

# FAMILY

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## Chapter 2

### Family Law Case Procedures<sup>1</sup>

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

This chapter has been revised to reflect the Supreme Court Family Rules, B.C. Reg. 169/2009, which come into force on July 1, 2010. The Supreme Court Family Rules (the “SCFR”) govern family law procedures in the Supreme Court. The Provincial Court (Family) Rules (the “PCFR”) govern FRA matters in that court.

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

#### [§2.01] Choice of Law

In British Columbia the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the “FRA”) govern most family law matters. The Supreme Court of British Columbia and the Provincial Court (Family) of British Columbia hear all family law cases in the province.

The marital status of the parties and the nature of the issues to be resolved influence what legislation the litigants choose to rely upon. Only legally married spouses or formerly married spouses may invoke the *Divorce Act*, although the Supreme Court may grant leave for another person 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 *FRA*.

The *Divorce Act* alone governs divorce and the recognition of foreign divorce orders. The *FRA* alone governs the division of family assets between married spouses, the guardianship of children and parental support. Both the *Divorce Act* and the *FRA* deal with custody of and access to children, child support and spousal support.

Neither the *Divorce Act* nor the *FRA* governs the division of assets between unmarried parties. In such cases the applicable law is that which governs the ownership of property by two or more unrelated persons, such as the *Land Title Act* and the *Partition of Property Act*, the common law of trusts (discussed at §2.13.6) and the principles of equity. Unmarried parties may bring themselves within the property division provisions of the *FRA* if they execute a cohabitation agreement dealing with property, although this result is more often inadvertent than intentional (*FRA*, s. 120.1).

The property division provisions of the *FRA* do not apply to real property situated on First Nations’ reserve lands as a result of the division of powers in sections 91 and 92 of the *Constitution Act, 1867* and the operation of the doctrine of paramountcy. 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.

#### [§2.02] Choice of Forum

The criteria governing the choice of 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.

##### 1. Jurisdiction<sup>2</sup>

Before commencing a proceeding, you must determine whether the court has jurisdiction to grant the remedy sought. For example, no court in British Columbia has jurisdiction to make a vesting order transferring title to real property located outside the province, although the court may order a party who has attorned to its jurisdiction to effect the transfer.

<sup>1</sup> John-Paul E. Boyd, Aaron Gordon Daykin & Nordlinger, Vancouver has kindly revised this chapter in January 2010, February 2006 and March 2005. Michael R. Eeles of Greiner Bethell & Company, Burnaby revised this chapter annually between February 1999 and June 2004. Janet E. Murphy, Maple Ridge, kindly provided the content relating to land on reserves in January 2002. Paul M. Daykin, Aaron Gordon & Daykin, revised the chapter in February 1998.

<sup>2</sup> Three key cases established the precise division of powers under sections 91, 92 and 96 of the *Constitution Act, 1867*. See *Re: Questions Concerning Marriage*, [1912] A.C. 880; *Re: Adoption Act*, [1938] S.C.R. 398 and *Re: British Columbia Family Relations Act*, [1982] 1 S.C.R. 62 (also known as the “Polglase” decision).

The Supreme Court of British Columbia has jurisdiction to resolve all family law matters. The Provincial Court (Family) has jurisdiction only over matters specifically assigned to it by statute.

For constitutional reasons, only a justice of a superior court may make orders under the *Divorce Act* or respecting property, including division of family assets. 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 FRA 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 a child respecting an issue not governed by any legislation.

See the jurisdiction chart at Appendix 2.

## 2. Disclosure

The SCFR include mechanisms for disclosure not ordinarily available in the Provincial Court, including the examination for discovery of a party before trial, the discovery of a party by interrogatories, and pre-trial examination of a witness.

## 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)).

The Provincial Court (Family) may enforce orders for custody or access made by or registered with the Supreme Court as it enforces its own orders for custody or access (*FRA*, s. 12).

The Director of Maintenance Enforcement may enforce *Divorce Act* and *FRA* support orders in both the Provincial Court and the Supreme Court under the *Family Maintenance Enforcement Act*. FMEA proceedings are usually brought in the Provincial Court.

Orders for spousal support or child support made outside of British Columbia pursuant to legislation other than the *Divorce Act* 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. As a result, enforcing Provincial Court orders for custody, guardianship or access can be challenging and is often futile.

Under s. 128 of the FRA, however, the breach of an FRA order for custody and access is an offence which may be prosecuted through the *Offence Act*, like any other act designated an offence under a provincial statute. A party may lay an information under that act (s. 11) which may result in a summons being issued against the respondent (s. 28) and a trial. While this relief is available to enforce a Provincial Court order, it is rarely used.

See *Practice Material: Family*, Chapter 6 for more information.

## [§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 include proceedings in which a party seeks an order under the *Divorce Act* and the *FRA*, seeks relief in relation to a family law agreement, seeks an annulment, and proceedings in which 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 Part 17 (SCFR Rule 3-1(2) to (4)). A person 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 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 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);
- *FRA*, ss. 44 or 45 (extraprovincial orders for custody or access); or,
- *Divorce Act*, ss. 3 or 4 (divorce proceedings and corollary relief proceedings).

Once served, respondents and petition respondents may contest jurisdiction, without attending, 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 30 days after being served with a notice of claim (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 the methods, such as leaving the document at the person's address for service, ordinary mailing to the address for service, faxing with cover sheet, and emailing.

(b) Applications for non-final orders

Parties may seek non-final orders for custody and support, to restrain dealings with property, 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 a judge waives the requirement for a judicial case conference (SCFR 7-1(4)). The requirement to first attend a judicial case conference does not apply to the types of applications set out in SCFR 7-1(3), which include applications without notice and consent applications.

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, a party may apply through the court registry for a final order by consent (SCFR 10-10). This summary procedure cannot be used to obtain an order for divorce (see §2.06 below). If the proceeding is contested, a party may apply for a final order at trial, or in chambers by summary trial under SCFR 11-3 (SCFR 10-11).

(d) Form F8 Financial Statements

(i) General

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

(ii) Timing and procedure

When SCDFR 5-1 applies, each party must serve a financial statement in Form F8, observing the following procedures (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 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 older than 91 days at the start of a 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; 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 pay stubs, income tax returns and CRA notices of assessment and reassessment, property assessments, corporate financial statements and tax returns, and other documents relevant to establishing a party's income or the value of an asset.

(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 and issuing a fine under *FRA*, s. 92.

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

(vi) Agreement on income

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 particulars are not provided within 7 days, the complaining party may apply for an order that particulars 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 the 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 form and content requirements of a Form F8 financial statement must be given deference, the court form may be amended 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.

#### *valuing assets*

- The value of a non-monetary asset is rarely certain. If the value is not known, then say that the value is an estimate or approximation; list the value as "unknown" as a last resort only.
- It is possible to use the assessment authority's value of property pending a proper appraisal. 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."

#### *debts*

- List the entire amount of any joint debt and personal debts, taking care to distinguish between the two.
- Take care to distinguish between 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 PCFRs, and updates and information about family court can be found at:

[www.qp.gov.bc.ca/dispute/famrules.html](http://www.qp.gov.bc.ca/dispute/famrules.html)

A Provincial Court (Family) proceeding begins by filing an application to obtain an order in PCFR Form 1, with a financial statement in PCFR 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/or 21, where applicable, have been met. (See the discussion of PCFR 5 and 21 below.) Be aware that while the notice will indicate that the date set is for a 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), most often the parties are referred to the judicial case manager to set dates for interim applications, a family case conference, or trial.

Pursuant to PCFR 1, the registries of Kelowna, Surrey and Vancouver are designated as "family justice registries"<sup>3</sup> subject to PCFR 5. Under PCFR 5 the parties to a contested proceeding must meet with a family justice counsellor before a first 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.

Pursuant to PCFR 21, when the parties have children and the proceeding is commenced in the registries of Abbotsford, Kamloops, Kelowna, Nanaimo, New Westminster, Port Coquitlam, Prince George, Surrey, Vancouver or Victoria, the

<sup>3</sup> The registry of Port Coquitlam treats itself as a family justice registry and will apply PCFR Rule 5 to proceedings commenced in that court.

parties to a contested proceeding involving child custody 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.

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)). If affidavit evidence is to be relied on, the applicant must serve a filed copy of the affidavit on the respondent together with his or notice of motion (PCFR 12(1)). The Provincial Court (Family) Rules do not provide a specific form for a respondent to reply to an application; however a reply in PCFR Form 3 may be used if necessary.

The parties can apply for a consent order at any point in the process (PCFR 14).

## [§2.04] Urgent Matters

Matters that must be addressed in haste, more quickly than court rules normally permit, may arise before or after proceedings have commenced. Consequently, at the first client meeting, the lawyer needs to explore aspects of the client's situation that may call for immediate action.

In family law, urgent situations typically involve the protection of persons or property and the urgency will be apparent at the initial client meeting. When property is at issue, a lawyer may be negligent if he or she fails to take the basic steps required to secure the client's interest in the family assets, even if a cause for urgency is not evident.

### 1. Status of Litigation

When a family law case has been commenced, counsel may need to advise the client that immediate action is necessary to prevent default judgment, to set aside or vary any without notice orders obtained by the opposite party, or to defend any pending applications for which short leave has been granted.

### 2. Preservation of Property

Typically, the client will want to ensure that the assets are not wasted, encumbered or sold pending trial or settlement, whether the assets are held

jointly or in the other party's name alone. Such assets may include bank accounts and investments, the contents of safety deposit boxes, chattels and other movables and 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 ss. 213 or 215 of the *Land Title Act*;
- obtain an order under s. 67 of the *FRA* restraining the use, sale or encumbrance of assets;
- obtain an order protecting and preserving property under SCFR 12-1 and 12-4, or s. 39 of the *Law and Equity Act*; or,
- file an entry under the *Land (Spouse Protection) Act*.

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 where there is family violence, a threat of kidnapping or removal of the child from the jurisdiction, evidence of child neglect, or where one party has been threatening or harassing the other.

Both the Supreme and Provincial Courts may issue personal restraining orders under *FRA*, ss. 37, 38, 124 and 126.

Orders pursuant to ss. 37, 38 and 126 may restrain a party from harassing or communicating with the client or the parties' children, interfering with the children, or entering into premises where the children or client reside. Under s. 124, the court may order that the client have the occupancy and use of the family home to the exclusion of the other party.

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 (SCFR 10-9(2), Form F17; PCFR 20(2)).

Restraining orders can also be sought by an 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 generally brought when there has been a change in circumstances since the making of the order such that the original order is no longer appropriate.

Variation 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 existing order of the Supreme Court is brought by notice of application 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 under the *Divorce Act* to vary a 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 (Family)

An application to vary a provincial court order is brought by filing an application to change an order or agreement in PCFR Form 2 in the registry where the order was made (PCFR 2(2)), with a financial statement in PCFR Form 4 where appropriate. The procedure is identical to that for bringing an application to obtain an order.

Applications to vary orders of a provincial court of another province or reciprocating jurisdiction are brought pursuant to 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 grounds for divorce are (*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 during the marriage with a person who is not the other spouse; and
- (c) physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

Adultery or cruelty may not be used as a ground of divorce 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)).

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), the ground of divorce, and 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 definition of “spouse” in the *Divorce Act* includes same-sex spouses to (s. 2(1)).

The notice of family claim in a divorce proceeding must be served on the defendant by someone other than the claimant (SCFR 6-3(2)(a)) and service may be effected by the counsel for the claimant, or counsel’s partner, agent or employee. The notice of family claim must be served personally on the respondent and an affidavit of service in Form F15 must be filed (SCFR 6-6(1)(a)).

The affidavit of service must show the means by which the deponent has identified the person served. Most of the time, however, someone who doesn’t know the respondent, such as a professional process server, will effect service. When the respondent is cooperative, the server may confirm the respondent’s identity by examining his or her driver’s licence or other photographic identification; when the respondent is unlikely to be cooperative, the server should be provided with a photograph of the respondent, which will then be attached as an exhibit to the affidavit of service.

If a party has made diligent but fruitless efforts to serve the notice of family claim, the party 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

Part 2 of the *FRA* governs guardianship of a child and determines who is a child's guardian, absent a court order or separation agreement determinative of the issue. The *Divorce Act* does not specifically address guardianship, however *Divorce Act* orders for custody are presumed to include guardianship and *FRA*, s. 27(4) provides that a party granted sole custody of a child in a divorce order is the sole guardian of the child.

Anyone may apply for an order appointing a guardian for a child, but a person who is not a parent of the child must not be appointed guardian unless both parents have consented or have been given notice of the application and the child, if over the age of 12, has given consent (*FRA*, s. 30). When making orders about guardianship, or another other matter affecting children, the court is required to give paramount consideration to the children's best interests (*FRA*, s. 24).

Unless otherwise articulated in an order or separation agreement, guardianship means being the guardian of the child's estate and the guardian of the child's person. As a practical matter, the guardian of a child's estate is empowered to make decisions respecting the child's property. The guardian of a child's person is empowered to make decisions respecting where the child lives, what the child does and how the child is cared for, including the child's medical care, mode of education and religious instruction.

As a matter of law there is no presumption in favour of joint guardianship over sole guardianship (*Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21 (B.C.C.A.)), however over the last few years the court has been increasingly inclined to order joint guardianship in all but the most strained situations.

Two models have been developed to define the rights and obligations involved in joint guardianship. The *Joyce model*, created by Mr. Justice Joyce, requires the parents to consult with each other, but vests the parent with the "primary care" of the children with the power to make decisions in the event agreement cannot be reached, subject to review by a court on application by the other parent under *FRA*, s. 32. The *Horn model*, developed by Master Horn, gives each parent the right to access information about the child while minimizing the parents' obligation to attempt to reach agreement. For more on this, see Continuing Legal Education Society of

BC's, *BC Family Law Practice Manual*, Volume 1, §14.30.)

### [§2.08] Custody

In British Columbia, the relationship between guardianship and custody of a child is confusing, particularly given the increasing frequency with which parents share joint custody and the fact that joint custody has very little to do with the amount of time a parent has with a child. The confusion between joint custody and joint guardianship is discussed in *Re Wong*, (2000) 81 B.C.L.R. (3d) 362 and *Abbott v. Abbott*, (2001) 89 B.C.L.R. (3d) 68.

One result of this confusion is the emerging importance of the concept of the children's "primary residence," also known as "primary care" or "primary care and control." The child's primary residence is the home at which the child lives for most of the time. Under the Joyce model of joint guardianship (see §2.07), the parent with primary residence is given ultimate decision-making power when consensus on an issue cannot be reached. In cases where the child's time is split evenly between the parents, one parent may be assigned to have the child's primary residence.

The meaning of custody is clearest when a parent has sole custody of a child. A parent with sole custody has the day-to-day care and control of the child and the sole right to make parenting decisions on matters that are not reserved to a guardian or some other person by statute or court order.

See the *Family Law Sourcebook*, (Vancouver: CLE) §2.5 to 2.8 for a broader discussion of these issues.

#### 1. *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 are unable to support themselves by reason of illness or disability, or are in full-time attendance at university or college. Step-children 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 a spouse 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 than the province in which the claim is made, 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 of the marriage should have as much contact with each parent as is consistent with the best interests of the child (s. 6(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. 6(9)).

## 2. *Family Relations Act*

A "child", for purposes other than child support, is defined in s. 1 of the *FRA* as "a person who is under the age of 19".

Part 2 of the *FRA* governs custody and s. 34 describes who may exercise custody if there is no court order. Section 35 allows the court to grant custody to any person, including a relative and non-relative.

Part 3 of the *FRA* addresses extraprovincial orders for custody and access and sets out the jurisdictional criteria which must be met for a British Columbia court to make an order on those subjects. Section 44 provides that a court must exercise its jurisdiction to make an order for custody of or access to a child only if:

- (a) the child is habitually resident in British Columbia at the commencement of the application for the order; or
- (b) although the child is not habitually resident in British Columbia, the court is satisfied that all of the following conditions are met:
  - (i) the child is physically present in British Columbia at the commencement of the application for the order;
  - (ii) substantial evidence concerning the best interests of the child is available in British Columbia;

- (iii) 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;
- (iv) no extraprovincial order of or access to the child has been recognized by a court in British Columbia;
- (v) the child has a real and substantial connection with British Columbia; and
- (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.

"Habitual residence" is defined as the place where a child resides:

- (a) with both parents;
- (b) if the parents are living separate and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or
- (c) with a person other than a parent on a permanent basis for a significant period of time.

Under s. 45, the court has a discretionary jurisdiction to make or vary an order in respect of custody or access to a child where:

- (a) the child is physically present in British Columbia; and
- (b) the court is satisfied that the child would, on the balance of probability, suffer serious harm if the child:
  - (i) remains in the custody of the person legally entitled to custody of the child;
  - (ii) is returned to the custody of the person legally entitled to custody of the child; or
  - (iii) is removed from British Columbia.

Despite all of the above, a court having jurisdiction in respect of custody or access may decline to exercise that jurisdiction if the court is of the opinion that it is more appropriate for jurisdiction to be exercised outside British Columbia (*FRA*, s. 46).

Section 24 of the *FRA* requires a court to give paramount consideration to the best interests of the child when making a custody order. Under s. 24(1), the court is directed to consider:

- (a) the health and emotional well-being of the child, including any special needs for care or treatment;
- (b) where appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;

- (d) education and training for the child; and
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately.

### 3. Additional 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. 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 12 a significant 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 some consideration to but not be bound by the wishes of younger children. The *FRA* directs the court to take the views of the child into account where appropriate (s. 24(1)(b)). The *Divorce Act* is silent on this point, although Canada is a signatory to the U.N. Convention on the Rights of the Child and is therefore required to ensure that children are afforded the opportunity to be heard in any judicial proceeding affecting their interests (art. 12(2)).

Section 15 of the *FRA* empowers the court to order an investigation by a third party into any family matter, including custody and access. In Supreme Court matters, this third party is usually a psychologist or psychiatrist 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. In the Provincial Court, the third party is usually a family justice counsellor who will not have the same degree of training and will not go into the same depth as a psychologist or psychiatrist. These reports are often very useful in negotiating an agreement on custody and access, and, failing settlement, will be presented as expert evidence at trial. See *Practice Material: Family*, §4.03 for more information about s. 15 reports.

### 4. Joint Custody

Both the *Divorce Act* (s. 16(4)) and the *FRA* (s. 35(1)) provide for joint custody. The courts are increasingly inclined to grant joint custody over sole custody, and generally only order sole custody in situations where the relationship between the parents is toxic, uncooperative and conflict-laden.

One analysis requires the parents to be able to communicate and cooperate with each other before joint custody will be granted (*Stewart v. Stewart* (1994), 2 R.F.L. (4th) 53 (B.C.C.A.); *Ness v. Ness* 1999 BCCA 51). Another approach suggests that the imposition of joint custody, despite the parents' acrimony, will encourage future cooperation and discourage further conflict (*Mbaruk v. Mbaruk* (1997), 27 R.F.L. (4th) 146 (B.C.S.C.) and *Fawcett v. Fawcett*, [1999] B.C.J. No 506 (Q.L.) (B.C.S.C.), supplementary reasons [1999] B.C.J. No. 1576 (Q.L.) (B.C.S.C.)).

## [§2.09] Access

Children’s time between their parents is allocated by an order or agreement for access. Although both parents have access, access usually refers to the parenting time enjoyed by the parent without the child’s primary residence.

“Access” has historically had a negative connotation as it implied a distinction between the “custodial parent” and the “access parent,” and fostered adversarial win-lose attitudes as a result. Over the last several years the bench and bar have begun to use a variety of different phrases instead of “access”, such as “parenting time,” “parenting schedule” and a parent’s “time with the child”. The use of these terms has had no deleterious impact on the enforcement of orders or agreements.

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 amount of access a parent has is governed by the best interests of the child, and thus can be as generous or parsimonious as circumstances suggest. Some deference 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 an escalating amount of access as the child grows older and becomes increasingly independent.

Apart from scheduling issues for young children, the amount of time each parent can have with the child is almost wholly dependent on the child’s best interests and the parents’ circumstances. Some parents manage a schedule of week-on/week-off access quite well; others prefer to have their 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 and the flexibility of the parents.

When there are concerns about a party’s parenting skills or capacity, that parent’s access can be made conditional on the fulfillment 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 parent’s time with his or her child be supervised by a third party, such as a relative, social worker or a professional supervisor. This is an extremely onerous form of access, 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 *FRA*. Although the language on spousal support differs between the statutes, the court will apply the same principles to determine the issue, regardless of which statute the application is brought under.

### 1. Tax Impact

Periodic spousal support payable as a result of a written agreement or order is tax deductible by the payor and taxable income 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 exempt 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 Relations Act*

The *FRA* allows persons qualifying as spouses to claim spousal support. “Spouse” includes married persons and formerly married persons applying for spousal support within two years of divorce or annulment (s. 1(1)).

Unmarried persons will qualify as spouses where the parties lived together in a “marriage-like relationship” for at least two years and the application for support is made within one year of the date of separation (s. 1(1)).

### 3. The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines (SSAG) is an academic paper first published in draft form by the Department of Justice in January 2005. The SSAG proposes a number of mathematical formulae for the calculation of the amount and duration of spousal support, once a spouse has been found to be entitled to receive support. The final version of the SSAG was published in July 2008.

Although the SSAG is not law, and the Department of Justice is not presently 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—really a cluster of related formulae—which is used where there is a child support obligation, 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. In brief, 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 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” formulae are much more complex and attempt to divide the parties’ net disposable incomes, once 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 to be left with 40 to 46% of the difference between the parties’ net disposable incomes. Duration is calculated by reference to the dates the youngest child will enter and leave full-time school and the length of cohabitation. Duration will be indefinite when the length of cohabitation plus the age of the recipient equals 65.

The math required by the without child support formula is fairly straightforward. The math required by the with child support formulae is much more complicated and demands 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 without child support formulae require the use of software designed for the purpose.

It is beyond the scope of this chapter to delve any deeper into the SSAG or its formulae. The full text of the SSAG can be found online at:

[www.justice.gc.ca/en/dept/pub/spousal/project/](http://www.justice.gc.ca/en/dept/pub/spousal/project/)

See John-Paul Boyd’s technical paper on the SSAG, “Obtaining Reliable and Repeatable SSAG Calculations,” for a more detailed discussion of the data inputs required by the SSAG, the calculation of income for the SSAG and the tax deductions allowed by the SSAG at:

<http://canada.justice.gc.ca/eng/pi/fcy-fea/spo-epo/calc/index.html>

### 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 Relations Act*

Part 7 of the *FRA* governs spousal support applications under the *FRA*. Section 89 provides that a spouse is responsible and liable for the support and maintenance of the other spouse having regard to:

- (i) the role of each spouse in their family;
- (ii) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (iii) custodial obligations respecting a child;
- (iv) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves; and
- (v) economic circumstances.

Under s. 93, an order for spousal support should take into account the needs, means, capacities and economic circumstances of each spouse, including:

- (i) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
- (ii) any other source of support and maintenance for the applicant spouse;

- (iii) the desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;
- (ii) the obligation of the spouse against whom application is made to support another person; and
- (iii) the capacity and reasonable prospects of a spouse obtaining an education or training.

Except as specifically provided in s. 89, a spouse or former spouse has a statutory duty to become or remain economically independent and self-sufficient. In *Kahn v. Kahn*, 2008 BCSC 396, the BC Supreme Court held that non-family assets held exclusively by one spouse could be considered in the assessment of economic independence and self-sufficiency of both parties.

(c) Case Law

*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Miglin v. Miglin*, [2003] 1 S.C.R. 303, are the leading cases respecting spousal support in Canada.

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 “clean break” theory of spousal support on the basis that marriage entails an economic merger which may visit lifelong consequences upon a financially dependent spouse that cannot be justly addressed by short-term, sink or swim orders for spousal support.

In *Bracklow*, the court recognized three conceptual grounds for entitlement to spousal support: compensatory; non-compensatory entitlement based on the recipient’s present need; and, contractual. 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*. The term is used to describe the financial consequences suffered by one spouse as a result of decisions made during marriage when the marriage breaks down. These decisions may result 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 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: CLE), Chapter 3.

In *Bracklow*, the court held that where a spouse is financially dependant 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 highly probable 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 *FRA* are almost identical 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. 61/98).

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 child of the child support payments owed indexed by the number of children support is paid for and the payor's income.

### **1. Tax Considerations**

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.

Gross income is used to determine the amount of support payable under the Guidelines, and the income of persons who pay less or no income taxes 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 an equivalent net 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 for child support purposes.

## 2. Governing Legislation

### (a) *Divorce Act*

Section 15.1 of the *Divorce Act* governs original applications for child support, 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 Relations Act*

Under s. 93(1)(a), child support orders are to be determined in accordance with the Guidelines. Under s. 93(2), the court may make an award of child support in a different amount if it is satisfied that provisions in an order or agreement directly or indirectly benefit a child or that special provisions have otherwise been made for the child such that an award in the Guidelines amount would be inequitable. The court may also make an award in a different amount under s. 93.1 where the parties consent and the court is satisfied that reasonable arrangements have been made for the support of the child.

## 3. Eligible Children

The definition of “child” for support purposes under the *FRA* is basically the same as the definition of “child of the marriage” in the *Divorce Act*. The child must be under 19, or over 19 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 mean full-time attendance at a post-secondary educational institution.

## 4. Liable Parents

### (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 party will be found to “stand in the place of a parent” if he or she is the child’s step-parent, without a detailed inquiry into the nature of the party’s relationship with the child.

### (b) *Family Relations Act*

Under s. 88, persons qualifying as “parents” are liable to pay child support. The definition of “parent” at s. 1(1) and (2) of the *FRA* includes:

- a child’s biological parents
- guardians of a child
- 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

“Step-parent” is defined as:

- a person who is or was married to a parent
- a person who lived with a parent in a “marriage-like relationship,” as long as the application is brought within one year the parties’ separation.

### (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.” While the liability of step-parents is not always secondary to that of the biological parents (*Reich v. Sager* (1997), 33 R.F.L. (4th) 101 (B.C.C.A.)), the court may order that an amount lesser than the table amount be paid or find that no support is payable at all (*Fedoruk v. Jamieson*, 2002 BCSC 304). In some cases the court treated step-parents’ obligations as means of “topping up” the support paid by a biological parent.

### (d) Paternity

*FRA*, s. 95(1) sets out the circumstances in which the paternity of a child is presumed. Under s. 95.1(2), however, the court may order that the parties participate in a paternity test where a man denies a liability to pay child support on the basis that he is not the child’s father.

When *FRA*, s. 95.1 is not available to a party, the Supreme Court may also order that a paternity test be conducted under SCFR 9-5(1).

## 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;
  - 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.
7. Determine the total amount of child support payable by adding the base amount to the payor’s portion of the special or extraordinary expenses.

There are a number of exceptions to this general process. Some of the most commonly pled exceptions are:

- 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.
- 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 must be “clear and compelling evidence” 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.)). Claims brought under this provision rarely succeed.
- CSG s. 8 provides that in situations of “split custody” (each parent has custody of one or more of the children) the amount to be paid is the difference 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” (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* hardship (*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 from the grossed up amount, costs for the financial burden of a Hereditary Chief (*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.

A large body of law has developed under the Guidelines. See the *Family Law Sourcebook*, Chapter 3, and *Annotated Guidelines and Family Practice* (both Vancouver: Continuing Legal Education Society of BC).

## [§2.12] Variation of Custody or Support Orders

Orders for child support, spousal support, custody, guardianship 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.

### 1. Jurisdiction

#### (a) *Divorce Act*

The *Divorce Act* gives the Supreme Court jurisdiction to hear a proceeding to vary support if one of the former spouses is ordinarily resident in British Columbia at the commencement of the proceeding, or both former spouses accept the court’s jurisdiction (s. 5). If the respondent is not ordinarily

resident in the jurisdiction and does not consent to the court’s jurisdiction, the court may only make a provisional order, which has no legal effect until it is confirmed by a court in the province in which the respondent resides (s. 18(2)). Sections 18 and 19 set out the process to obtain and confirm a provisional order.

A court may vary, rescind or suspend a support or custody order prospectively or retroactively (s. 17(1)).

#### (b) *Family Relations Act*

Under s. 20 of the *FRA*, the court may vary or rescind any order made under the act, except orders under Parts 5 (division of assets) and 6 (division of pensions), where circumstances have changed since the last order was made or varied.

### 2. 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:

- recognize any economic advantages or disadvantages to the parties arising from the marriage or its breakdown;
- apportion between the parties any financial consequences arising from the care of a child of the marriage beyond any child support obligation;
- relieve any economic hardship of the parties arising from the breakdown of the marriage; and
- promote the economic self-sufficiency of each party.

A spousal support order that is expressly for a limited 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 Relations Act*

Section 91(4) of the *FRA* gives the court authority to alter, vary, or rescind a *FRA* spousal support order, including canceling the order or reducing any arrears accumulating as a result of it. Under s. 96(1), a court hearing a variation application must consider any changes in the needs, means, capacities, and economic circumstances of each person affected by the order since the last order was made.

## (c) Principles

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.

## 3. Variation of Child Support

Applications to vary child support under the *Divorce Act* are governed by ss. 17(4) and 17(6.2) to (6.5). Applications to vary child support under the *FRA* are governed by s. 96.

Variation applications under either Act must also 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.

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 authority for *Divorce Act* applications; *L.S. v E.P.*, 1999 BCCA 393 remains the leading case on *FRA* applications.

*L.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.

The same factors apply under *D.B.S.*, except that the court must 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.

## 4. Variation of Custody

(a) *Divorce Act*

Before a court varies a custody order the court must satisfy itself 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 Relations Act*

The *FRA* does not delineate all of the specific factors that should be considered by the court in a variation proceeding, however the court will require a material change of circumstances.

## (c) Principles

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

In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the court set out a two-stage inquiry when a change in custody 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.

This analysis also applies when the variation sought 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 is anything but consistent. A review of hundreds of mobility cases presented to CLE's 2003 Family Law Conference (CLE, July 2003) was able to conclude only that the parent with the child's primary residence was allowed to move 60% of the time, regardless of the presence or absence of these various factors.

## [§2.13] Dividing Assets

### 1. Dividing Family Assets between Married Spouses

Parts 5 and 6 of the *FRA* govern the division of assets upon the breakdown of a marriage. An action to divide assets under the *FRA* must be commenced while the parties remain spouses. A "spouse," for the purpose of Parts 5 and 6, is defined as a person who is married or who has brought a claim under the act within two years of a divorce or a declaration that the marriage is null and void (s. 2).

Upon the occurrence of any of the "triggering events" set out in *FRA*, s. 56 each party is prima facie entitled to an undivided one-half interest in all assets that are family assets. The four "triggering events" are:

- (a) the execution of a separation agreement;
- (b) the pronouncement of a declaration under s. 57 that there is no reasonable prospect of reconciliation between the parties;
- (c) the making of a divorce order; or
- (d) the pronouncement of a declaration that the marriage is null and void.

Family assets are defined in s. 58 as assets that are ordinarily used for a family purpose. "Ordinary use" means use in the course of a customary mode of life of the family, rather than special, occasional or casual use (*Elsom v. Elsom* (1983), 37 R.F.L. (2d) 150 (B.C.C.A.)). Ordinary use may be found where the use is infrequent (*Hanuse v. Hanuse* (1984), 40 R.F.L. (2d) 250 (B.C.S.C.)). Ordinary use may be found where an asset was intended to be used for a family purpose, such as a plot of land on

which the family meant to build a home (*Graff v. Graff* (1987), 11 R.F.L. (3d) 392 (B.C.C.A.)).

The onus is on the spouse opposing a claim against a particular asset to prove that the property in question is *not* ordinarily used for a family purpose (s. 60).

## 2. Specific Assets

### (a) Pensions and RRSPs

Specific assets such as pensions and registered retirement savings plans are family assets 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 *FRA* 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.70) or an *extraprovincial* plan (s. 77). 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 *FRA*.

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 *FRA*. 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: CLE).

#### (iv) Plans subject to Part 6

Under 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.

*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 *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.
- 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.
- 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.

The Division of Pensions Regulation BC 77/95 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) Ventures

A spouse's interest in a venture may qualify as a family asset if the other spouse contributed money or money's worth to the venture, either directly or indirectly (s. 58(3)(e)). Childrearing and other household responsibilities assumed by a non-owning spouse may constitute indirect contributions to a venture (s. 59(2)).

Ventures have been held to include such things as patent rights, farmland, and professional practices such as law partnerships. Diplomas, licences and degrees cannot be declared family assets, despite any contributions to their acquisition by the non-owning spouse (*Barley v. Barley* (1984), 43 R.F.L. (2d) 100 (B.C.S.C.)).

(c) Business Assets

Under s. 59, assets that are or were used primarily for business purposes will not qualify as family assets, provided the non-owning spouse made no direct or indirect contribution to acquisition of the property by the owning spouse or to the operation of the business.

Even though a business asset may not qualify as a family asset, the non-owning spouse will usually receive some credit for the value of the asset:

- where a business asset is or is owned by a corporation, the value of the business asset will be reflected in the value of the owning spouse's shares, which shares are a family asset (s. 58(2), (3)(a)(i)); and,
- childrearing and other household responsibilities assumed by a non-owning spouse are often regarded as indirect contributions to a business asset owned by the other spouse (s. 59(2)).

(d) 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 under a certificate of possession. The parties may be registered joint owners of a certificate of possession, or the

certificate may be registered in only one party's name.

The provisions of the *FRA* 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* (*Hageman v. Gladstone* (26 March 2004), Vancouver E040753, unreported (B.C.S.C.)).

While 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.

(e) Other Assets

An asset that cannot be characterized as a family asset because it is not used ordinarily for a family purpose and does not fall within the other enumerated categories of s. 58 is classified as an "other" asset and remains the property of the owning spouse (*Underhill v. Underhill* (1983), 34 R.F.L. (2d) 419 (B.C.C.A.)). However, an "other" asset can be vested in the other spouse to effect a fair division of the family assets (see s. 65(2), and *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171), and a party's "other" assets may sometimes be considered in relation to the spouses' relative economic circumstances and result in a reapportionment of the assets which qualify as family assets in favour of the non-owning spouse (*Kahn v. Kahn*, 2008 BCSC 396).

(f) New Assets

An asset acquired by one spouse after separation will generally not be a family asset unless it was acquired, in whole or in part, by using a family asset or using the proceeds of sale of a family asset.

3. Reapportionment

Once a triggering event occurs, the spouses hold all of the family assets as tenants in common regardless of the former legal ownership of the asset. The eventual division of those assets may not

be an equal division, however, as the *FRA*'s presumption of equal entitlement is just that, a presumption, and is subject to rebuttal. The court has discretion under s. 65 to reapportion the division of property in favour of one spouse if an equal division is proven to be unfair having regard to:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses 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 the property, or the capacity or liabilities of a spouse.

If parties cohabited before marriage, their contributions during that time to the acquisition or maintenance of assets are relevant under s. 65(f) (*Piskor v. Piskor* (1981), 27 B.C.L.R. 230 (C.A.)).

The *FRA* does not specifically provide for the allocation of debts between spouses. Generally, debts that are shown to have been incurred for the benefit of the family rather than personal benefit will be shareable between the parties. Common examples of shareable debts are mortgages, unpaid income tax owed on income used to support the family, lines of credit where the money was used for family purposes, credit card debts where the credit cards were used to provide for the family, or loans advanced by relatives and used for family purposes.

A debt secured by a family asset, such as a car loan or a line of credit secured by the family home, will be deducted from the value of that asset. Otherwise, a party must satisfy the court that the division of assets should be reapportioned in his or her favour under s. 65 as compensation for unsecured family debts that he or she remains liable to pay. See *Mallen v. Mallen* (1992), 40 R.F.L. (3d) 114 (B.C.C.A.) for a discussion of reapportioning family assets to provide for outstanding liabilities.

The Supreme Court of Canada has determined that while a debt itself cannot be "reapportioned," there is no time limit on court's ability to adjust the division of family assets under s. 66(2)(c), such that a party may be free to apply for an adjustment of

the division once, for example, a tax liability is crystallized (*Stein v. Stein*, 2008 SCC 35).

#### 4. Marriage Agreements

If there is a valid, enforceable marriage agreement as defined in s. 61, the presumption of equal sharing of family assets is displaced by a presumption that the marriage agreement will govern the division, unless the agreement is unfair, taking into account the factors in s. 65 (*Hartshorne v. Hartshorne*, 2004 SCC 22.)

#### 5. Canada Pension Plan

The Canada Pension Plan credits accrued 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 (*FRA*, s. 62), however for the waiver to be valid it must specifically enumerate the relevant sections of the *Canada Pension Plan*. These provisions also apply to unmarried parties who qualify as "common-law partners" within the meaning of s. 2(1) of the *FRA*.

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.

#### 6. Property Claims Between Unmarried People

Parts 5 and 6 of the *FRA* do not apply to unmarried couples unless they enter into an agreement under s. 120.1.<sup>4</sup> As a result, none of the act's presumptions about ownership and entitlement to property apply to unmarried couples, and the only presumptive claims a couple might have will relate to property registered in both of their names.

A party seeking an interest in property owned by the other party will usually frame the claim in trust, most often as a constructive trust where unjust enrichment is established. The Supreme Court of Canada dealt with unjust enrichment in the cases of

*Pettkus v. Becker* (1980), 19 R.F.L. (2d) 165, and *Peter v. Beblow*, [1993] 1 S.C.R. 980, which remain the leading cases on the subject. Unjust enrichment will be found:

- (a) if one party has provided assistance or service to the other party, and
- (b) that contribution directly or indirectly enriched the recipient at a corresponding loss to the donor, and
- (c) there is was no legal reason for the enrichment, such as a contract of employment or a strictly landlord/tenant relationship.

When unjust enrichment has been found, the amount of restitution owing to the donor can be established according to the value of labour performed at an hourly rate, the increase in value of an asset resulting from the donor's contributions or a value derived some other way. If the recipient does not have the cash on hand make restitution, the court may impose a trust relationship between the parties under which the recipient is deemed to hold a share of his or her assets in trust for the benefit of the donor. This remedy is called a "constructive trust." Other trust remedies that may apply to unmarried persons include the express trust and the resulting trust.

The law of unjust enrichment and the remedies that flow from it can apply to people in any relationship, including business relationships, but when the parties are in a domestic relationship, the court will more readily infer that services freely given by one party have enriched the recipient at the expense of the donor. For example, in *Peter v. Beblow* the Supreme Court of Canada held that childrearing duties performed by one parent unjustly enriched the other.

The property interest a party to an unmarried relationship will receive is almost always significantly less than the relief a married person would receive under the *FRA*, even when the relationship was of significant length. Only in rare cases will an interest amount to 50% of the total assets. For a review of the law of constructive trusts as applied by the British Columbia Court of Appeal, see *Clarkson v. McCrossen Estate* (1995), 13 R.F.L. (4th) 235 and *Bruyninckx v. Bruyninckx* (1995), 13 R.F.L. (4th) 199.

Unmarried parties who jointly own real property, either as tenants in common or as joint tenants, may also apply under the *Partition of Property Act* for partition and sale of the property, and the distribution of the proceeds of sale.

<sup>4</sup> Under s. 120.1, if a couple enter into an agreement which would be a marriage agreement had they been married and the agreement governs ownership, management or division of property during their relationship or upon its breakdown, the agreement is subject to Parts 5 and 6 of the *FRA*. This result is largely unanticipated by common-law couples who usually enter into cohabitation for the express purpose of protecting the property they are bringing into their relationship. It is not clear whether a couple may opt out of s. 120.1.

## 7. Variation of Property Division

Variation of an order dividing family assets ordinarily is not possible under the *FRA*, except on appeal. There are exceptions, such as an application to set aside an order that has been obtained by fraud, or an order on consent made in circumstances where a comparable contract would be rescinded by the court. In the former case, the order could be varied before it is entered. In either case, after the order is entered it is most likely that a fresh proceeding must be commenced requesting that the order made in the original proceeding be set aside and a fresh order be made.