

FAMILY

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Chapter 1

Preliminary Matters¹

Indian Act

Land Title Act

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Supreme Court Family Rules

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[§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, common-law or married relationship. Most often, you will be asked to provide advice on issues such as:

- (a) custody, guardianship, access and the primary residence of the children (*Family Relations Act* or *Divorce Act*);
- (b) division of family assets (*FRA*, Parts 5 and 6);
- (c) entitlement to share in assets in the case of common-law relationships (trust law);
- (d) divorce (*Divorce Act*);
- (e) interim and permanent support for spouses or children (*FRA* or *Divorce Act*);
- (f) paternity (*FRA*);
- (g) preservation of family assets (*FRA*, Parts 5);
- (h) protection of a party or the children (*FRA*);
- (i) separation;
- (j) variation and enforcement of prior court orders for custody, access or support (*FRA* or *Divorce Act*); and
- (k) removal or protection of a child (*Child, Family and Community Service Act*).

Other relevant legislation and rules include:

Child Support Guidelines

Family Maintenance Enforcement Act

Child, Family and Community Service Act

Adoption Act

[§1.02] Initial Considerations

Clients typically consult a lawyer during an emotionally difficult time in their lives. In divorce and family 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 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 valuers. To give your client a sense of some basic issues that arise in family law, you could refer the client to the Ministry of Attorney General's web-site: <http://www.ag.gov.bc.ca/family-justice.index.htm>.

1. First Client Meeting

Clients often come to a lawyer's office with misconceptions about what the law is and how it applies. When meeting with a client, particularly the first time, it is important that the lawyer be alert to these misconceptions. Common ones include the following:

- 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 "legally separated". Clients should be told that anyone is entitled to separate. What lawyers assist with is the orderly settlement of all legal issues.
- The "common-law marriage." People who are living common-law are not married and do not need to get a divorce to end their relationship.
- Many people do not realize that their issues can be settled by contract or adjudicated upon without necessarily proceeding to a divorce.
- Some people are unaware that commencing a court action does not preclude settlement without trial.

¹ Carolyn Christiansen of Nixon Wenger, Vernon, kindly updated this chapter in January 2010. John-Paul E. Boyd, Aaron Gordon & Daykin, Vancouver kindly revised this chapter in March 2008, March 2005 and February 2006. Revised in July 2002 and July 2003 by Jeremy S. Sheppard, Hayward Sheppard, Vancouver. Revised in February 2001 by Cindy J. Lombard, Kelowna. Revised annually from March 1994 to February 1997 by Nancy Cameron, Cameron Kenney, Vancouver.

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 may be at least a year or more before their family case would proceed to trial (if it goes to trial) and in a first meeting outline your fee arrangement clearly. Follow this up with a retainer letter (see example at the end of this chapter).

- It is frequently assumed that fault attaches to adultery and that support, custody, access or a property division may be used to punish an adulterous spouse. This is not the case.
- Some clients believe that support is a fee paid in exchange for rights of access, or, conversely, that access rights only exist so long as support is paid. Explain that these are independent rights and obligations.

It is important for your client to understand the steps that will be necessary as a file proceeds, as well as the alternatives to litigation. It is also important for you to find out what your client wants and help the client evaluate whether or not their 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 thinks he or she would like to do, you will require basic information in order to commence proceedings and to negotiate fruitfully.

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 any pleadings. Appendix 1 contains a sample first interview questionnaire for a married spouse. See also the Law Society of British Columbia's *Checklists Manual Family Practice Interview* at: http://www.lawsociety.bc.ca/practice_support/checklists/docs/D-1.pdf.

In many cases it is helpful to have your client prepare a written history of the relationship for you. A relationship history is useful when drafting pleadings and when preparing your client for discovery or trial. The written history will also save you some time (and fees for your client) and may help your client emotionally.

When the health of a client is a relevant issue, obtain written authorizations for 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 action must be taken to protect property or persons, litigation must commence immediately to obtain orders restraining the disposition or dissipation of assets, to prevent the harassment of a party or a child of the parties, or to prevent the removal of a child from the jurisdiction. (See §2.04 and §3.04 for more about these applications.)

Restraining 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, it will delay the onset of substantive dialogue where the restrained party feels particularly aggrieved by the order.

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? Such actions may affect the outcome of the case substantially.

4. Limitation Periods

Review applicable limitation periods at or immediately following the initial interview. Take any necessary steps to prevent expiry or to mitigate the impact of an expired limitation period.

Limitation periods are primarily of concern to common-law and unmarried couples who risk losing an entitlement to spousal support or child support if a proceeding is not commenced within the time periods set out in s. 1 of the *FRA*.

5. Conflicts of Interest

Remember that a conflict of interest disqualifies a lawyer from acting. A conflict of interest may arise where the lawyer, a partner, or an associate has represented either of the parties in the past or has acted as a mediator 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.

Remember also that when one lawyer in a firm acts on behalf of a company whose shares are a family asset, and the husband or wife consults another lawyer in the firm about a marriage breakdown, conflict of interest results.

Refer to Chapter 2 of the *British Columbia Family Practice Manual* (Vancouver: CLE) 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 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 (*Professional Conduct Handbook*, Chapter 10).

If you are writing a letter on your client's behalf—particularly demand letters or letters proposing settlement—you may want to provide your client with a copy of the letter before you send it, so that there can be no mistake about your instructions.

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

[§1.03] Financial Disclosure

Financial disclosure is vital in all family law proceedings involving the division of property or a claim for support. When the parties are litigating their dispute, 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. Remember that however the matter proceeds, whether to trial or otherwise, financial information must be exchanged whenever property or support is at issue.

After obtaining disclosure from the client, you should verify the information provided. Conduct a title search on any properties described by the client such as the family residence, recreation property, investment property, and company or business property. 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, shares in closely-held companies and property held in trust.
- Failing to claim, record, or properly appraise assets. This is a recurring allegation made against family law practitioners in negligence actions.
- Failing to consider the impact income tax issues will have on the net distribution of assets, which may materially change the intended distribution. Access appropriate expertise in this area.

It is useful to list all of the spouses' assets and liabilities before you commence negotiation or litigation, which will allow you to determine what each of the spouse's rights and obligations are with respect to each asset and liability.

[§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 the mediation facilities which can assist the client and spouse 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 Statement of Claim or Counterclaim seeking a divorce, you must sign a declaration that you have complied with s. 9 of the *DA*. (This declaration will be attached to the pleading and filed in court).

[§1.05] An Introduction to Mediation

Family law disputes are often resolved using methods other than litigation (alternative dispute resolution, or “ADR”). Mediation is one form of ADR. Mediation is a method of resolving disputes that uses a neutral professional to control a process in which the parties themselves define the solution. Mediation is available whether court proceedings have commenced or not.

Mediation is particularly important in family law, where clients’ war chests are bare more often than not 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 have more legs and last longer 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.
- 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 will also refuse to proceed to mediation where allegations of spousal abuse have been raised or where their client alleges that the relationship was excessively controlling.

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 custody, access, support, and division of property. The mediator has no binding decision-making power. As full disclosure and the confidentiality of the negotiations are essential to the mediation process, the 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 five Supreme Court Registries, including Vancouver, a party to a family law proceeding may initiate mediation by delivering a notice to the other party and the Dispute Resolution Office, pursuant to the *Notice to Mediate (Family) Regulation*, B.C. Reg 296/2007. That Regulation sets out the procedural requirements for those mediations.

The mediation process does not displace the role of counsel. Not only do lawyers routinely participate in the mediation process, 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 legal 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 generally exhibit a cooperative or conciliatory attitude, recognize the legitimacy of competing interests, 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 move (like the exact amount of a party's interest in a property).

If the parties are in significantly unequal bargaining positions, mediation may be inappropriate, such as where there is a real or perceived imbalance of power in a relationship. This is particularly so where there has been spousal violence. In cases like these, mediation should only be attempted with the assistance of a mediator with special skills in dealing with such issues.

There is no point in pursuing mediation if one of the parties is not committed to giving the process his or her best effort: both parties must be willing to listen to the other party, communicate respectfully with the other party, express their needs and fears, and be willing to negotiate and compromise their initial positions.

3. Independent Legal Advice

People will often seek your advice about an agreement already reached through mediation: Is the agreement fair? How does the settlement compare to the results which could have been obtained at trial? What effect does it have on their immediate rights and obligations? How will it affect them in the distant future? Are the terms of the agreement practical?

In 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 and to compromise their positions if they choose to do so; 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 suggest that the agreement should be abandoned. If your client insists on signing such an agreement you should confirm your client's instructions in writing or refuse to take your client's signature and send the client elsewhere.

4. Qualifications of Mediators

(a) Lawyers as mediators

The Law Society of British Columbia has imposed standards for lawyers who act as mediators (Law Society Rules, 3–20).

- (1) A lawyer may act as a family law mediator only if the lawyer has
 - (a) engaged in the full-time practice of law for at least 3 years or the

- equivalent in part-time practice, and
- (b) completed a course of study in family law mediation approved by the Practice Standards Committee.

- (2) The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without qualifying under subrule (1)(a).

Appendix 2, Item 3 of the *Professional Conduct Handbook* 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, the lawyer-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 2 Item 5 of the *Professional Conduct Handbook* 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 to one of the parties, 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 services as a non-lawyer mediator. There are no universal standards for training and accreditation except those imposed by voluntary professional associations on their own members.

See the list of mediation referral sources in Chapter 7 of the *British Columbia Family Practice Manual*. In addition, lists of resource persons are available through the ADR

subsection of the CBA.

[§1.06] An Introduction to Collaborative Law

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

Family law lawyers who are prepared to engage in the collaborative model have specialized training in collaborative law and are also qualified as family law mediators in their own right. 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 withdrawal in the event that the process fails and litigation is to be undertaken.

The process consists of multiple, carefully managed four-way meetings between counsel and their clients. 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 recruit the assistance of such third-party professionals as may be necessary to move negotiations forward.

[§1.07] References

The Law Society of British Columbia’s *Checklists Manual* (updated annually and available at <http://www.lawsociety.bc.ca/practice-support/pcm.html>) is a very useful resource. The *Checklists Manual* includes checklists for conducting family practice interviews, for preparing separation and marriage agreements and for carrying out *Divorce Act* and *FRA* 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* (looseleaf), 2nd edition. The *Sourcebook* is updated annually and provides authoritative guidance on substantive family law matters. Topics include: guardianship, custody and access; maintenance; injunctive relief; financial disclosure and valuation; experts and expert evidence; property issues; procedural alternatives; variation and enforcement of orders and agreements; costs; protection of children; adoption; and, testamentary issues.

- (b) *British Columbia Family Practice Manual* (looseleaf with forms and precedents on disk), 4th edition. 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; mediation, arbitration and negotiation; family law agreements; undefended divorces; commencement of proceedings; interlocutory proceedings; preparation for and conduct of trial; minutes of settlement, orders and costs; appeals; enforcement of orders; protection of children; adoption; naming and name changes; and, tax considerations.
- (c) *Annual Review of Law and Practice*. An annual hardcover current to January of each year, the *Review* touches on developments in family law cases, 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.
- (d) *Annotated Family Practice*. A compact annual paperback of current provincial and federal laws, encompassing family law statutes, rules, practice directions and case annotations. This book provides annotated versions of the *Family Relations Act* and the Child Support Guidelines, and the full text of the forms for the Provincial (Family) Court.
- (e) *Desk Order Divorce: An Annotated Guide* (looseleaf with forms and precedents on disk). Includes applicable rules, excerpts from legislation, forms and precedents, annotations and strategic commentary on the desk-order divorce process.
- (f) *Family Law Agreements: Annotated Precedents* (looseleaf with forms and precedents on disk). This is an essential reference for drafting marriage and separation agreements. Topics include: judicial discretion; minutes of settlement and consent orders; recitals, introductory operative clauses and general clauses; guardianship, custody and access; spousal and child support, as well as security for support; assets and liabilities, including pensions and RRSPs; pre-nuptial agreements and agreements made during a relationship; and, tax issues. Sample clauses are provided for each topic.

The *Sourcebook*, the *Practice Manual* and the *Review* are critical reference tools for all family law practitioners. The *Annotated Family Practice* is essential for practitioners who do any work in the Provincial (Family) Court and for those involved in child protection litigation.