses related to a residence;
(b) prohibit a party from terminating specified utilities for a residence;
(c) require a specified person to supervise the removal of personal belongings, by another person, from a residence.

8. Restraining the Use, Disposition or Encumbrance of Property: Family Law Act, s. 91; Land Title Act, ss. 213 and 215; Land (Spouse Protection) Act

Only the Supreme Court can make orders preserving property. The lawyer who does not take steps to ensure that assets are preserved may be negligent. Before counsel can take such steps, he or she must know of what the property consists and should obtain full disclosure as soon as possible.

Steps that may be taken to preserve property include the following:

(a) filing, concurrently with the commencement of proceedings, a certificate of pending litigation against real property under the Land Title Act;
(b) obtaining an order under s. 91 of the FLA restraining the use, disposition or encumbrance of assets;
(c) filing an entry under the Land (Spouse Protection) Act, whether litigation has commenced or not; and,
(d) obtaining an order protecting and preserving property under SCFR 12-1 and 12-4 or s. 39 of the Law and Equity Act.
Filing an entry under the *Land (Spouse Protection) Act* can be very helpful as it allows married and unmarried spouses to preserve an interest in a “homestead,” usually the family home, without starting court proceedings. A homestead is defined at s. 1 as:

“land or any interest in it entitling the owner to possession of which is registered in the records of the land title office, in the name of the spouse and on which there is a dwelling occupied by the spouses as their residence, or that has been so occupied within the period of one year immediately preceding the date of the making of the application”

Certificates of pending litigation are available to married spouses and unmarried spouses where a claim is made under *FLA*, Part 5.

The British Columbia Court of Appeal addressed the question of the effect of filing a certificate of pending litigation in family law proceedings in *Antenen v. Antenen* (1992), 68 B.C.L.R. (2d) 300 (S.C.). A certificate of pending litigation does not, in and of itself, create substantive rights. Filing a certificate of pending litigation does nothing more than defeat the *Land Title Act*’s protection of bona fide purchasers for value and warn potential lenders that title to the property may change hands. Moreover, a certificate holder does not automatically gain priority over other competing claims simply because the certificate holder subsequently establishes an interest in property. If there is a competing claim to priority, such as a judgment registered after your client files a certificate of pending litigation, but before a triggering event occurs, your client’s claim to priority may be defeated.

The protection of chattels and personal property is most easily effected by an application for an order pursuant to s. 91 of the *FLA*, which may also be used to protect real property. An order under this section restraining the use, sale or encumbrance of assets protects not only assets that fall within the *FLA*’s definition of “family property” but “other property at issue” as well.

The court must make an interim order pursuant to s. 91 of the *FLA* on the application of a party, unless the other party establishes that the relief sought by the applicant will not be defeated or adversely affected by the disposal of that family property or other property. This application may be brought without notice.

The supporting affidavit material should set out a reasonable apprehension that the property at issue will be disposed of and that it cannot be replaced or replenished. If the application is to be defeated, the onus lies on the application respondent to show that a claim will not be defeated or adversely affected. Case law on applications under s. 67 of the *FRA* will be helpful in deciding this issue.

When some of the property at issue is used for business purposes, the order may contain an exemption allowing the application respondent to deal with the property in the ordinary course of business.

When counsel obtains an order under s. 91, counsel should serve a copy of that order on all individuals who will be affected by the order, despite the effect that the order is binding only between the parties. Make certain that any relevant financial institutions are also served although they are not bound by the order. When restraining RRSPs, the head office of the financial institution may also need to be served as RRSPs are often administered through a central location. If necessary, an order can also be made to restrain entry into a safety deposit box.

Note that the effect of a s. 91 order can be extremely broad and prevent the application respondent from accessing funds to deal with routine expenses. Counsel may wish to seek a term permitting the use of funds as may be necessary to meet the application respondent’s reasonable day to day living expenses and possibly legal fees.


Section 89 of the *FLA* allows the Supreme Court to order the interim distribution of property as follows:

If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

(a) family dispute resolution,

(b) all or part of a proceeding under this Act, or

(c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

Supreme Court Family Rule 15-8 allows the court to make an order for the sale of property in a family law case where it appears necessary or expedient. The court may also make directions for the purpose of effecting a sale, which can include requiring payment of the purchase price into court or to trustees or to other persons (SCFR 15-8(1) and (3)). The court’s willingness to order the sale of property, in advance of a trial, is limited. The onus
is on the applicant to show that the sale of the property before trial is necessary or expedient (see Reilly v. Reilly (1992), 44 RFL (3d) 72 (BCCA)).

10. Pre-Trial Examination of Witnesses: Supreme Court Family Rule 9-4

Before trial, a party can examine a person who may have material evidence relating to a matter in issue under SCFR 9-4. An effort must first have been made either to interview the witness orally or to obtain written responses. Supreme Court Family Rule 9-4(3) sets out specifically what the affidavit in support of such an order should contain. The proposed witness must be provided with at least 8 business days’ notice of the application (SCFR 9-4(4) and SCFR 10-6(7)).

11. Appointment of Receiver or Receiver Manager: Supreme Court Family Rule 12-2

Under SCFR 12-2, the court may appoint a receiver. A receiver’s duties might include taking in the rents from family property or taking possession of such property in order to preserve it pending trial. A party should only apply for appointment of a receiver when there is a real danger of the assets in dispute being dissipated by the spouse in control of them. The court will look at the balance of convenience in deciding whether to grant the order. For example, if historically one spouse has managed the assets, the right to manage may well continue if there would otherwise be certain losses.

The affidavit in support of the application should set out the following:

(a) why the assets concerned are family property;
(b) the grounds for the fear that they will be dissipated if a receiver is not appointed;
(c) any harm that has already come to the assets through the fault of the other spouse;
(d) the name and qualifications of the proposed receiver; and
(e) the estimated costs of the proposed receivership.

See also s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253 for related relief.

12. Security for Costs: Supreme Court Family Rule 22-1(6)

Supreme Court Family Rule 22-1(6) provides that the court may make an order for security for the costs of a party. Security will not be ordered when the applicant has a sufficient separate estate to pay the costs or if the other party is unlikely to be able to provide security for costs.

In general, security should be sought where a party has repeatedly invoked court proceedings on the same issue or closely related issues, has been unsuccessful in those proceedings, and again seeks to litigate that issue. Security may also be awarded where the party has ignored past orders of costs.

13. Applications for Findings of Contempt: Supreme Court Family Rule 21-7

Supreme Court Family Rule 21-7 codifies contempt proceedings, but does not derogate from the Supreme Court’s inherent jurisdiction to punish for contempt.

A contempt application seeks a finding that the purported contemnor is in contempt of court. Once that finding has been made, the application moves to a sentencing phase. Under SCFR 21-7, the court may punish contempt by committal or imposition of a fine, or both. The court has been creative in levying punishment for contempt, and has ordered, for example, community service or that a fine be payable to the innocent party rather than to the Crown.

Contempt is a remedy of last resort, and supplements the remedies for non-compliance set out in SCFR 21-5 and 21-6 and the FLA, and a single breach will not likely result in a finding of contempt. The contumacious conduct must generally be repeated and ongoing before the court will find a party in contempt.

An award of costs against a party who is in contempt of court is inappropriate since contempt is an affront to the dignity of the court and not a part of the dispute between the parties (Frith v. Frith, 2008 BCCA 2).

A party may apply for a finding of contempt where, among other circumstances, the opposing party has:

(a) disobeyed an order of the court, such as a support order, restraining order or order for the production of a property and financial statement; or
(b) refused to answer interrogatories or make discovery of documents, or refused or neglected to produce documents under SCFR 9-1 and 9-3.

A filed copy of the notice of application and all filed affidavits in support of it must be served personally on the alleged contemnor at least 7 days before the hearing of the application (SCFR 21-7(11)). The affidavits in support must set out the conduct alleged to be contempt of court (SCFR 21-7(12)).

An extraprovincial order similar to a local order for guardianship, parenting arrangements or contact with a child may be dealt with under Part 4, Division 7 of the *FLA* and be enforced or varied by the courts of this province.

Issues about extraprovincial orders typically arise when a parent has removed a child to British Columbia from a jurisdiction in which an order was made. The other parent may retain a lawyer here to have the extraprovincial order enforced in British Columbia.

The *FLA* requires courts in British Columbia to “recognize” an order made by an extraprovincial tribunal unless one of the following circumstances applies:

- (a) the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;
- (b) the respondent was not given an opportunity to be heard by the extraprovincial tribunal before the order was made;
- (c) the law of the place in which the order was made did not require the extraprovincial tribunal to have regard to the best interests of the child;
- (d) the order of the extraprovincial tribunal is contrary to public policy in British Columbia; or
- (e) the extraprovincial tribunal would not have jurisdiction under s. 44 if it were a court in British Columbia (this is an important restriction and s. 44 should be reviewed to see when an extraprovincial tribunal will be deemed to have had jurisdiction).

When a court in British Columbia recognizes the extraprovincial order, the order is enforceable as a local order. The court may make any further orders under the *FLA* as may be necessary to give effect to the order.

Section 73 of the *FLA* outlines the purposes underlying this part of the *FLA*:

- (a) ensuring that all applications are determined on the basis of the best interests of children;
- (b) recognizing that there should not be duplication of applications in more than one jurisdiction with respect to custody or access of children, except in exceptional circumstances;
- (c) discouraging the abduction of children as an alternative to custody rights by due process; and
- (d) providing for a more effective enforcement of extraprovincial custody and access orders.

Section 74 of the *FLA* provides that the court should exercise its jurisdiction to make an order respecting a child who is not habitually resident in British Columbia, only if it is satisfied that

- (a) the child is physically present in British Columbia at the commencement of the application for the order;
- (b) substantial evidence concerning the best interests of the child is available in British Columbia;
- (c) no application for custody of or access to the child is pending before an extraprovincial tribunal in another place where the child is habitually resident;
- (d) no extraprovincial order in respect of custody or access to the child has been recognized by a court in British Columbia;
- (e) the child has a real and substantial connection with British Columbia; and
- (f) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.

Section 76 of the *FLA* provides the court with an overriding jurisdiction to make or vary an order if the court is satisfied that the child would, on a balance of probabilities, suffer serious harm if the court does not intervene. However, s. 74 of the *FLA* also allows the court to decline jurisdiction if it believes it is more appropriate for the jurisdiction to be exercised in another province.

The purposes outlined in s. 73 of the *FLA* should not be overlooked. If you are retained by a client who has recently removed his or her children from another jurisdiction where there is an existing order, seriously consider whether or not it is more appropriate for that client to return to the governing jurisdiction before any attempt is made to seek to have a court of British Columbia exercise jurisdiction over the children.

Division 8 of the *FLA* deals with the problem of child abduction across international borders. British Columbia is a signatory to the *Hague Convention on Civil Aspects of International Child Abduction* (the “*Hague Convention*”) along with a number of American states and foreign jurisdictions.
Under the *Hague Convention*, the removal or retention of a child is considered wrongful where it is in breach of rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal or retention, and where those custody rights were actually exercised. The *Hague Convention* provides a procedure for having children returned who have been abducted and taken to a contracting state. The process is, however, lengthy and cumbersome.

Division 8 of the *FLA* provides authority for British Columbia to enforce custody orders made in the *Hague Convention* signatory jurisdictions. Counsel should immediately contact the Attorney General if the client has a valid order for custody under the *Divorce Act* or parenting arrangements or guardianship under the *FLA* and suspects that a child has been abducted to a reciprocating state.
APPENDIX 3A-AFFADAVIT GUIDELINES

Interim Support

1. Applicant
   (a) age
   (b) education, training, special skills and expertise
   (c) employment history and prospects of employment
   (d) health status, history of medical and mental health
   (e) statements of income and expenses, documentation of income form employer, pension plan, etc.
   (f) statement of present expenses and any projected expenses
   (g) statement of expenses necessary to care for any children, including daycare and health care expenses
   (h) description of respondent spouse's income and assets
   (i) description of spending habits of spouses if relevant, i.e. number of cars, nature of restaurants and bars frequented, shopping habits, travel, etc.

2. Children
   (a) ages and names of children
   (b) grades attending and names of schools
   (c) description of special expenses for schooling, recreation or health, showing past standards or reasons for needs

Notes (Section references are to the Guidelines):

1. Post secondary education expenses (s. 7(1) (e)) include tuition, books, supplies, paper, etc. Note that the court can consider the child's income under s. 7(2). The affidavit should contain the place of employment, hours of work and wage paid to the child if claiming s. 7 expenses.

2. Section (7)(1)(a) expenses include the net expense (i.e., after the childcare deduction). If the net amount cannot be determined (i.e., if counsel does not have access to the Child View Computer software program) include the gross expense with a statement that the tax deduction will be shared in proportion to the amount paid by each party: sees. 7(3).

3. For tutoring or special education expenses under s. 7(l)(d), show receipts or provide information respecting how the particular program will meet the child's needs.

4. For s. 7(f) expenses for "extraordinary expenses for extracurricular activities", the court often requires receipts or verification as to why the expense is "extraordinary" in relation to the particular activity. The cost of equipment (i.e., soccer cleats) should be added to registration fees.

---

Interim Care of Children

(a) full name and birthdates of children
(b) special health or education problems of children
(c) the names of children’s schools and proximity to parents’ homes
(d) parents’ respective roles in day-to-day care and parenting of children, i.e., feeding, cleaning, assistance with school work, discipline, etc.
(e) parents’ respective involvement in children’s care outside the home, i.e. school activities, extracurricular activities, medical and dental care, etc.
(f) hours of work of the respective parents
(g) regular time of parents away from home and children when not at work, i.e., evening recreation, sports activities, social engagements, etc.
(h) relationship of each child to each other and to each parent
(i) description of any relevant behavioural, medical or psychological issues which materially impact on a parent’s capacity to care for the children
(j) description of any relevant civil and criminal litigation relating to the safety and well-being of the children
(k) append medical or education records that give insight into which spouse should be preferred

Exclusive Occupancy of Residence

(a) description of dwelling
(b) location to children’s schools
(c) reasons for wanting sole occupancy, i.e.
   (i) description of why impossible to continue to cohabit
   (ii) any relevant history of drug or alcohol abuse
   (iii) any relevant history of violence or threats of violence between parties, and other forms of mental or emotional abuse
   (iv) description of any relevant involvement of other spouse with criminal justice system
   (v) alternate accommodation available to other spouse
(d) why balance of convenience favours applicant remaining in house despite inconvenience to other spouse

Restraining Entry

(a) description of dwelling
(b) reasons for wanting sole occupancy, i.e.
   (i) description of why impossible to continue to cohabit
   (ii) any relevant history of drug or alcohol abuse
   (iii) any relevant history of violence or threats of violence between parties, and other forms of mental or emotional abuse
   (iv) description of any relevant involvement of other spouse with criminal justice system
   (v) alternate accommodation available to other spouse
Exclusive Use of Chattels
(a) identify the chattels at issue clearly (e.g., licence and registration numbers)
(b) history of use before the separation (e.g., pattern of use of each party)
(c) state reason that the applicant spouse needs exclusive use of the chattel now
(d) list any similar chattels that are available to the defendant spouse in lieu of chattels at issue

Restraining Use, Disposition, Encumbrance of Property
(a) identify the assets clearly (e.g., licence and registration numbers)
(b) the present location of assets
(c) history of use before the application
(d) legal ownership or title
(e) actions or statements of other spouse indicating that he or she might dispose of assets
(f) reasons why the assets are to be considered family property or are at issue in proceeding
(g) description of any physical or monetary contribution to the acquisition, preservation or maintenance of the assets by the applicant
(h) fear that assets would be disposed of and not be replaced or that sufficient funds are not available from other assets to compensate if encumbered or sold

Severance of Joint Tenancy
(a) legal or civil description of real property in question
(b) manner in which tenancy held, including full names of owners
(c) why the joint tenancy ought to be severed
Interim Application for Production under Rule 9-1 (Discovery of Documents) or Rule 5-1 (Financial Statement or Production of Documents from Third Parties)

(a) when the notice or demand was served
(b) the acknowledgement, if any, of service
(c) dates of subsequent demands and the responses if any, with supporting copies of letters sent and received
(d) description of documents sought and explanation of relevance to case

Application for finding Party is in Contempt of Court

(a) particulars of order breached, with copy of order
(b) means by which party had knowledge of order, i.e. presence at hearing, receipt of entered order, etc.
(c) acknowledgement, if any, of order
(d) precise particulars of party’s breach of order
(e) prejudice, if any, suffered by the applicant as a result of the breach
(f) description of subsequent requests to correct to deficiency or breach, with supporting copies of letters sent and received

Interim Applications to Inspect Property

(a) state grounds for inspection
(b) dates when inspection sought,
(c) who will be conducting the examination, if other than counsel
(d) if entry upon lands or premises is necessary, state who is in possession and describe rebuffed requests for entry, with supporting copies of letters sent and received

Interim Applications to Preserve Property

(a) state grounds of need for preservation
(b) name of proposed trustee or custodian and the cost, if any, of preservation
(c) if entry upon lands or premises is necessary, state who is in possession and describe rebuffed requests for entry, with supporting copies of letters sent and received
(d) describe consequences if property is not preserved

Appointing Receiver and Receiver Managers

(a) describe party’s past breaches of orders or agreements restraining disposition or encumbrance
(b) describe consequences of breaches
(c) the name and qualifications of proposed receiver or receiver manager and the costs of his or her services

Pre-Trial Examination of a Witness under Rule 9-4

(a) describe the evidence believed to be within the knowledge of the proposed witness and why that evidence is relevant
(b) if the proposed witness is the expert of the other party, describe why the applicant is unable to obtain the facts and opinions on the subject by other means
(c) describe either the efforts made to obtain the desired evidence, with supporting copies of letters sent and received, and refusal of proposed witness to provide information, or the witness’ conflicting statements
(d) describe efforts made to obtain proposed witness’ voluntary attendance at examination give responsive reply to your request for examination, with supporting copies of letters sent and received

Family
Chapter 4

Pre-Trial Investigation and Preparation

[§4.01] Discovery

Rules and procedures regarding discovery in a family law case are similar to those in any civil case. The pre-trial procedures are set out in Rule 9 of the Supreme Court Family Rules, B.C. Reg. 169/2009 (the “SCFR”).

Rule 5 of the Supreme Court Family Rules requires each party in a family law case where child support, spousal support or a division of property and debt under the FLA is at issue to provide a sworn financial statement. Supreme Court Family Rule 5-1 also permits each party to demand the production of specific documents and information to clarify the opposing party’s financial circumstances.

In addition to the documents required to be disclosed under SCFR 5-1, counsel often ask for:

- more than the previous three years’ worth of personal and corporate tax returns;
- accountant’s files and working notes;
- more than the previous three years’ worth of financial statements for any corporation;
- three or more years’ worth of bank and credit card statements; and,
- applications for mortgages and loans.

When the care and control of children, the ability of a dependent spouse to work and become independent, the ability of a payor to earn a given income, or a claim in tort is made as a consequence of family violence, counsel may also demand production of:

- the child’s report cards and attendance records;
- dental records;
- reports and working notes from psychologists, psychiatrists and counsellors;
- hospital records;
- medical reports from doctors, physiotherapists and physiologists;
- information relating to any criminal or civil proceeding that relates to the child’s safety; and,
- resumes and proof of attempts to secure employment, including rejection letters.

Supreme Court Family Rule 9-2 allows for examinations for discovery of the parties involved in a family law case. This can be helpful not only to get a party’s testimony on record, but also to provide an initial assessment of a party’s likely demeanor while testifying at trial.

Counsel should ensure that most documents have been exchanged and reviewed before conducting the examination. Examinations for discovery are limited to five hours for each party adverse in interest, although this limit may be extended by consent of the party or by court order (SCFR 9-2(2)). Supreme Court Family Rule 9-2(3) sets out the factors the court must consider on an application to extend the limit on the examination for discovery. These factors include the conduct of the party being examined and the conduct of the examining party. In order to ensure that you have all necessary documentation and information, allow adequate time to prepare and exchange experts’ evidence before holding examinations for discovery. The production of additional documents can be demanded at the examination, and the examination can be adjourned pending the production of those documents.

Remember that the value of property, particularly real property or investment holdings, can change dramatically between the date of first disclosure and trial. It can be prudent to request that opposing counsel advise you of any known changes a few weeks before trial. Also, SCFR 5-1(15) and (16) require that if the information contained in documents filed and served under SCFR 5-1 is rendered inaccurate or incomplete by a material change, the parties must promptly serve on all parties a written statement setting out the accurate information or a revised Form F8 financial statement. If the party is obliged to file new documents as a result of the material change, that party must serve those new documents within 28 days after the material change as well as comply with SCFR 5-1(15) (SCFR 5-1(16)).

An application may be made at any state of a proceeding to seek an order to disclose information in accordance with the SCFR. Section 212 of the FLA gives the court authority to order disclosure of information by parties at any stage of the proceeding. The information to be provided by a party must be necessary to resolve the family law dispute, and be in accordance with the order.

**Property and Financial Experts**

It is not unusual, even in the simplest of family law proceedings, to retain at least one expert. Typically, these experts include:

- certified business valuators;
- appraisers for art, collections and antiques; and,
- real estate appraisers.

In complex property cases, and indeed in all cases, it is the lawyer’s duty to coordinate experts so that the best evidence with the most probative value is presented. For example, a business valuator may require that experts prepare real estate and equipment appraisals.

If a party wishes to present expert evidence to the court on a financial issue, that evidence must be presented by means of a jointly appointed expert, unless the court otherwise orders or the parties otherwise agree (SCFR 13-3). Supreme Court Family Rule 13-4 sets out the rules for jointly appointed experts and includes a list of what matters must be settled before an expert is appointed.

Supreme Court Family Rule 13-2 sets out the duty of an expert witness and states that the expert has a duty to assist the court and is not to be an advocate for any party. The expert must certify in his or her expert report that he or she is aware of this duty, has made the report in conformity with the duty and, if giving testimony, will give testimony in conformity to that duty.

Counsel have a duty to the client to ensure that proper retainer arrangements are made with each expert. It should be clear at the outset who will be responsible to pay the expert—either the law firm or the client—and how much the expert’s report is likely to cost. If counsel will be paying the expert, it is prudent to have sufficient funds in trust from the client, in advance. Otherwise, arrangements should be made directly between the expert and the client with your assistance. If the client does not have sufficient funds to pay the expert, consider a court application for an interim distribution of assets to finance the valuation.

It is wise to obtain written statements from each expert as early as possible as expert evidence can have a substantial influence on settlement negotiations.

Unless the court otherwise orders, an expert report must be served on every party at least 84 days before trial, along with written notice by the party that intends to introduce the expert’s report at trial or, if a jointly appointed expert, by each party who intends to tender the report at trial (SCFR Rule 13-6). If a party intends to introduce an expert’s report to respond to an expert witness, that responding report must be served at least 42 days before trial under SCFR 13-6(4), along with written notice that the responding report is being served under SCFR 13-6. Supreme Court Family Rule 13-6(9) requires that the party who is required to serve the expert report must promptly after the appointment of the expert or after the trial date has been obtained, whichever is later, inform the expert of the trial date and that the expert may be required to attend for cross-examination at the trial.

**Needs of the Child Assessments**

A lawyer or the court may initiate the preparation of a report on the needs and views of the child or on the ability of the parties to satisfy the needs of a child in proceedings related to guardianship, parenting arrangements and contact pursuant to s. 211 of the FLA. This section also gives the court the ability to address who will pay the costs of the report. The reports are either publicly funded through Family Justice Services Division (Ministry of Justice) or paid for by the parties. If such a report is likely to be useful, counsel can apply to the court for an order directing that the assessment be prepared.

Normally, a child psychologist, psychiatrist or family therapist is retained to prepare the report at the parties’ own expense. The cost of these reports is often between $3,000 and $12,000. Consideration should be given to the necessity of the report in relation to the parties’ ability to pay and the distance between their respective positions on the parenting arrangements and contact for the child.

The author of the report will investigate all the matters relevant to the care of the children. In most cases, the psychologist will administer a number of basic tests to each parent, such as the Minnesota Multiphasic Personality Inventory, interview each parent, and interview the child with each parent. The psychologist may interview collateral witnesses, and may, if counsel direct, review all or some of the affidavits filed in the proceeding. The psychologist’s report will describe and synthesize his or her findings, and offer a recommendation to the court. Such assessments can be used to help parents decide for themselves what is best for the children and can be an invaluable settlement tool. If an agreement cannot be reached, the report will be valuable to counsel when preparing for trial. By helping

---

2 Note the comments made in Family, Chapter 3 regarding these reports (§3.04).
to define the areas of dispute between the parties and pointing out the other spouse’s viewpoint, these reports often narrow the areas of dispute, thereby and shortening the length of the trial.

Note that section 211 reports inevitably contain hearsay evidence, usually the observations of the collateral witnesses, which the client will dispute. Consider an application under SCFR 9-4 to examine the author of the report or of the hearsay, but note that SCFR 9-4(2) states that an expert retained by a party cannot be examined under the Rule unless the party seeking the examination is unable to obtain the facts and opinions on the subject by other means. Supreme Court Family Rule 9-4(1) also permits the court to order that the examining party pay the reasonable lawyer’s costs for the application and examination of the person being examined.

If the report reaches a conclusion unfavourable to the client, counsel may want to consider retaining a psychologist to provide a critique of the report when presenting the case at trial. When a needs of the child assessment is fundamentally flawed and obviously biased, an application can be made for a fresh assessment. The fresh report will not supplant the first report, but it can offer an alternative viewpoint to the trier of fact. Both authors may be subpoenaed to testify at the trial.

When a child is sufficiently mature, a lawyer may commission an evaluative “views of the child report” as an alternative to a full needs of the child assessment. These reports are limited to the expert’s interview of the child and analysis of the child’s wishes. Because of the limited nature of these reports, they are not recommended when there are concerns about the fitness or parenting skills of the party with whom the child wishes to reside.

As an alternative, a lawyer may commission a non-evaluative views of the child report from a lawyer, social worker or other person with special training in interviewing children. These reports merely restate the child’s comments to the interviewer without analysis or commentary, but can be valuable to both the parents and the court. These reports are often much cheaper than evaluative reports.

§4.05 Identifying and Interviewing Witnesses

Identify potential witnesses early in the proceeding, and obtain the particulars of each witness, his or her relationship to the parties, and the person’s contact information. There is no property in a witness, and you may speak to an adverse witness if you wish, so long as he or she is willing to talk to you and you first identify who you are, whom you represent, and otherwise comply with Sections 5.3 and 5.4 of the BC Code. Note that access to opposing expert witnesses is limited by SCFR 9-4(2).

In some cases, such as cases about the care of children, it is advisable to speak to all of the relevant witnesses as soon as possible. Witnesses can give counsel a sense of the strength of the client’s case and of the issues that the other side may raise. Aside from being a valuable source of information, credible and reliable witnesses can lend considerable weight to the client’s position at trial. Counsel should cultivate a good working relationship with all witnesses.

If a witness is not responsive, consider obtaining an order for pre-trial examination under SCFR 9-4.

§4.06 Interrogatories

Interrogatories are also available as a form of discovery in family law cases. In a family law case, interrogatories may be an ideal and inexpensive way to gain evidence pertaining to financial information, valuations, or for admissions on an allegation. Supreme Court Family Rule 9-3 provides that a party may serve interrogatories on any other party, or on a director, officer, partner, agent, employee or external auditor of a party, if the party consents or if the court grants leave.

Interrogatories under Supreme Court Civil Rule 7-3 are discussed in Practice Material: Civil Litigation, chapter 2 at §2.04. Since SCFR 9-3 mirrors the civil rule, consult that paragraph also.
[§4.07] Schedules of Assets (“Scott Schedules”)

From the financial information the client provides to the lawyer, the lawyer can draw up what is known as a “Scott Schedule”. It is important to have a schedule of property in a form that may be easily followed by the trial judge.

A Scott Schedule includes the following items:

(a) a listing of each significant asset, with a description;
(b) brief particulars of the acquisition or disposition of each asset including the date of acquisition and the value at that date;
(c) value of each asset, if known;
(d) the position of one or both parties regarding ownership and apportionment; and
(e) provision for a reference or cross-reference to the exhibit to be filed in support of the particular item on the Scott Schedule.

The person who is seeking an order as to family property generally prepares the schedule, rather than the one who is resisting. It is usually prepared after there has been an examination for discovery and the full particulars of all assets and debts are available.

Shortly before trial, counsel should provide the schedule to opposing counsel. Opposing counsel may respond either by agreeing with submissions on division and valuation, or by presenting his or her own Scott Schedule setting out the opposing party’s position regarding the assets. The judge may require that counsel exchange Scott Schedules at the trial management conference, which must take place at least 28 days before the scheduled trial date (SCFR 14-3).

One or both Scott Schedules will be presented to the court at trial to provide the judge with a reasonably clear and concise statement of the property and of each party’s position respecting them.
Chapter 5

Case Management Conferences, Settlement Conferences and Alternatives to Trial

For details on the procedures in the Provincial (Family) Court, see those Rules. You may refer your clients to the family justice website for descriptions of the process: www.ag.gov.bc.ca/family-justice. Remember that in some jurisdictions, the Provincial Court imposes mandatory pre-trial referrals to a family justice counsellor and to a Parenting After Separation Course. At the first appearance, the provincial court judge can order that parties attend a family case conference. See §2.03.2 for some information on the Provincial Court.

Part 2 of the FLA emphasizes that out of court resolution of family law disputes is to be the preferred option with court available as a last resort.

§5.01 Judicial Case Conference

Under Supreme Court Family Rule 7-1, the parties to a family law case are generally prohibited from serving a notice of application and affidavits to the opposing party unless a judicial case conference (“JCC”) has been held in the proceeding. There are certain applications that may be brought even though a JCC has not been conducted. Those applications include applications for an order respecting protection of property under section 91 of the FLA, applications for a consent order, applications made without notice, and applications to change a final order.

JCCs are conducted in an informal, in camera setting. The proceedings are recorded, but no party can access the recording without a court order (SCFR 7-1(19)). The purpose of the JCC is to assist the parties, at an early stage in the litigation, in narrowing the issues, finding areas of agreement, and canvassing the appropriateness of alternatives to litigation to resolve the dispute. JCCs may be used to schedule dates for pre-trial events, such as examinations for discovery, applications or the exchange of documents. At a JCC, a judge or master can, give a non-binding opinion on the probable outcome of a hearing or trial (SCFR 7-1(15)(o)).

Counsel should ensure that their clients understand that the presiding judge or master will seek their participation and input during the JCC.

Counsel should take the opportunity to canvass the issues and any possible resolution to them with their clients and each other to maximize the potential utility of the JCC.

At the conclusion of the JCC, the parties, their counsel, and the presiding judge or master will sign a case management plan prepared by the court clerk setting out any orders going by consent and any scheduling directions given by the master or judge. See Family, Chapter 3 for further details and Supreme Court Family Practice Direction—Judicial Case Conference (FPD-4).

§5.02 Trial Management Conference

A trial management conference must be held at least 28 days before the scheduled trial date, unless the court otherwise orders (SCFR 14-3). If practicable, the judge presiding at trial should conduct the trial management conference. Each party must prepare a trial brief and file and serve it within 7 days of the trial management conference. The lawyers for each party and the parties themselves must attend the trial management conference, although a party may be exempted from attending if there is a lawyer present on that party’s behalf and that party is readily available for consultation during the conference either in person by telephone (SCFR 14-3(4) and (6)).

At a trial management conference, the judge may consider and make orders for: attendance at a settlement conference; amendments to pleadings; a plan for conducting the trial; admissions of fact; admissions of documents; time limits on direct examination and cross-examination of witnesses and opening or closing statements; parties to provide summaries of the evidence of witnesses or directing witness evidence by way of affidavit; expert reports; written opening or closing statements; adjournment of the trial or the trial management conference; changes to the number of days set for trial; a further trial management conference, and any other matters that may assist in making the trial more efficient or in aiding to resolve the family law case, or that will further the object of the Supreme Court.
Family Rules. Section 223 of the FLA allows the court to make conduct orders respecting case management. For example, a court may make an order to dismiss or strike out all or part of the party’s claim or application (s. 223(1)(a)), adjourn a proceeding while the parties attempt to resolve one or more issues before the court (s. 223(1)(b)(i)), require that all further applications be heard by the judge or master making the order (s. 223(1)(c)), or prohibit a party from making an application, without leave of the court respecting any matter over which a parenting coordinator has authority to act under an agreement or order (s. 223(1)(d)).

§5.03 Settlement Conference

The purpose of a settlement conference is to explore the possibilities for settlement with the assistance of a judge on a without prejudice basis (SCFR 7-2(1)). Like a JCC, a settlement conference is a relatively informal meeting of the parties and their counsel before a judge, and the proceedings at a settlement conference are recorded (SCFR 7-2(2)). Under SCFR 14-3(9) and 7-1(15), a judge who conducts a trial management conference, or a judge or master who conducts a JCC, may direct that the parties attend a settlement conference.

At the settlement conference the judge will expect counsel to provide a formal statement of the facts and law. It can be extremely helpful to prepare a settlement conference brief, and provide a copy to opposing counsel and the court a few days prior to the settlement conference. Once the judge reads the summaries and listens to the arguments of counsel, the judge will attempt to resolve the dispute through a process of evaluative mediation, and may provide the parties with his or her perspective of the appropriate outcome for the case, often called “a view from the bench.”

Settlement conferences are particularly appropriate and often successful in family matters. Consequently, to get the most out of the conference, the lawyer should thoroughly prepare for these conferences, reviewing pertinent affidavits, financial statements, pleadings and discovery transcripts well ahead of the conference. The court’s views of each party’s prospects of success can be quite sobering to the litigants, and encourage them to adopt the more flexible positions necessary to reach settlement.

Settlement conferences can be arranged through the trial registry by filing a requisition in Form F17 under SCFR 7-2.

§5.04 Summary Trial

The summary trial procedure available under SCFR 11-3 gives litigants in a family law case a means to obtain a relatively quick final disposition of a proceeding on affidavit evidence, interrogatory evidence, evidence from examinations for discovery, admissions and expert evidence, without the expense and delay of a full trial.

A summary trial may be appropriate for obtaining an order for divorce when a defence and counterclaim has been filed and the corollary relief can be adjourned to be decided at the trial. It can also be used to obtain an order dividing family assets when there is little factual dispute.

Summary trials will rarely, if ever, be appropriate in disputes over parenting arrangements or contact. Summary trials are not appropriate when credibility is at issue or when the parties present polarized versions of critical facts. When the court is unable to determine an issue in the absence of oral evidence, the parties run the risk of incurring the expense of the summary trial only to have it rejected completely and remitted to the trial list.

A summary trial application must be heard at least 42 days before the scheduled trial date (SCFR 11-3(3)). The evidence permitted on a summary trial application is outline in SCFR 11-(5), and includes affidavits, admissions and answers to interrogatories.

For a summary trial application, the notice and supporting documents must be served at least 12 business days before the date set for hearing. The responding person must file and serve within 8 business days after service of the application documents.

§5.05 Offers to Settle

Offers to settle are governed by SCFR 11-1, which allows the court to award costs to a party after trial, regardless of the result at trial, where an offer to settle was issued that ought to have been accepted, including double costs from the date of delivery of the offer. In determining whether the offer ought to have been accepted, the court will consider the result achieved at trial with the terms of settlement offered; in general, where the terms of an offer are as good as or better than the result achieved at trial, the court will conclude that the offer should have been accepted.

Offers to settle can be powerful tools to move a dispute toward settlement. The party making the offer must make a proposal that is reasonably capable of acceptance and falls within the range of probable outcomes at trial. The party receiving the offer must review the proposal carefully in light of the potential for costs or double costs.
Chapter 6

Judgments & Enforcement of Orders and Agreements

This chapter uses the terminology and procedure mandated by Supreme Court Family Rules and Forms, B.C. Reg. 169/2009, as amended (the “SCFR”).

§6.01 Judgments and Orders

Orders submitted to the courts must comply with the Rules of that court.

For orders of the Provincial Court, Rule 18 provides that restraining orders must be in Form 25 and all other orders, except consent orders, must be in Form 26. Rule 14 governs consent orders which must be in Form 20.

In the Supreme Court, SCFR 10-8 and 15-1 require that orders be in a specified form. The forms are found in Appendix A to the SCFR. Rule 15-1(1) states that unless the SCFR otherwise provide the order must be in the following form:

(a) if the order is a final order,
   (i) in Form F33 if the order changes, suspends or terminates a final order and is made by consent,
   (ii) in Form F51 if the order changes, suspends or terminates a final order and is not made by consent,
   (iii) in Form F34 if the order is made under Rule 10-8 without notice and without a hearing, or
   (iv) in Form F52 in any other case. This includes final orders made following a hearing, trial or summary trial or in an undefended family law case;

(b) if the order is not a final order and is made without a hearing and by consent, in Form F33;

(c) if the order is not a final order and is made under Rule 10-8 without notice and without a hearing, in Form F34;

(d.1) if the order is a protection order under section 183 of the Family Law Act, in Form 54;

(d.2) if the order is a change of a protection order under section 187 of the Family Law Act, in Form F54.1;

(d.3) if the order is a restraining order under section 46 of the Family Maintenance Enforcement Act, in Form F54.2;

(e) for any order not referred to in paragraph (a), (b), (c), (d.1), (d.2) or (d.3), in Form F51.

The forms in Appendix A must be used, if applicable, with variations as the circumstances of the family law case require (SCFR 21-1).

The following is a description of the information that is included in family law orders when particular types of relief are ordered.

A support order will include:

(a) the names of who will pay and who will receive support;

(b) the names and birthdates of the children for whom support is paid (for child support);

(c) the amount to be paid, whether it is being paid in installments, and the commencement date;

(d) the legislation under which the order is made;

(e) each party’s guideline income, any extraordinary expenses (pursuant to s. 7 of the Child Support Guidelines), the parties’ proportionate share of the extraordinary expenses, and how those expenses are to be paid (for child support);

(f) the reason for the hardship and the assessed amount to be paid if the Guideline amount of child support is found to cause the payor undue hardship;

(g) whether the order is final or interim;

(h) whether the order is a variation of a previous order and what is being varied; and

(i) any terms providing for a review or termination after a specific period.

An order for the care of and time with children will include:

(a) the complete name and date of birth of each child;
(b) the name of the party (or parties) who are guardians of the child(ren);
(c) allocation of parenting responsibilities;
(d) a schedule of parenting time (for guardians) or contact with children (for non-guardians).

An order for the care of and time with children may also include terms such as:

(e) whether the transfer of the child(ren) or the contact itself is supervised;
(f) that a person not remove a child from a specified geographical area;
(g) that a needs of a child assessment be prepared; and
(h) the means for resolving future disputes respecting an Order made by the Court, including parenting coordination.

An order for the division of family property and family debt will include:

(a) a detailed description in the order or in a schedule to the order, of each item of property (personal and real property) and debt, its value, location, and how it is to be divided or allocated;
(b) a declaration of the apportionment of the family property and family debt between the parties;
(c) a description as to the timing and any specifics regarding any sale or transfer of property; and
(e) if applicable, a reference to the registrar for an accounting of family property and family debt.

For sample orders and provisions, see the British Columbia Family Practice Manual (Vancouver: CLEBC) FP 113 to FP 118 (Provincial Court) and FP 125 to FP 156 (Supreme Court) and Chapter 15.

[§6.02] Effective Date of Orders

An order or judgment is binding from the date of its pronouncement, whether that order is entered or not (SCFR 15-1 (9)). Although the order is binding from the date of its pronouncement, it is very difficult to enforce if it has not been entered. Furthermore, if a party does not obey an order of the court, a party cannot proceed with a contempt application unless the party can show that the noncompliant party has had actual notice of the order. While it is not necessary, it is preferable to personally serve an entered copy of the order on the affected party if that party is not represented by counsel.

[§6.03] Enforcement of Restraining Orders regarding Property

When a party obtains an order to restrain the encumbering or disposal of property, the party should serve a copy of that order on all individuals who will be affected by the order, and on any institutions, such as banks, where restrained property is kept or managed. To avoid any ambiguity, it is crucial that the orders be as clear and precise as possible.

Note that: if you indiscreetly serve restraining orders on third parties such as brokerages, banks, or lending institutions, you may prejudice the financial position of the opposing party. Not only may you cause embarrassment, you may place the other party in a position where he or she will be unable to raise funds to settle with your client because of the nervousness of bankers and lending institutions. It is important to advise the client of the risks associated with each course of action, and to obtain instructions from the client as to which course to follow. If you have stable assets, such as real property, that have a value in all likelihood exceeding your client’s claim and that property is owned by the opposing party, it might well be inadvisable to proceed with serving restraining orders to other third parties if that property is not substantial. Refer to s. 91 of the Family Law Act.

[§6.04] Enforcement of Support Orders

1. Extraprovincial Support Orders

Under s. 20 of the Divorce Act, an order made under that legislation has legal effect throughout Canada and may be registered in any province and enforced as an order of that court.

Section 18 of the Divorce Act provides a mechanism for obtaining or confirming a variation order for support made in another jurisdiction. When two former spouses reside in different provinces, the order may be made provisionally in one jurisdiction and then reviewed and confirmed in another jurisdiction where the other party resides. See SCFR 15-3—Provisional and Extra-Provincial Orders.
The Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 provides a process for obtaining, varying, recognizing and enforcing support and maintenance orders between British Columbia and other provinces and some non-Canadian jurisdictions. This act came into force on January 31, 2003. Refer directly to the legislation for details of the procedures and authority of BC courts.

Under the Interjurisdictional Support Orders Act, support orders from other provinces have the same effect as orders from a BC court when they are registered in BC. Parties may also apply in a BC court to cancel or vary orders that were made in another jurisdiction. The BC court will apply the law of the jurisdiction in which the children reside when determining the amount of support to be paid to children.

The aim of the Interjurisdictional Support Orders Act is to simplify the process for obtaining, varying, recognizing and enforcing child and spousal support orders between British Columbia and other jurisdictions, by eliminating a two-step process of making a provisional order in BC and having to wait for that order to be confirmed by a court in the other jurisdiction, and vice versa. However, in those jurisdictions where provisional orders continue to exist, that process still needs to be followed.

2. Family Maintenance Enforcement Act

The Family Maintenance Enforcement Act ("FMEA") establishes the Family Maintenance Enforcement Program, a publicly funded governmental organization that monitors and enforces child and spousal support orders and agreements in British Columbia. The FMEA does not eliminate enforcement procedures already available to holders of support orders under the Supreme Court Family Rules and the Court Order Enforcement Act ("COEA"), although some COEA remedies were modified by the FMEA.

The goal of the Family Maintenance Enforcement Program ("FMEP") is to collect support monies and replace the inconvenience, cost and frustration of enforcing support orders privately.

A support order can be filed anytime with the FMEP, however, filing may not always be necessary or convenient. There are delays in receiving payments through FMEP. When the person paying the support can be relied on to pay support on time, it may be beneficial not to file with the program.

To enroll with FMEP, a person receiving support can obtain a filing kit online at the FMEP website, at the local courthouse, Service BC Centres, or by mailing or calling the FMEP office. The kit contains a filing application, which asks for information about the debtor and the history of payment. The application, along with a copy of the support order, should be sent to the FMEP Enrollment Office. An enforcement officer will then draw up an affidavit of arrears, which will be sent to your client to be sworn and returned. Once the affidavit of arrears has been returned, the applicant is formally enrolled in the program.

Under s. 4 of the FMEA, the Director of Maintenance Enforcement is authorized to enforce support orders that are filed with him or her. In doing so, the Director can take whatever steps he or she considers advisable, including commencing, conducting, continuing or discontinuing any proceeding that may be taken by a creditor under Part 3 of the FMEA. As long as the order is filed with the FMEP, only the Director of Maintenance Enforcement, and the creditor if so authorized by the Director, may take steps to enforce the order (s. 5(1)). Default hearings are authorized by s. 21 of the FMEA. A debtor is summoned to court to show cause before a judge why the support order should not be enforced.

The FMEP has the authority to use various measures to collect arrears of support. These enforcement powers include: attachment of any income or benefits owed to the payor, including wages, pension benefits (OAP, CPP or employment pensions that are being paid), bank accounts (including 50% of joint bank accounts), income tax refunds, GST credits or rental income; registering a lien against land or personal property; reporting to the credit bureau, obtaining an order to seize and sell property of the payor; instructing ICBC to refuse to issue or renew the payor’s driver’s licence or vehicle registration; requesting the federal government to suspend, refuse to issue or renew federal licences including the payor’s passport or aviation licence.

In response to enforcement proceedings, the payor may apply to the court under section 152 of the Family Law Act to change, suspend or terminate child support prospectively or retroactively or section 17 of the Divorce Act to vary, rescind or suspend child support prospectively or retroactively. The court may take the income and assets of the debtor’s spouse into account in determining the debtor’s ability to pay arrears of support.

A different set of issues arises under s. 89 of the Indian Act, R.S.C. 1985, c. I-5. This section presents no obstacle to enforcement when the spouse who is seeking enforcement and the debtor are status Indians or when the child for whom the support is ordered is a status Indian. However, if the support order is in favour of a child or spouse who
is not a status Indian, then a debtor who is a status Indian can rely on s. 89 to resist enforcement proceedings for real property or personal property that is located or earned on reserve.

3. Family Law Act

Support orders may also be enforced under the general and extraordinary enforcement provisions of the FLA, at ss. 230 and 231.

4. Contempt Proceedings

See Supreme Court Family Rule 21-7 and Practice Material: Family §3.04.18.

**[§6.05] Enforcement of Agreements**

Both the Supreme Court and Provincial Court (Family) have authority to enforce written agreements that are filed in their court registry with respect to:

- parenting arrangements (s. 44 of the FLA);
- contact with a child (s. 58 of the FLA);
- child support (s.148 of the FLA); and
- spousal support (s.163 of the FLA),

as if those agreements were an order of that Court.

The definition of “written agreement” in s. 1 of the FLA does not require the agreements to be witnessed, only signed by the parties. Further, s.6 of the FLA provides that written agreements are enforceable without consideration.

The FLA prescribes specific remedies to enforce certain orders. Where a specific remedy is not provided, the general remedy at s. 230(2) applies and the court may:

(a) require a party to give security in any form the court directs,

(b) require a party to pay

(i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party’s actions, including fees and expenses related to family dispute resolution,

(ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party’s actions, or

(iii) a fine not exceeding $5 000.

Where no other order will secure a party’s compliance with an order, the court may take the extraordinary step of ordering that the party be imprisoned for up to 30 days under s. 231(2). Pursuant to s. 231(3):

(a) a person must first be given a reasonable opportunity to explain his or her non-compliance and show why an order under this section should not be made,

(b) for the purpose of bringing a person before the court to show why an order for imprisonment should not be made, the court may issue a warrant for the person’s arrest, and

(c) imprisonment of a person under this section does not discharge any duties of the person owing under an order made under this Act.

Additional extraordinary measures are available to enforce orders for parenting time and contact, including the wrongful withholding of a child from a guardian by a person with contact.

Protection orders may not be enforced by any means under the FLA or the Offence Act, and can only be enforced under s. 127 of the Criminal Code.
Chapter 7

Undefended Family Law Cases

This chapter uses the terminology and procedure mandated by the Supreme Court Family Rules, B.C. Reg. 169/2009, as amended (the “SCFR”).

[§7.01] Undefended Family Law Cases

If a notice of family claim has been properly served and the time has elapsed for the filing of a response to family claim and no response has been filed, it is possible to obtain judgment, including an order for divorce, on an undefended basis. This can be accomplished using a requisition procedure, or what is often referred to as a “desk order”, without a formal hearing before a judge.

A party may apply for a final order on an undefended basis when:

1. a proceeding is undefended from the outset (SCFR 4-3(2));
2. a respondent wholly withdraws his or her response (SCFR 11-4(6));
3. a claimant discontinues their case and the matter proceeds on the counterclaim (SCFR 1-1 definition “undefended family law case” paragraph (d)); or
4. the divorce is not contested and all other claims have been settled, withdrawn, struck out, discontinued or dismissed (SCFR 1-1 definition “undefended family law case”).

The pleadings must be in order, and affidavits properly sworn and filed. The court registry staff review the documents and then put them before a judge who reviews the material in private chambers.

The following sections of the SCFR provide instructions on how to proceed with an undefended family law case.

1. Other Proceedings

A divorce order will not be granted until the court is satisfied that no earlier divorce proceeding is ongoing elsewhere in Canada (SCFR 15-2(1)).

In all family law cases in which a divorce is sought the claimant must file a registration of divorce proceeding form. This form is then transmitted to the Central Divorce Registry in Ottawa to ensure that divorce proceedings have not already been instituted or concluded in another province or registry in British Columbia. No divorce order will be granted until the registry has received confirmation that no other proceeding has been commenced in which a divorce order is sought.

2. Definition (SCFR 1-1(1))

An undefended family law case is defined as a family law case in which one of the following is true:

(a) the family law case is a joint family law case and no party has filed a notice of withdrawal;
(b) no response to family claim has been filed;
(c) a response to family claim was filed but has been withdrawn or struck out;
(d) a response to family claim and a counterclaim have been filed but the notice of family claim and any response to counterclaim have been
   (i) withdrawn, or
   (ii) struck out, discontinued or dismissed;
(e) all claims other than a claim for divorce, if any, have been settled, the parties have filed a statement to that effect signed by the parties or their lawyers, and the claim for divorce, if any, is not contested.

3. Certificate of Pleadings

Before a party can obtain an order for divorce, the party must obtain a Certificate of Pleadings, signed by the registrar of the family registry, indicating that all pleadings are correct and in order (SCFR Form F36). Any irregularity in the pleadings or proceedings must be corrected before the registrar will sign the certificate of pleadings.
4. What to File

Supreme Court Family Rule 10-10(2) sets out the documents that a party must file when applying for judgment in an undefended family law case. The documents are:

(a) a requisition in Form F35 setting out the order sought;
(b) a draft of the proposed order;
(c) proof that the case is an undefended family law case (typically a separate requisition in Form F17 is filed requesting the registry search the file for a Response to Family Claim or Counterclaim);
(d) a certificate of the registrar in Form F36 certifying that the pleadings and proceedings in the family law case are in order;
(e) if necessary, proof of service of the notice of family claim or counterclaim under which judgment is sought;
(f) if applicable, a Child Support Affidavit in Form F37 (see §7.02);
(g) if a divorce is sought, an affidavit in Form F38. There are restrictions to the date that an affidavit in Form F38 may be sworn. See Supreme Court Family Practice Direction—Divorce Applications, FPD-11.

When there are no children of the marriage involved, obtaining an order for divorce in an undefended family law case is quite simple. A party must provide the court with the information specified in the affidavit.

When a party to an undefended family law case does not apply for judgment by way of the requisition procedure, an undefended family law case may either be set for trial (SCFR 10-10(1)) or dealt with in any manner the Chief Justice directs, and evidence and other information the court requires may then be given orally.

5. The Order

An order for divorce or any order made in an undefended family law case must be in Form F52.

In a family law case in which a claim is made for a divorce together with one or more other claims, the court may, subject to s. 11(1) of the Divorce Act, grant the divorce and direct that the order for divorce alone be entered. The court may then adjourn the hearing of all other claims or grant judgment on the other claims and direct that a separate order dealing with them be entered at a later time (SCFR 15-2(2)).

Unless the court otherwise orders, the party entering an order for divorce must, immediately after the order is granted, serve a copy of the entered order on each of the other parties that have an address for service, and if any of the parties does not have an address for service, mail a copy of the entered order to that party’s last known address (SCFR 15-2(4)).

§7.02 Child Support in Undefended Family Laws Cases

In British Columbia, the courts have taken their duties under s. 11(1)(b) of the Divorce Act very seriously. This section provides that the court has a duty, before granting a divorce, to satisfy itself that reasonable arrangements have been made for the support of the children of the marriage.

If such arrangements have not been made, the court has a duty to refuse to grant a divorce order until suitable arrangements for support of the children are made.

The judge reviewing or hearing the application for divorce ultimately must approve the support arrangements even if the parties have been represented by counsel in prior proceedings under provincial legislation in which support was awarded, and careful consideration was given then to financial arrangements that have been entered into between the parties.

When seeking a divorce order where children are involved, a party must comply strictly with the court’s requirement for financial disclosure as set out in SCFR 5-1. The judge must be satisfied that the support arrangements entered into between the parties comply with the Child Support Guidelines and are reasonable. The party must provide details. Where there are children of the marriage, a party is specifically required to provide

(a) a completed child support affidavit in Form F37. If the amount of child support sought differs from the applicable Guidelines table amount, an explanation must be provided. If the judge is not satisfied with the explanation, the order will not be made and a divorce will not be granted until the court is satisfied that reasonable arrangements are in place for the support of the children; and
(b) an affidavit in Form F38 setting out the required information and providing sufficient detail to satisfy the court.
Chapter 8

Other Proceedings

[§8.01] Child, Family and Community Service Act

The Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, as amended (the “CFCSA”) outlines the practice and procedures for dealing with state intervention in the well-being and safety of children. While the Act applies to aboriginal children both on and off reserve, it does not apply on reserves where bands have passed child welfare by-laws under s. 81 of the Indian Act and the Minister of Indian and Northern Affairs has approved them.

The Provincial Court has jurisdiction over all proceedings under the Child, Family and Community Service Act (s. 1) except appeals.

The guiding principles for interpreting the CFCSA are detailed in s. 2. Generally, the Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations. The section enumerates 7 specific principles, including that

- children are entitled to be protected from abuse, neglect, and harm or threat of harm;
- a family is the preferred environment for a child; and
- attachments with the extended family, and with the cultural identity of aboriginal children, should be preserved.

The service delivery principles are detailed in s. 3. The delivery principles support the guiding principles and, in particular, support the involvement of aboriginal people and community services in delivering services in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services.

Section 4 provides that in determining the child’s best interests, all relevant factors must be considered including the child’s safety, physical and emotional needs, heritage, and views, as well as the importance of continuity in the child’s care.

Section 4(2) provides:

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

Section 4(2) recognizes that a disproportionate and greater number of aboriginal children are removed into care. The section was enacted as one measure toward ameliorating this situation.

Under Part 7, the Minister of Children and Family Development may enter into agreements with an Indian Band or legal entity representing an aboriginal community, the Nisga’a Nation or a Nisga’a Village, a treaty First Nation, the federal government, provincial governments or foreign government, Community Living British Columbia or “any person or group of persons” (s. 90). The Minister has delegated child protection services to family service agencies both on and off reserve.

The Minister may also designate one or more persons as “directors” under the CFCSA for the purposes of any or all provisions of the Act (s. 91). Directors of Child, Family and Community Services are designated by the Minister under the CFCSA to administer the Act. Some of the powers and duties of Directors include the power to:

- make written agreements with a parent about care of a child, the provision of services to a family, the taking a child into care temporarily (ss. 5 and 6) and for the payment of child maintenance (s. 97);
- establish support services for youth and make written agreements with young adults around support services (Part 2.1, ss. 12.1 and 12.2);
- investigate a child’s need for protection (s. 16);
- take an unattended child, including a runaway, into care for up to 72 hours (ss. 25, 26);
- remove a child if there are reasonable grounds to believe the child needs protection and, either the child’s health or safety is in immediate danger, or there is no less disruptive way to adequately protect the child (s. 30);
- obtain information within the control of any public body except that protected by solicitor-client privilege (s. 96); and
- make agreements with an Indian Band or a legal entity representing an aboriginal community or the Nisga’a Nation or a Nisga’a Village (s. 90).

A director can delegate to any person or class of persons, any or all of the director’s powers, duties, or functions under the CFCSA (s. 92).

---

The CFCSA prescribes the procedures that a director must follow when responding to concern around the well-being of a child. The responses may be classified within two broad categories: Alternatives to Removal (including voluntary care agreements and non-removal supervision orders) and Removal.

A. Alternatives to Removal

1. Voluntary Agreements

Procedurally, a case under the CFCSA begins when a report to the ministry is investigated. The CFCSA gives a director several avenues to assist with a child without having to move the child into the director’s care. These alternatives include support services and agreements, take charge provisions, protective intervention orders, mediation, and family conferences.

In appropriate cases, a director and a parent may enter into a written agreement to provide or to assist the parent to purchase services to support and assist a family to care for a child (s. 5). The initial term must not exceed 6 months, but an agreement can be renewed for a further 6 months.

A voluntary care agreement can be made between a director and a parent if the parent is temporarily unable to look after the child in the home (s. 6). In this case the parent agrees to give care of the child to the director under a plan of care. The initial agreement term is up to 3 months for a child under 5, or up to 6 months for child older than 5. There are also maximums for extending the terms of these agreements:

(a) 12 months, if the child is under age 5;
(b) 18 months, if the child is age 5 or older but under age 12;
(c) 24 months, if the child is age 12 or older.

Part 2.1 gives the director authority to enter into voluntary agreements with young adults for residential, educational or other support services, or financial assistance (ss. 12.2(2) and 12.3).

2. Take Charge Provisions

Section 25 provides that if a child is found unattended, a director may take the child to a safe place for up to 72 hours. Section 26 also permits a director to take charge of a child for up to 72 hours, if it appears that the child is lost or has run away. These provisions permit a director to intervene temporarily, without removing the child.

3. Protective Intervention Orders

If a director has reasonable grounds to believe that contact between a child and another person would cause the child to need protection under s. 13(1)(a) to (e) or (i), that director can apply to either the Provincial or the Supreme Court for a protective intervention order (s. 28).

4. Non-Removal Supervision Orders

A director may apply for a supervision order without first removing the child where there are reasonable grounds to believe that the child needs protection and a supervision order would be adequate protection (s. 29.1). A director must attend a presentation hearing no later than 10 days after applying for a supervision order (s. 33.1(1)). After removal and before the presentation hearing, the director may determine that interim custody is not necessary and may return the child to the parent apparently entitled to custody (s. 33(1)).

If the court finds reasonable grounds to support the director’s concerns, then the court must make an interim supervision order and set a date for a protection hearing. If at that protection hearing, the court finds that the child needs protection, then the court must order a supervision order under s. 41.

Notice of the date, time and place of the presentation hearing, in the form of a written report described in s. 33.2(1), must be served on:

(a) the child, if 12 years of age or over, and
(b) the person with care of the child.

In addition, the director must, if practicable inform those people outlined in s. 33.1(4).

At the presentation hearing for a supervision order, the director must present to the court a written report that includes (s.33.2):

(a) the grounds for making the application, and
(b) an interim plan of care for the child, including the director’s recommendations about the terms and conditions to be included in the supervision order.

5. Mediation

Section 22 provides a mediation mechanism by which a director and any person may resolve an issue about the child or a plan of care.
B. Removal
A director may, without court order, remove a child if that director has reasonable grounds to believe that the child needs protection, and that the child’s health or safety is in immediate danger, or no less disruptive measure that is available is adequate to protect the child (s. 30). Note that s. 13 contains a very wide definition of when the child needs protection. For example, the circumstances include those in which there has been or is likely to be physical harm, sexual abuse or exploitation, neglect, emotional harm, deprivation of necessary health care, deprivation of treatment for treatable conditions, or inadequate care.

The duties and powers of a director following a removal are set out in those sections following section 30.

If the director does not return the child to the parents, the director must, within 7 days of removing the child under s. 30, attend a presentation hearing (s. 34(1)). The director must, if practicable, inform the following parties of the time, date and place of the hearing:

- the child (if 12 years of age or older),
- each parent,
- the Public Guardian and Trustee, if the parent apparently entitled to custody of the child is under 19 years of age,
- the applicable aboriginal organization prescribed in the regulations for the purpose of s. 34, if the child is an aboriginal child, other than a Nisga’a child or a treaty first nation child,
- the Nisga’a Lisims Government, if the child is a Nisga’a, and
- the treaty first nation, if the child is a treaty first nation child (s. 34(3)).

Section 35 governs the material required at the presentation hearing. In the case of an aboriginal child, the director must present the steps to be taken to preserve a child’s aboriginal identity. At the conclusion of the hearing, the court must make an interim order for custody to the director; an interim order for return of the child to the parent under the supervision of the director; an order that the child be returned to or remain with the parent, or an interim order that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director’s supervision. Except where the judge orders return to the parent without supervision, the court must set a protection hearing within 45 days. Section 38 requires at least 10 days notice of the protection hearing. For who must be served, see s. 38(1) and s. 39.

At the protection hearing the court must

(a) determine whether the child needs protection (s. 40); and if so,
(b) make an order that (s. 41)
   (i) the child be returned to or remain in the custody of the parent and be under the director’s supervision for up to six months;
   (ii) the child be placed in the custody of a person other than the parent with the consent of the other person and under the director’s supervision, for a specified period in accordance with section 43;
   (iii) the child remain or be placed in the custody of the director for the specified period in accordance with section 43;
   (iv) the child be placed in the continuing custody of the director, if the requirements of s. 41(2) are met.

Temporary orders under s. 41 are time-restricted (s. 43), unless extensions are sought under s. 44. The time restrictions on the duration of orders under the Act apply to every child in a group of children at that time before the court (such as a sibling group from one family) and are then determined by the age of the youngest child in the group. For example, three brothers are removed aged 4, 9, and 13 years. The order for custody of all three is limited to the restriction affecting the 4 year old. The time restrictions under s. 43 are as follows:

(a) three months if any child in a group is a four year old or younger child;
(b) six months if any child in a group is a five to 11 year old;
(c) 12 months if any child in a group is a 12 year old or older child.

Section 49 outlines the procedures and time consideration for the director to apply for a continuing custody order.

Once a continuing custody order is made, the director becomes sole guardian of the person of the child and the Public Guardian and Trustee of the estate of the child (s. 50), until one of the following events occurs (s. 53):

(a) the child reaches the age of 19,
(b) the child is adopted,
(c) the child marries,
(d) the court cancels the continuing custody order, or

(e) the custody of the child is transferred under section 54.1.

Section 54 creates a form of proceeding in which a party to a proceeding in which a continuing custody order was made may apply, with permission of the court, to cancel a continuing custody order. Under s. 54.1, the director may apply to the court to permanently transfer the custody of a child who is in the custody of the director under a continuing custody order to a person other than the child’s parent. For example, this may allow the child to be transferred into the permanent custody of an individual within an aboriginal community who is not a parent. Once this transfer is ordered, the individual to whom custody is transferred becomes the guardian of the person and estate of the child (s. 54.2).

Section 70 of the CFCSA outlines the rights of a child who is in care.

Section 71 directs that the director must consider the best interests of the child when deciding where to place a child (after removal). Subsection 71(3) provides:

If the child is an aboriginal child, the director must give priority to placing the child as follows:

(a) with the child’s extended family or within the child’s aboriginal cultural community;

(b) with another aboriginal family, if the child cannot be safely placed under paragraph (a);

(c) in accordance with subsection(2), if the child cannot be safely placed under paragraph (a) or (b) of this subsection

Part 5 governs confidentiality and disclosure of information under the CFCSA. Part 5 expressly exempts the information collected and kept under this Act from the operation of the Freedom of Information and Protection of Privacy Act. The procedures for accessing file information are complex and unique to this Act.

It is appropriate to hear protection proceedings together with custody applications under the Family Relations Act. Often grandparents, aunts and other relations, apply for custody of a child who has been removed from a parent’s care. However, the court may refuse to hear a contested custody application at the presentation stage of the protection proceedings.

A party may appeal to the Supreme Court as of right (s. 81) and from the Supreme Court to the Court of Appeal with leave on a question of law (s. 82). The Supreme Court Civil Rules govern the procedure on the appeal.

Rule 2 of the Provincial Court (CFCSA) Rules directs that if at the commencement of a contested protection hearing, a consent order is not made and the judge determines the matter cannot be heard that day, the judge must direct the parties and lawyers to attend a case conference. At any other time a judge can direct that a case conference be held either at the request of a party or if the judge thinks it will help (Rule 2(2)). In practice, all protection hearings must be referred to a Rule 2 case conference before a hearing date will be set.

Mediation is also encouraged under the CFCSA. A list of approved mediators has been prepared and mediations are being conducted regularly under s. 22.

For more detailed information about proceedings under the Child, Family and Community Service Act, see Chapter 19 of the BC Family Practice Manual (Vancouver: CLEBC); Chapter 14 of the Family Law Sourcebook (Vancouver: CLEBC). See also Court Procedures for Child Protection, a publication of the Ministry for Children and Families. See also, Darwin Hanna, “Aboriginal families and the Child, Family and Community Service Act”, in Practice Desk: Aboriginal Practice Points (Vancouver: CLEBC, website). See also Child Protection Practice (Vancouver: CLEBC)

[§8.02] Adoption Act

There are four types of adoption:

(a) direct placement by an adoption agency, in which a child with whom there is no relationship by blood or marriage is adopted;

(b) relative or stepparent adoptions;

(c) ministry adoptions, by which children in the continuing custody of the director of Child, Family and Community Service are adopted; and

(d) custom adoptions.

Under s. 5 of the Adoption Act, R.S.B.C. 1996, c.5 one adult or two adults jointly may adopt a child: this provision extends the eligibility for adoption to unmarried couples and to same-sex couples.

Proceedings are commenced in the Supreme Court by petition (most non-family adoptions) or requisition (Supreme Court Family Rules 3-1 (2.2) and (3) and 17-1 (24)). See also Supreme Court Family Practice Direction—Adoption Applications, FPD-1, for further directions.

Family
The adopting parents must have been resident in British Columbia for at least six months or as otherwise provided by Adoption Act Regulation s.2 and the applicant(s) and child(ren) must have been living as a family unit for six months before an adoption order may be made.

Under s. 13(1), consents are required from the child if 12 years of age or over; the birth mother; the father (see the expanded definition in s. 13(2)); any person appointed as the child’s guardian. The consents of the birth mother and father are not required if the child is in the continuing custody of the director under the Child, Family and Community Service Act, or if the director is the child’s guardian under the Family Law Act. In special circumstances, a person’s consent may be dispensed with (s. 17).

When an adoption order is made the child becomes the child of the adopting parent(s) alone (s. 37(1)). Financial obligations of the natural parents to pay maintenance are terminated, although payments in arrears are still due. Right to contact with a child also ends unless expressly preserved in the adoption order (s. 38(1)). In the case of aboriginal children, rights or privileges acquired under other statutes are not lost upon adoption (s. 37(7)).

Section 46 of the Adoption Act recognizes custom adoptions:

> On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

Several issues around custom adoptions were raised by Hugh Braker, “Adoptions: Aboriginal Issues”, in Adoption (CLEBC, 1997). As he concludes, the Adoption Act is silent on some key definitions, making the provisions difficult to apply. The author concludes that the clearest conclusion that can be reached is that the law around adoptions continues to be different for aboriginal people than for non-aboriginal people. See this paper for more information.

For more information on adoptions, see Chapter 20 of the British Columbia Family Practice Manual and Chapter 15 of the Family Law Sourcebook. See also Darwin Hanna, “Aboriginal families and the Child, Family and Community Service Act”, in Practice Desk: Aboriginal Practice Points (Vancouver: CLEBC, website).
Chapter 9

Family Law Agreements

[Introduction to Family Law Agreements]

Negotiated agreements are an important tool for resolving disputes or potential disputes. They give control to the parties, avoid the emotional and financial cost of prolonged litigation and can be adapted to suit the specific circumstances and needs of the parties. The most common types of domestic agreements are:

(a) separation agreements, made on the breakdown of a married or unmarried spousal relationship;

(b) marriage agreements, usually made by spouses at the beginning of their marriage or in anticipation of marriage. Sometimes these are referred to as pre-nuptial agreements;

(c) cohabitation agreements, made by parties who live together or are planning on living together without necessarily marrying; and

(d) parenting agreements, made by parties whose only legal relationship is parenthood or who wish to deal with only the issue of parenting.

Family law agreements are governed by the common law of contracts in the same manner as any other contract. The court will apply the principles of contract law to interpret agreements, such as the contra proferentum doctrine, and set them aside, such as the defences of duress, undue influence, misrepresentation, mistake and unconscionability.

Family law agreements are also governed by statutory provisions. Sections 65 and 68 of the Family Relations Act allow the court to set aside agreements involving property in limited circumstances, generally those involving fairness. These provisions will continue to apply to family law agreements made by married spouses prior to the coming into force of the Family Law Act in March 2013. For agreements made after the coming into force of the FLA, the special provisions relating to agreements in the new legislation will apply:

- ss. 6 and 7 deal with agreements generally;
- ss. 44 and 58 deal with agreements concerning parenting and contact with children;
- ss. 92, 93, 94, and 127 deal with agreements and setting aside agreements relating to property and debt;
- ss. 148, 163, and 164 deal with agreements and setting aside agreements relating to child and spousal support.

It is expected that the policies reflected in the new FLA will make the use of family law agreements even more prevalent in practice. This is because the FLA:

- Focuses on the encouragement of out of court dispute processes to resolve family law disputes including the use of agreements.
- Treats unmarried spouses in a way that is identical to married spouses so that the utility of agreements is consistent in both forms of relationship.
- Is more deferential to fairly-made agreements.

Agreements regarding support for children that are at odds with the provisions of the Child Support Guidelines will not be given weight by the Courts. Agreements relating to the care and parenting of children may be given weight but only to the extent that such agreements are in the best interests of the children.

Agreements regarding support for a spouse, including waiver of support, are enforceable. They do not preclude a court from awarding support pursuant to the provisions of the Divorce Act in the case of spouses who are or were married to one another, although the court will pay deference to fairly negotiated agreements and will not usually make an order contrary to the terms of an agreement without proof of a material change in circumstances occurring after the execution of the agreement that was not foreseeable at the time of the execution of the agreement.

Care should be exercised when using a precedent to draft an agreement to ensure that all clauses of the agreement are relevant and useful, accord with the settlement reached by the parties, and reflect the current state of the law. Drafting techniques for family law agreements are beyond the scope this chapter. For special clauses, refer to the Family Law Agreements—Annotated Precedents (Vancouver: Continuing Legal Education Society of BC).

When finalized, five original copies of the agreement should be executed: one for the lawyer’s file, one for the client, one for the other party and one for the other party’s lawyer, with the fifth copy available to be filed in court for enforcement purposes if necessary.

The balance of this chapter will focus on property agreements between spouses as that is the area where domestic agreements can have the most significant long term effect.

§9.02 Statutory Framework – the FRA

1. Marriage Agreements

Marriage agreements are defined in s. 61 of the FRA, the relevant provisions are:

(1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.

(2) A marriage agreement is an agreement entered into by 2 people before or during the marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

(a) the management of family assets or other property during marriage, or

(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

(4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection 2(a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

In summary, a marriage agreement must deal with property and it must be in writing, signed by both spouses, and witnessed. There is no need for consideration for it to be enforceable.

2. Ante-Nuptial or Post-Nuptial Settlements

S. 68 of the FRA is titled Marriage Settlements. “Marriage Settlement” is not a defined term under the FRA. Section 68 deals with agreements made before (ante-nuptial) or during (post-nuptial) a marriage which address property issues but which do not meet the definition of “marriage agreement” set out in s. 61. Section 68 reads:

(1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, if circumstances warrant, extend the period during which an application may be made or power exercised under this section

3. Separation Agreements

The term separation agreement is not specifically defined in the FRA however it is mentioned as one of the triggering events under s. 56 of the FRA. A separation agreement must have a degree of formality and provide for one or more of property division, custody, access, spousal or child maintenance (Rutherford v. Rutherford (1981), 23 R.F.L. (2d) 337 (B.C.C.A)). A separation agreement that meets the formal requirements of a marriage agreement pursuant to s. 61, is a marriage agreement (Baker v. Baker (1994) 1 B.C.L.R. (3d) 220 (C.A.)).

4. Cohabitation or Separation Agreements between Unmarried Persons

Parts 5 and 6 of the FRA, which deal with division of property and pensions, do not apply to unmarried spouses.

§9.03 Statutory Framework – the FLA

Agreements to resolve current or avoid future family law disputes are dealt with under s. 6 of the FLA:

(1) Subject to this Act, 2 or more persons may make an agreement

(a) to resolve a family law dispute, or

(b) respecting

(i) a matter that may be the subject of a family law dispute in the future,

(ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the
future, including the type of family dispute resolution to be used, or
(iii) the implementation of an agreement or order.

(2) A single agreement may be made respecting one or more matters.

(3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

(4) Subsection (3) applies whether or not
(a) there is consideration,
(b) the agreement has been made with the involvement of a family dispute resolution professional, or
(c) the agreement is filed with a court.

(5) A child who is a parent or spouse may enter into and be bound by an agreement, including an agreement respecting the division of property or debt.

In other words, agreements are binding despite a lack of consideration, the formality of signatures or witnesses, or the non-involvement of a family law dispute resolution professional (independent legal advice). However, this section is subject to the Act, which includes specific provisions regarding property agreements at ss. 92 and 93. Those sections require the formality of writing and witnesses for the agreements to be treated with deference up to the point of “significant unfairness.”

Sections 92 to 94 of the FLA provide as follows:

92. Despite any provision of this Part but subject to section 93, spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

(a) divide family property or family debt, or both, and do so equally or unequally;
(b) include as family property or family debt items of property or debt that would not otherwise be included;
(c) exclude as family property or family debt items of property or debt that would otherwise be included;
(d) value family property or family debt differently than it would be valued under section 87.

93. (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

(2) For the purposes of subsection (1), the same person may witness each signature.

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
(c) a spouse did not understand the nature or consequences of the agreement;
(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;
(b) the intention of the spouses, in making the agreement, to achieve certainty;
(c) the degree to which the spouses relied on the terms of the agreement.

(6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

94. (1) The Supreme Court may make an order under this Division on application by a spouse.

(2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement
described in section 93 (1), unless all or part of the agreement is set aside under that section.

The three sections need to be read together. In summary, they permit parties to draft agreements that do not follow the statutory division of property, provided the agreement meets the formalities of s. 93(1), and it is not successfully attacked under s. 93(3) or 93(5). In fact, the Court may not make an order about property or debt that are dealt with under such an agreement unless the agreement is set aside under s. 93.

**[§9.04] Varying or Setting Aside Agreements**

Family law agreements are contracts governed, except where displaced by statutory provisions, by the common law as it relates to formation of contract, by the enforceability to contracts and the defences to a contract. As a starting point, for example, parties must have the capacity to contract and there must be the requisite certainty of subject matter and identification of the parties. This chapter does not consider when the Court may ignore or set aside agreements on the basis of these fundamental contractual issues.

Family law property agreements are susceptible to attack both on statutory and common law grounds. The overarching principle under the *FLA* is that agreements that are sufficiently unfair may be set aside. Considerations of unfairness are divided into two categories:

1. unfairness in the making of the agreement, or a lack of procedural fairness; and
2. unfairness in the operation of the agreement in light of the three specific factors set out in s. 93(3).

1. Procedural Fairness
   a. Historically, the procedural fairness bases for challenging family law property agreements were those provided by the common law defences to contracts and the jurisprudence related to those defences: Mistake: A mistake occurs when the agreement is made on a misapprehension of the true facts or there is a failure to understand that a material term of an agreement is not accurately recorded. Such a mistake must be substantial and go to the “root” of the contract. A mistake can be mutual or unilateral. Where it is unilateral and made by only one party, the mistaken party must establish that the other party had some indication of the mistake and either proceeded on willful blindness or intentionally prevented the mistaken party from becoming aware of the mistake (*Frollick v. Frollick*, 2007 BCSC 84).

   b. *Duress*: Duress occurs when threats or actual physical violence is used to induce a person to consent to the agreement (*Saxon v. Saxon* (1976), 24 R.F.L. 47 (B.C.S.C.), aff’d [1978] 4 W.W.R. 327 (B.C.C.A.)).


   d. *Unconscionability*: Similar to duress and undue influence, unconscionability refers to situations of unequal bargaining power. The test for unconscionability is set out in *Klassen v. Klassen*, 2001 BCCA 445 at para 59:

   > The elements required for a finding of unconscionability are: i. Proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger; and ii. Proof that the purchase was made from the ignorant party at a considerable undervalue.

   Related to these common law grounds for challenging procedural fairness are non-disclosure of relevant financial information and the provision or lack of independent legal advice in relation to family law property agreements.

   **Non-Disclosure**: A failure to disclose significant assets in a family law agreement may lead to an agreement to be set aside. In *Rick v. Brandsema*, 2009 SCC 10 Abella J., writing for the court, found a duty to make full and honest disclosure of all relevant financial information when spouses are negotiating agreements and that agreements made with full and honest disclosure were more likely to be respected by the court (at para 47-48). The circumstances a court will consider to intervene when the duty of disclosure has not been met include, the extent of the defective disclosure, the degree the disclosure was deliberately generated, and the extent the terms vary from the goals of the relevant legislation (*Brandsema* at para 49).

   Often the easiest way to effect a reasonable level of disclosure is to have each party prepare a financial statement using Supreme Court form F8. This form is routinely used in out-of-court dispute resolution processes to disclose a party’s income, expenses, assets and liabilities.

Independent Legal Advice: Both parties obtaining independent legal advice will not bar a court from interfering with an agreement. However, it is a factor that courts will consider in determining whether an agreement was procedurally fair. Pitfield J. articulated the important role that independent legal advice has in relation to family law agreements in *Gurney v. Gurney*, 2000 BCSC 6 at para 29:

> In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course. In this regard, the cases of Turyk v. Derby, [1980] B.C.J. No. 773 (B.C.S.C.), Inche Noriah v. Shaik Allie Bin Omar, [1929] A.C. 127 (H.L.) and Brosseau v. Brosseau, (1989), 63 D.L.R. (4th) 111 (Alta. C.A.) are of assistance.

There is no requirement for independent legal advice in either the FRA or the FLA and, in fact, s. 6 of the FLA specifically states that an agreement is enforceable absent the involvement of a family law lawyer. That said, there is no doubt that the provision of independent legal advice vastly improves the likelihood that an agreement will be enforced since this will go some distance in addressing claims of duress, undue influence, unconscionability, and the factors set out in s. 93(3) of the FLA. Answerable

Section 93(3) of the FLA is, in essence, codification of the common law procedural fairness bases for setting aside agreements. See, for example, *Rick v. Brandsema*, 2009 SCC 10. It is important to note the test of procedural fairness under s. 93(3) does not require a finding of “significant unfairness” in the operation of the agreement. If one or more of the factors set out in s. 93(3) is present, the Court may substitute its own view of what is fair unless its view of fairness is not substantially different than the terms of the impugned agreement (s. 93(4)).

2. Substantive Fairness

Under the FRA, marriage agreements were subject to review under s. 65. Section 65 provides:

1. If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
   
   (a) the duration of the marriage,
   (b) the duration of the period during which the spouses have lived separate and apart,
   (c) the date when property was acquired or disposed of,
   (d) the extent to which property was acquired by one spouse through inheritance or gift,
   (e) the needs of each spouse to become or remain economically independent and self sufficient, or
   (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

   the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

The challenge to an agreement under this section had to be launched within 2 years of divorce. In considering fairness, the Court was confined to the considerations set out in s. 65. However, these considerations are so broadly stated as to invite wide open judicial discretion with zero concurrent statutory guidance for the Courts in the exercise of that discretion.

Family
The Supreme Court of Canada, in *Hartshorne v. Hartshorne*, 2004 SCC 22, Bastarache J at para 47 outlined the approach that should be taken when assessing agreements under *FRA* s. 65:

a. A court first must apply the agreement. The court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support.

b. The court must then, in consideration of those factors listed in s. 65(1) of the *FRA*, make a determination as to whether the contract operates unfairly. At this stage:

i. Consideration must be given to the parties’ personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time;

ii. Where the current circumstances were within the contemplation of the parties at the time the agreement was formed, and whether their agreement and the circumstances surrounding it reflect consideration and response to these circumstances, then the burden on the challenging party to establish unfairness is heavier;

iii. Whether consideration of the factors listed in section 65(1) of the *FRA* reveal economic consequences of the marriage breakdown not shared equitably in all of the circumstances.

The court’s jurisdiction under s. 65 of the *FRA* was not to set aside the agreement but to reapporion entitlement to property (*Clarke v. Clarke* (1991), 31 R.F.L. (3d) 383 (B.C.C.A)).

As noted above, ante-nuptial and post-nuptial settlements may be varied by the Supreme Court. In doing so, the court is not confined solely to the grounds set out in s. 65. That is, the grounds for variation of these agreements may be even broader than s. 65 grounds.

Section 93(5) of the *FLA* sets out the bases for challenging a property agreement that falls under s. 93 on the basis that it is not just substantively unfair, but “significantly unfair”. Under s. 93(5) of the *FLA*, the court may only consider the specific criteria set out therein. They are:

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

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

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

(c) the degree to which the spouses relied on the terms of the agreement.

3. Increased Deference Under the *FLA*

The explanatory notes offered by the Ministry of Justice in relation to s. 94(2) of the Act provide:

Section 94 Orders respecting property division

- Section 94 prevents a court from making an order respecting the division of property or debt that is already dealt with by an agreement unless it first sets aside part or all of the agreement in accordance with section 93.

- The *Family Relations Act* property division provisions were criticized for setting the threshold for review too low and providing courts’ with too much discretion to change agreements dividing property. It created uncertainty for spouses as to whether their agreements would be upheld.

This emphasizes the greater deference to agreements, provided they are procedurally fair and do not fail under s. 93(3), provided by the *FLA*. Further, under s. 93(5), the test of substantive fairness is limited to fewer grounds and the unfairness must be “significant”.

[§9.05] Limitation Periods

There is no limitation period in s. 65 of the *FRA*. However, because one must be a spouse to seek relief under that section, the effective limitation period is created within the definition of spouse s.1 of the *FRA*. Under s.1 a spouse includes a person who applies for an order under the Act within 2 years of the making of an order for dissolution of the person’s marriage, for judicial separation, or declaring the person’s marriage to be null and void.

The limitation period to vary settlements under s. 68 the *FRA* is not clear. Section 68 sets a 2 year limitation period from when one of the following occurs: an order for dissolution of marriage, judicial separation or declaration the marriage as null and void. However, the court has jurisdiction to extend this limitation period.
The time limits for setting aside an agreement are set out under s. 198 of the **FLA**:

1. Subject to this Act, a proceeding under this Act may be started at any time.

2. A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
   - in the case of spouses who were married, the date
     - a judgment granting a divorce of the spouses is made, or
     - an order is made declaring the marriage of the spouses to be a nullity, or
   - in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

3. Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

4. The time limits set out in subsection (2) do not apply to a review under section 168 or 169.

5. The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.

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.

**[§9.06] Transitional Provisions**

The transition provision at s. 252 sets out that the **FRA** will continue to apply to certain property agreements made before the coming into force of the **FLA**:

1. This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

2. Unless the spouses agree otherwise,
   - a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
   - a proceeding respecting property division started under the former Act must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

In other words, for married parties who made an agreement prior to March 18, 2013, that falls within the definition of marriage agreement pursuant to s. 61 or is an ante-nuptial or post-nuptial settlement pursuant to s. 68 of the **FRA**, the **FRA** (and the common law) will continue to apply to the determination of applications to vary or set aside the agreements.

However, for married spouses who make an agreement after March 18, 2013, which falls under s. 93(1) of the **FLA**, the **FLA** and the common law will apply to a determination of an application to vary or set aside the agreement.

Unmarried spouses who make or have made an agreement dealing with property which falls under s. 93(1) of the **FLA**, the **FLA** and the common law will apply to a determination of an application to vary or set aside the agreement. The timing of the commencement of the application or proceeding to vary or set aside the agreement is not material for unmarried spouses since such proceedings could not have been commenced under the **FRA**.

**[§9.07] Wills and Estates Considerations**

The new **Wills, Estates and Succession Act**, R.S.B.C. 2009, c. 13 (“**WESA**”), has changed the definition of spouse to exclude separated spouses. This is because s. 2(2) states that, “two persons cease to be spouses if

- in the case of marriage, an event occurs that causes an interest in family property, within the meaning of the **Family Law Act**, to arise, or
- in the case of a marriage-like relationship, one or both persons terminate the relationship.”

Once a person ceases to be a spouse under the **WESA** they no longer have rights to make a claim to vary the will under Division 6, Part 4. A separated spouse would also not be entitled to make claim a spousal proportion of the Estate on intestacy under Division 1.

Given the importance of this distinction, it will be particularly important to determine whether a couple truly separated for family law purposes.

In situations where the parties are found to be truly separated, the surviving former spouse may have an option to bring a claim under the **FLA** or a claim for unjust enrichment. This area of the law is evolving and will likely be clarified by the Courts in due course.
Under *WESA*, a marriage no longer revokes a will. When acting for clients who are intending to get married, counsel should find out if they have a will and whether they will wish to make a new one in light of their marriage plans.

**[§9.08] Minutes of Settlement and Consent Orders**

As an alternative to or in conjunction with a separation agreement, the parties may consider resolving issues by way of minutes of settlement.

Minutes of settlement record the settlement of a family law case, often a settlement reached on the eve of trial. They are often prepared with some haste and as such record the broad-strokes outline of the settlement with the expectation that the terms will be stated in more detail in a subsequent separation agreement or consent order based on the minutes. Minutes of settlement should deal with each claim made in the case so that nothing is left for further litigation.

Counsel alone will often sign the minutes, especially when pressed for time. However, the parties should sign the minutes whenever possible to reduce the chances of future attempts or resile and to prevent claims that counsel lacked the authority to reach settlement.

The choice between minutes of settlement and a separation agreement, and the subsequent decision as to which, if any, of the terms of the minutes or agreement to include in a consent order, can be complicated. The complexity arises from the intertwining doctrines of *res judicata*, merger and election.

If proceedings are ongoing, counsel will normally follow minutes of settlement with a consent order. In some situations, typically where an agreement is unusually complex or contains contingent terms that cannot be incorporated into an order, it will be best to combine the consent order with a separation agreement. Bear in mind that consent orders which are vague or uncertain, may be difficult if not impossible to enforce.

Parties who agree on the terms of an order may obtain an order by consent without a court appearance. Affidavit evidence will be required where a term requires the court to exercise discretion, particularly with respect to child support. See the Continuing Legal Education Society of BC’s publication, *Desk Order Divorce: An Annotated Guide*, for guidance on this process.

A consent order cannot be appealed. Nor can a court vary the property provisions (*Mitchell v. Mitchell* (1982), 35 B.C.L.R. 392 (S.C.)) absent a successful defence based on the common law of contracts. In *Mitchell* the court refused an application for variation of the terms of the settlement order on the ground that the minutes of settlement had merged with the consent order.