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

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

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Please note that on June 5, 2020, the federal government announced the decision to delay the changes to the Divorce Act due to the COVID-19 pandemic. Instead of coming into force on July 1, 2020, the changes to the Divorce Act will come into force on March 1, 2021. The Practice Material: Family was published before the announcement and contains the original coming into force date.
Professional Legal Training Course 2020

Practice Material

Family

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May 2020
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Chapter 1

Preliminary Matters

[§1.01] Introduction to Family Law Practice

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

- parenting arrangements under the Divorce Act (Canada) or the Family Law Act (the “FLA”);
- division of family property, excluded property and family debt (FLA);
- entitlement to an interest in assets under equitable principles and the law of trusts;
- divorce (Divorce Act);
- spousal support (FLA or Divorce Act);
- child support and payment of children’s special expenses (FLA or Divorce Act);
- parentage (FLA);
- preservation of family property (FLA, rules of court);
- protection of a party or a child (FLA, rules of court);
- variation and enforcement of existing court orders (FLA or Divorce Act);
- setting aside or enforcement of agreements (FLA); and
- removal or protection of a child (Child, Family and Community Service Act).

Relevant legislation, rules and documents include the following:

- Adoption Act;
- Court Order Enforcement Act;
- Family Maintenance Enforcement Act;
- Indian Act;
- Interjurisdictional Support Orders Act;
- Land Title Act;
- Land (Spouse Protection) Act;
- Provincial Court (Family) Rules;
- Supreme Court Family Rules;
- Child Support Guidelines;
- Spousal Support Advisory Guidelines; and

Family law has undergone significant changes over the past several years, and more changes are expected. It is important to verify that your legal knowledge and resources are current. For example, note these changes:

- The Family Relations Act (the “FRA”), the main provincial legislation on family relations since 1972, was replaced by the FLA on March 18, 2013.
- The Supreme Court Family Rules (introduced in July 2010) and the Provincial Court (Family) Rules have been amended to accommodate the FLA, and they continue to be modified (the Provincial Government is currently overhauling the Provincial Court (Family) Rules).
- The child support tables in the Child Support Guidelines were updated on November 22, 2017 (lawyers should use the 2011 tables to calculate support for a period before that date).
- Bill C-78, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, received Royal Assent on June 21, 2019. The Bill makes significant changes to the Divorce Act; most of these changes are set to come into force on July 1, 2020. The changes are set out in more detail in the applicable chapters of these materials. Note that in these chapters, the “old” Divorce Act (before the amendments) is referred to as the 1985 Divorce Act and the “new” one (with the amendments in force) is referred to as the 2019 Divorce Act; any reference to the Divorce Act without a preceding date refers to the legislation both before and after the amendments.
- Bill 26, the Child, Family and Community Service Amendment Act, came into force on October 1, 2018 and April 1, 2019.
Clients typically consult a lawyer during an emotionally difficult time in their lives. In family law matters, clients are family members who may end up on opposite sides of litigation. If there are children involved, clients will probably continue to have a relationship with each other after any litigation has been resolved. It may also be the client’s first exposure to the legal system.

As a lawyer, your role is to protect and advance your client’s legal rights while complying with your duties under the legislation and all professional and ethical obligations applicable to BC lawyers. You should inform and advise the client about the applicable law and the options available to the client, ensuring that the client understands your advice. You should find out what the client hopes to achieve, and help the client evaluate whether or not these goals are realistic and reasonable.

You may refer your client to other resources and services, including counsellors, resources about parenting after separation, resources for emotional support for the client and children, and experts such as accountants. To help your client understand basic issues that arise in family law, you could refer the client to the Ministry of Justice’s Family Justice website (www2.gov.bc.ca/gov/content/life-events/divorce/family-justice), the Legal Services Society’s family law website (www.familylaw.lss.bc.ca), or John-Paul Boyd’s public legal education wikibook, JP Boyd on Family Law (wiki.clicklaw.bc.ca/index.php/JP_Boyd).

1. Screening for Conflicts of Interest

Before discussing a family law matter with a potential client, you must ensure there is no conflict of interest. A conflict of interest will disqualify you from acting.

A conflict of interest may arise where the lawyer, or a partner or an associate in the lawyer’s firm, represented either of the parties in the past or acted as a mediator or arbitrator for them. If a lawyer joins a new firm, the firm may act against a former client only if “a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur” (MacDonald Estate v. Martin (1990), 77 D.L.R. (4th) 249 (S.C.C.) at 270). See also Bell v. Nash, 1992 CanLII 2210 (B.C.S.C.), aff’d 1993 CanLII 845 (C.A.), where a firm was disqualified from acting after the wife had a brief telephone conversation with a family law lawyer who had previously been retained by the husband, although neither the wife nor the lawyer knew that when they spoke.

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

Refer to Chapter 2 of the British Columbia Family Practice Manual (Vancouver: CLEBC), the Code of Professional Conduct for British Columbia (the “BC Code”), and the Practice Material: Professionalism: Ethics for further guidance.

2. First Client Meeting

Clients often come to a lawyer’s office with misconceptions about the law and how it applies to their situation. When meeting with a client, particularly for the first time, the lawyer should be alert to these misunderstandings and clarify them. Common misconceptions surround the following concepts:

- The “common-law marriage”
  People often colloquially use the term “common law” to refer to partners who are spouses but are not married. However, “common law marriage” and “common law spouse” are not actually terms in the FLA or the Divorce Act.

  Under the FLA, two people are “spouses” if they marry each other or live with each other in a “marriage-like” relationship for two years or more (or, for the purposes of spousal support, if they have a child together, even if they have lived together for less than two years). However, people who are spouses by virtue of having lived in a marriage-like relationship are not married, and they do not need to get a divorce to end their relationship.

- The “legal separation”
  There is no such thing as a “legal separation”; non-lawyers often use the term when they mean a separation agreement, or because they think there is some process that will make spouses “officially separated.” Separation occurs without a formal process or the involvement of lawyers. As soon as someone communicates their intention to separate to their partner, they are separated.

- Parenting schedules and child support
  Some clients believe that paying child support creates an entitlement to time with the child, or, conversely, that a right to spend time with a child only exists so long as child support is paid. These are independent rights and obligations.
• Settlement during litigation
  Some people are unaware that commencing a court action does not preclude settlement without a trial.

• Effect of misconduct
  The conduct of each spouse may be relevant in some circumstances, but family law is not meant to be a tool to “punish” that conduct.

Few people are aware of how long it may take to resolve matters by litigation or how expensive litigation may be. It is important for your client to understand the steps that will be necessary as a file proceeds. Let clients know that it will be at least a year or more before their family law case will get to trial, if it goes to trial, and that even when resolving family law matters out of court, it can still take months (or longer) to reach a final settlement.

In your first meeting, outline your fee arrangement and identify the types of expenses that the client should expect to pay, like photocopying, court filing fees, and fees for other professionals or agents. Follow this discussion with a retainer letter.

Consider whether any foreign jurisdiction might affect the case (for example, are there assets outside of BC, or significant ties with another jurisdiction?).

Consider also how your advice might differ if one or both of the parties is Indigenous, has Indian status, is a member of a First Nation, or has assets located on reserve land (see the Indian Act, s. 88, and the Family Homes on Reserves and Matrimonial Interests or Rights Act).

When the client’s health is relevant, consider obtaining authorizations for the release of medical records. You might also want written authorizations from your client to obtain records from the Canada Revenue Agency, accountants, bankers or financial advisors.

Whatever your client’s goals are, you will need basic information in order to commence negotiation, mediation, a collaborative settlement process, arbitration or litigation. Using a standard client information form can help you obtain relevant information about the file in a complete, methodical, and easily retrievable way. It will also help if you need to draft pleadings. Appendix 1 contains a sample client intake questionnaire that is suitable for the first interview. See also the family practice interview checklist from the Practice Checklists Manual on the Law Society’s website (www.lawsociety.bc.ca).

3. Urgent Matters
At your first meeting with the client, determine whether there are any issues that must be addressed immediately. For instance, you may need to seek an order restraining the disposition or dissipation of property, a protection order preventing contact with a party, or an order to prevent the removal of a child from the jurisdiction. If steps must be taken to protect property or persons, you may need to commence litigation immediately. See §2.04 and §6.03.

4. Preserving the Status Quo
At your initial interview with the client you should also canvass any immediate plans the client might have that would alter the status quo or be prejudicial to the client’s interests. Is the client about to leave the children with the other party, leave the family home, or leave the country? Is the client planning on selling or moving any assets? Such actions could substantially affect the outcome of the case.

5. Limitation Periods and Time Limits
Review any applicable limitation periods and time limits at or immediately after the initial interview. Take any necessary steps to prevent the expiry of any limitation period or to mitigate the impact of an expired limitation period.

In family law, the most notable time limit governs the ability of spouses to make claims for spousal support and the division of property and debt. Under s. 198 of the FLA, such claims must be brought within two years of the date of separation (for unmarried spouses) and within two years of the date of the divorce or declaration of nullity (for married spouses). Section 198 also sets out a limitation period for an application to set aside an order or an agreement. Some limitations apply to child support matters, such as seeking child support from a step-parent. Further, the Limitation Act includes time limits that may apply in family law matters, such as time limits for claims to enforce or sue on a judgment.

6. Obtaining Instructions
A lawyer has a duty to recommend an appropriate and sensible course of action, particularly when the client wants to litigate a family law issue more vigorously than the matter warrants. The lawyer must not promote frivolous and vexatious claims.

If you are concerned about the instructions that you are receiving, it is good practice to confirm those instructions in writing before taking any further steps. If your client refuses to give you reasonable instructions and cannot be swayed from those instructions, you may wish to consider withdrawing services (see BC Code rule 3.7).
If you are writing a letter on your client’s behalf, you should provide your client with a copy of the letter to review and approve before you send the letter. This practice ensures that there is no mistake about your instructions and that the client confirms the approach you are taking.

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

### §1.03 Financial Disclosure

Financial disclosure is vital in resolving claims for support or for division of property and debt, whether in court or out of court. Whether or not the parties litigate, the obligation to disclose financial information continues beyond the initial exchange of information.

Your client will sometimes be misinformed about the family finances. Have the client obtain copies of any documents relating to the family finances, such as bank account statements and credit card statements. If the client does not have access to the full particulars of accounts held by the other spouse, obtain any information that the client does have, such as the names of financial institutions where the other spouse has accounts. Ensure that your client is not using improper measures to obtain information, such as accessing the personal online accounts of the other party without that party’s consent.

Ask the client to produce income tax returns for at least the last three years, and if the returns are not available, have the client write to the Canada Revenue Agency to obtain copies. The client should also produce all Canada Revenue Agency notices of assessment and notices of reassessment issued in connection with those tax years. Remember that financial information must be exchanged whenever property and debt or support is at issue, no matter how the matter is proceeding (i.e. whether by negotiation, mediation, arbitration or litigation).

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

- overlooking assets such as pensions, items in safety deposit boxes, foreign property, shares in closely held companies, and property held in trust;
- failing to claim, record, or properly appraise assets; and
- failing to consider the effect of tax, such as how capital gains tax may apply to property being divided. (Always access proper expertise when dealing with tax issues.)

See also Chapter 7 for financial disclosure requirements under the Supreme Court Family Rules.

### §1.04 Legislated Duties

#### 1. Duties of Counsel

(a) 1985 Divorce Act

Under s. 9 of the 1985 Divorce Act, every lawyer who acts in a divorce proceeding must do the following, unless it would be clearly inappropriate in the circumstances of the case:

- draw to the client’s attention the provisions of the 1985 Divorce Act that have as their object the reconciliation of the spouses;
- discuss with the client the possibility of the client reconciling with their spouse;
- inform the client of the counselling facilities available to assist in efforts at reconciliation; and
- discuss with the client the advisability of negotiating (rather than litigating) custody and support issues, and inform the client of any facilities that can assist the parties in negotiation.

When preparing a notice of family claim or counterclaim seeking a divorce, you must sign a declaration that you have complied with s. 9. This declaration is included in the court forms.

(b) 2019 Divorce Act

Section 7.7 of the 2019 Divorce Act replaces s. 9 of the 1985 Divorce Act (effective July 1, 2020). The new section preserves the lawyer’s duty to draw to the client’s attention the provisions of the 2019 Divorce Act that have as their object the reconciliation of the spouses, to discuss with the client the possibility of reconciliation, and to inform the client of the counselling facilities available to assist in efforts at reconciliation. The wording has been modified to impose this duty on any “legal adviser” rather than a “lawyer.”
Section 7.7(2) also requires the legal adviser to do the following:

- encourage the client to attempt to reach resolution through a family dispute resolution process, unless it would be clearly inappropriate to do so in the circumstances of the case;
- inform the client of the family justice services known to the legal adviser that can assist with resolution or with complying with an order or decision; and
- inform the client of the duties of the parties under the 2019 Divorce Act.

The terms “family dispute resolution process” and “family justice services” are defined in s. 2(1) of the 2019 Divorce Act and discussed in §1.06 of this chapter.

The lawyer must certify that they have complied with these duties. The certification must be provided in the document that starts a proceeding under the 2019 Divorce Act or that responds to that document.

(c) Family Law Act

Under s. 8 of the FLA, the lawyer must assess whether family violence is present and, if so, the extent to which the family violence may impact the safety of the client or a family member of the client, and the ability of the client to negotiate a fair settlement (s. 8(1)). (See §1.05 for the definition of “family violence” under the FLA.)

In light of the lawyer’s assessment, the lawyer must discuss with the client the advisability of different dispute resolution processes and the availability of resources to assist in the resolution of the dispute (s. 8(2)). The lawyer must advise the client that agreements and orders concerning children must be made in the best interests of the child only (s. 8(3)).

When preparing a notice of family claim with claims made under the FLA, you must sign a declaration that you have complied with s. 8(2). This declaration is included in the court forms.

2. Duties of the Parties

(a) 2019 Divorce Act

The 2019 Divorce Act sets out the duties of the parties (effective July 1, 2020). Note that the 1985 Divorce Act did not provide for such duties. The duties of the parties to a proceeding under the 2019 Divorce Act are as follows (ss. 7.1–7.6):

- to exercise any parenting time or decision-making responsibility allocated to that party, or any contact with the child of the marriage granted to that party, in a manner that is consistent with the best interests of the child;
- to protect any child of the marriage, to the best of their ability, from conflict arising from the proceeding;
- to try to resolve matters that may be the subject of an order through a family dispute resolution process, to the extent that it is appropriate to do so;
- to provide complete, accurate and up-to-date information, if required to do so under the Act (this duty applies to parties and any person who is subject to an order under the Act); and
- to comply with any orders made under the Act until the order is no longer in effect.

Parties who represent themselves must certify that they are aware of these duties. The certification must be provided in the document that starts a proceeding under the Act or responds to that document.

(b) Family Law Act

Section 5 of the FLA requires parties to provide to each other “full and true information for the purposes of resolving a family law dispute,” and to not use the information received from the other party except as necessary to resolve the family law dispute. (Section 13 provides additional confidentiality requirements.)

Section 9 requires that the parties comply with any requirements set out in the regulations respecting mandatory family dispute resolution or prescribed procedures.

Section 37 requires the parties to consider only the best interests of the child in making an agreement regarding guardianship, parenting arrangements, and contact.

Section 43 requires guardians to exercise their parental responsibilities in the best interests of the child.

3. Duties of the Court

Section 7.8 of the 2019 Divorce Act introduces new duties for the court (effective July 1, 2020). The purpose of these new duties is to facilitate the identification of orders, undertakings, recognizances, agreements or measures that may conflict with an order under the 2019 Divorce Act; and to allow for
coordination among various legal proceedings (s. 7.8(1)).

The duties apply when a party is asking for corollary relief (that is, orders for something other than the divorce itself, such as orders about parenting arrangements).

The duties are to consider whether any of the following is pending or in effect (unless this is clearly inappropriate to consider):

- a civil protection order or a proceeding in relation to such an order (“civil protection order” is defined in s. 7.8(3));
- a child protection order, proceeding, agreement or measure; or
- an order, proceeding, undertaking or recognition in relation to any matter of a criminal nature.

To carry out this duty, the court may make inquiries of the parties or review any information that is readily available and obtained in accordance with provincial law and the Act.

[§1.05] Family Violence

In proceedings under the 1985 Divorce Act, family violence was not expressly addressed but could still be considered as a relevant factor. Both the FLA and the 2019 Divorce Act define “family violence” and expressly require the court to consider it.

As noted earlier, the FLA requires counsel to assess whether family violence is present and its effect. It is highly recommended for lawyers practicing family law to obtain training about family violence, including screening for family violence. Such training is compulsory for family law mediators and arbitrators and for parenting coordinators.

This section sets out the definitions of family violence in the FLA and 2019 Divorce Act.

1. Family Law Act

Family violence (and the related term “family member”) are defined in s. 1 of the FLA:

“family violence” includes

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member’s financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence.

The list of conduct that constitutes family violence is not exhaustive, so other types of conduct can be considered family violence as well. A “family member” is defined in s. 2(1) and includes a person’s spouse or former spouse, a person with whom the person is living or has lived in a marriage-like relationship, and the person’s child (see s. 2(1) for the full definition).

2. 2019 Divorce Act

Family violence is defined in s. 2(1) of the 2019 Divorce Act as follows (effective July 1, 2020):

family violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person—and in the case of a child, the direct or indirect exposure to such conduct—and includes

(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;

(b) sexual abuse;

(c) threats to kill or cause bodily harm to any person;

(d) harassment, including stalking;

(e) the failure to provide the necessaries of life;

(f) psychological abuse;

(g) financial abuse;

(h) threats to kill or harm an animal or damage property; and

(i) the killing or harming of an animal or the damaging of property.

The list of types of violence is not exhaustive.

The term “family member” in this definition includes “a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who
participates in the activities of the household” (s. 2(1)).

[§1.06] Out-of-Court Dispute Resolution

Family law disputes are frequently resolved using methods other than litigation. Both the FLA and the 2019 Divorce Act include provisions aimed at encouraging out-of-court resolution (the 1985 Divorce Act does too, but to a lesser extent). This section reviews the most common non-litigation dispute resolution mechanisms in family law matters, and the relevant legislation.


The FLA contains various definitions that are relevant to out-of-court dispute resolution.

A “family law dispute” under the FLA means “a dispute respecting a matter to which the FLA relates” (such as parenting arrangements, child and spousal support, and property and debt division) (s. 1).

“Family dispute resolution” means “a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court” (s. 1). This includes assistance from a family justice counsellor or a parenting coordinator, mediation, arbitration, collaborative family law and other processes.

“Family dispute resolution professionals” include family justice counselors, parenting coordinators, lawyers advising clients in relation to family law disputes, mediators conducting family law mediations, and arbitrators conducting family law arbitrations (s. 1).

Part 2 of the FLA deals with the resolution of family law disputes generally. It includes various provisions to encourage out-of-court resolution of disputes, such as provisions about making agreements (ss. 6–7), about the duties of family dispute resolution professionals (s. 8), and about the duties of parties when engaged in family dispute resolution (s. 9).

Note that though the legislation encourages out-of-court resolution, family dispute resolution professionals must also screen for family violence and assess how any family violence could impact the safety and appropriateness of any family dispute resolution processes.


The 2019 Divorce Act contains new definitions (effective July 1, 2020) related to dispute resolution that did not exist in the 1985 Divorce Act.

“Family dispute resolution process” is defined as “a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law” (s. 2).

“Family justice services” means “public or private services intended to help persons deal with issues arising from separation or divorce” (s. 2).

Section 16.1(6) provides that, subject to provincial law, the court may direct parties to a family dispute resolution process as part of a parenting order. Because the provinces are largely responsible for establishing services that constitute “family dispute resolution processes,” the orders that the court can make under this section depend on the services available in the province.

See also the discussion of the duties of counsel and of the parties earlier in this chapter.

The balance of §1.06 introduces the specific out-of-court dispute resolution processes in BC.

3. Mediation

Mediation is a dispute resolution process where a neutral professional manages the negotiation process. Mediation is available whether or not court proceedings have commenced.

For mediation to take place, both parties must agree to participate in this process. The exception is that a party to a family law proceeding at the BC Supreme Court may compel mediation by serving on the other party a Notice to Mediate pursuant to the Notice to Mediate (Family) Regulation of the Law and Equity Act. The regulation describes how the process is commenced and the mediator is selected, and prescribes certain pre-mediation steps.

Mediation is particularly important in family law matters, where the costs of prolonged litigation are often beyond the parties’ means and legal disputes often involve parties who will have an ongoing relationship with one another long after the dispute is resolved (most notably, when the parties have children together). The benefits of mediation in family law include the following:

- When successful, mediation is less expensive than litigation and usually resolves matters more quickly than litigation.
- The mediation environment may assist the parties to focus more on the children’s interests than they would in an adversarial trial setting.
- The persons who have decision-making power in mediation are the parties themselves rather than the judge.
- Parties who resolve issues by mediation tend to return to mediation if future disputes arise.
Note that for these benefits to be meaningful the mediation process must be fair and safe, with careful screening for family violence and power imbalances, and proper disclosure of information and documents (for example, regarding financial issues).

Cultural differences may also affect how your client approaches dispute resolution. For example, in some Indigenous communities, circles are used as a mechanism for working through conflicts; some Muslim clients may want to resolve matters by applying Sharia law; and some orthodox Jewish clients may wish to resolve matters by applying Rabbinical law. However, it is important not to assume that certain clients would necessarily prefer certain approaches.

Mediation will not be suitable for all clients. For some clients the wounds from the separation may be too fresh; others are simply unwilling to contemplate any compromise. Some cases involving family violence or power imbalances may not be suitable for mediation. Even if mediation may be productive in a later stage of the dispute, it may be necessary to first commence proceedings in order to protect the client’s interests (for instance, to obtain orders for protection of persons and property).

(a) The Process

Before beginning the mediation, the mediator, the parties, and counsel will enter into a mediation agreement, which includes terms about the obligations of the parties, the role of the mediator, confidentiality, and fees.

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

Mediation may be conducted with the mediator, the parties, and counsel together in the same room, or alternatively by way of “shuttle mediation,” in which each party is in a separate room with their counsel and the mediator “shuttles” between them. Mediation may also take place with combination of the two, with everyone together for some parts of the mediation, and part (or most) of the mediation with the parties in separate rooms. Some mediators also provide “remote” mediation by videoconferencing or other technologies, which can be useful in some cases to accommodate geographic, access, or safety issues. The form of mediation in each case should prioritize safety.

The mediation process does not displace the role of counsel. Not only do lawyers routinely participate in the mediation process with the client, they also critically evaluate any potential settlement with the client and advise the client as to that client’s individual legal rights and the positive and negative consequences of any settlement.

In the course of the mediation, various proposals, terms, and drafts will go back and forth between the parties. It is important to avoid misunderstandings about whether a binding agreement has been reached, as this will likely lead to litigation, additional costs to the parties, and potential claims against counsel. Although a binding agreement can form without a written and signed agreement, relying on such an agreement is risky and should be avoided, as one party may later take the position that no binding agreement has been reached or the parties may disagree on the terms of the agreement. It is therefore very important to document the terms of the agreement in writing, executed by the parties. Counsel will usually witness their client’s signature. When there is litigation, the agreement can also be documented in a consent order that is then entered in court.

See the discussion in *C.C.R. v. T.A.R.*, 2014 BCSC 620 about best practices in mediation and the problems (including litigation) that can arise in their absence.

(b) Independent Legal Advice

Many people attend mediation without a lawyer, and the resulting agreement is then generally subject to each party obtaining “independent legal advice,” that is, advice from a lawyer whose role is to advise that party only. Clients in this situation will generally ask the lawyer to witness their signature on the agreement and sign a certificate of independent legal advice. Often, the lawyer will have had no prior involvement in the file, so if you are consulted in such circumstances, you will have to obtain all the necessary information from the client in order to properly assess the agreement and advise the client about it. You will be required to offer your opinion about whether the agreement is fair, and how it compares to the results that might be achieved through litigation or another dispute resolution process. You will also need to explain how the agreement affects the client’s rights and obligations in both the short
and long term, and provide your opinion about whether the obligations imposed on the client by the agreement are practical, manageable, and appropriate in the circumstances.

When giving this advice, it is important to respect the mediation process through which the agreement was reached and the right of the individual to settle the dispute. However, it is important to not just “rubber stamp” the agreement. Be alert to, and advise the client of, any unfairness and departure from the applicable laws.

You will run into agreements that are so one-sided and so obviously unfair that you cannot recommend the agreement to the client, and you may in fact vigorously recommend against entering into the agreement. If your client insists on signing such an agreement, you should send the client a letter summarizing your opinion of the agreement and confirming your client’s instructions. You may also refuse to witness the client’s signature on the agreement or to sign a certificate of independent legal advice. Note also that some clients will expect independent legal advice to be a brief meeting in which the lawyer reviews the agreement and then witnesses their signature and executes a certificate of legal advice. To avoid disputes and misunderstandings about your role, it is good practice to clearly explain it to the client in advance, including informing the client in writing that you may decline to witness their signature or to sign the certificate of independent legal advice.

(c) Qualifications of Mediators

The FLA Regulation, s. 4(1), provides that “Only a mediator who is qualified as a family dispute resolution professional may conduct a mediation in relation to a family law dispute” and sets out which professionals may act as family law mediators and their required qualifications. Under s. 4, a person may qualify by meeting the Law Society’s requirements if that person is a lawyer, or by meeting different requirements if that person is not a lawyer.

**Lawyers as Mediators**

The Law Society requires that lawyers who wish to act as family law mediators must have:

1. sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;
2. a minimum of 80 hours of approved mediation skills training, which must include theory and skills training, drafting, how to conduct a mediation, the statutory frame-

work of mediation, family dynamics and a minimum of 10 hours of role-playing scenarios; and

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

Lawyers who wish to hold themselves out as family law mediators may request accreditation through the Law Society after completing the above requirements. (For more information, see Law Society Rule 3-35(1) and Family Law Alternate Dispute Resolution Accreditation on the Law Society’s website.)

Appendix B, para. 2 of the BC Code sets out when a lawyer would be disqualified from acting as a family law mediator (as well as an arbitrator and a parenting coordinator) or as counsel for a party in the mediation due to a conflict of interest. The mediator must not be in a position in relation to the parties that could limit the mediator’s impartiality. The mediator must not have had a prior mediator relationship with either of the parties, and the mediator must not be in a position where confidential information received previously could be disclosed. These prohibitions extend to partners and associates of the family law mediator.

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

**Non-Lawyer Mediators**

A non-lawyer may qualify to conduct family law mediations by being a member in good standing of the Mediate BC Family Roster; a member in good standing of and certified mediator with Family Mediation Canada, who meets
its training and practice requirements; or by meeting the other requirements listed in s. 4(2)(d).

4. Arbitration

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

Arbitration offers a number of advantages compared to litigation and mediation, including the following:

- It is private and offers a certain amount of discretion—hearings are conducted in camera, no public records are kept, and arbitral awards are not published.
- It is flexible and adaptable to the needs of the parties and their disputes—arbitration hearings can be conducted with varying degrees of formality, using the procedural rules and rules of evidence selected by the parties and their arbitrator.
- It provides parties their choice of arbitrator—the parties can select the arbitrator whose skills are best suited to the matters in dispute.
- Unlike mediation, it resolves family law disputes even if the parties do not reach an agreement, because the arbitrator has the authority to make a decision.
- It can be relatively speedy—conferences and hearings can be scheduled at the convenience of counsel, the parties and the arbitrator.

As with other dispute resolution mechanisms, counsel should assess whether these benefits apply to the specific client. Any family law issue can be conclusively resolved through arbitration, except that the parties can only be divorced by an order of the BC Supreme Court.

(a) The Process

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

Arbitration hearings are generally formal in nature, although less so than court hearings, and use the same order of proceedings. The party nominated as the claimant proceeds first and presents the claimant’s case. The respondent’s case is next, and the hearing concludes with closing arguments. The arbitrator must provide the award (the decision) in writing.

An arbitration award in a family law proceeding may be filed in the court registry (Supreme Court Family Rule 2-1.2) and enforced in the same manner as a judgment or order of the court (Arbitration Act, s. 29). Pursuant to the Arbitration Act, the Supreme Court may set aside an award; it can also change, suspend, or terminate an award in the same way that a court can under the FLA. An award can be appealed to the Supreme Court on questions of law or mixed law and fact.

(b) Qualifications of Arbitrators

The FLA Regulation, s. 5(1), provides that “Only an arbitrator who is qualified as a family dispute resolution professional may conduct an arbitration in relation to a family law dispute.” Lawyers and non-lawyers may qualify as family dispute resolution professionals under this section.

Lawyers as Arbitrators

The Law Society accredits lawyers who wish to act as family law arbitrators. The qualification requirements are as follows:

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

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

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

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

Lawyers who wish to hold themselves out as family law arbitrators may request accreditation through the Law Society after completing the above requirements. (For more information, see Law Society Rule 3-36(1) and Family Law Alternate Dispute Resolution Accreditation on the Law Society’s website.)

Non-Lawyer Arbitrators

To qualify to conduct family law arbitrations, a non-lawyer arbitrator must be a member in good standing of the College of Psychologists of BC or the BC College of Social Workers and meet the additional requirements listed at s. 5. A non-lawyer arbitrator may only arbitrate matters related to children and limited matters of child support.

(c) Legislative Framework

The Arbitration Act, R.S.B.C. 1996, c. 55, applies to arbitrations generally. It also contains specific provisions for family law arbitration that distinguish it from arbitration in other areas of law (see e.g. ss. 2, 2.2, 23, 30, and 31).

5. Mediation-Arbitration (Med-Arb)

Med-Arb aims to combine the benefits of mediation and arbitration with a two-stage process managed by a single third party who is qualified as both a mediator and an arbitrator. In the first stage, the parties engage in mediation. If the parties do not reach an agreement, the process moves to the next stage, arbitration, which ultimately results in a decision made by the mediator/arbitrator.

6. Collaborative Law

Collaborative law is a negotiation-based dispute resolution process. It is a more structured process than mediation and is interdisciplinary, involving multiple professionals. In addition to lawyers, the collaborative process may include counsellors, financial advisors and child specialists. The purpose of the collaborative process is to reach an interests-based settlement with a minimum of emotional trauma to the parties and their children.

Family law lawyers who engage in the collaborative process have training in collaborative law and in mediation. At the beginning of the process, the parties and lawyers sign a special retainers agreement called a “Participation Agreement,” which obliges the lawyers to withdraw if the process fails and litigation is planned.

The collaborative process includes four-way meetings between counsel and their clients as well as meetings with the other professionals involved in the process. If successful, the process concludes with the execution of a separation agreement. The lawyers and the parties are expected to work with one another to make whatever disclosure and investigation may be necessary, manage conflict between the parties, and recruit the assistance of such third-party professionals as may be necessary to move negotiations forward.

7. Parenting Coordination

Parenting coordination is a child-centred, hybrid dispute resolution process that combines elements of mediation and arbitration to resolve disputes about the care and control of children. This process can be engaged where the parties have a final order or separation agreement in place. Parenting coordinators are family law lawyers, psychologists, registered clinical counsellors, social workers and mediators who have taken special interdisciplinary training on childhood developmental issues, attachment and family systems theories, conflict resolution, mediation and arbitration. Under s. 15 of the FLA, parenting coordinators may only be appointed pursuant to a court order or a written agreement between the parties. They may be appointed for up to two years, and the appointment can be renewed by agreement or court order for further periods of up to two years each. Section 18 of the FLA and s. 6 of the FLA Regulation specify the issues that the parenting coordinator may make determinations about.

(a) The Process

Parenting coordinators assist with the implementation of parenting arrangements contained in an order or agreement.

The parenting coordination process begins after the order or agreement appointing the parenting coordinator is made and the parenting coordination agreement is executed. The parenting coordination agreement sets out the terms of the parenting coordinator’s service and the obligations of the parenting coordinator and the parties, defines the scope of the parenting coordinator’s authority, and sets out the matters to be addressed and how the parenting coordinator can address them.

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

In addition to this dispute resolution function, parenting coordinators work with the parties to improve their communication skills and conflict management, in order to improve the parties’ capacity to co-parent.

(b) Qualifications of Parenting Coordinators

The FLA Regulation, s. 6(1) sets out who may act as a parenting coordinator and the necessary qualifications. See the Regulation for requirements for non-lawyer parenting co-ordinators.

Lawyers as Parenting Coordinators

The Law Society accredits lawyers who wish to act as parenting coordinators. The qualification requirements are as follows:

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

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

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

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

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

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

Lawyers who wish to hold themselves out as parenting coordinators may request accreditation through the Law Society after completing the above requirements. (For more information, see Law Society Rule 3-37(1) and Family Law Alternate Dispute Resolution Accreditation on the Law Society website).

Before advising clients about whether or not to propose or agree to parenting coordination, lawyers should consult the case law that has developed since this process was introduced under the FLA in 2013. For instance, there is case law on whether or not to appoint a parenting coordinator (see e.g. Robertson v. Vega Soto, 2019 BCSC 1140 and Hart v. Hart, 2019 BCSC 885), selecting a parenting coordinator when the parties cannot agree on one (see e.g. I.J.G.P.G. v K.M, 2018 BCSC 2468), and the scope of a parenting coordinator’s decision-making authority (see e.g. F.J.V. v. W.K.S., 2019 BCCA 67).

8. Family Justice Counsellors

Family justice counsellors are government family dispute resolution professionals whose roles are set out in s. 10 of the FLA. They typically work out of the Provincial Court registries and their services are free. Family justice counsellors may provide information about family law disputes; make referrals to services; and mediate disputes about guardianship, parenting arrangements, contact, and child and spousal support. They may also prepare reports regarding children (see §7.05).

The Provincial Court (Family) Rules require each party to meet separately with a family justice counsellor, and the court can order the parties to have additional meetings to attempt to mediate issues.

§1.07 Further Reading

These materials contain an overview of family law in BC; they are not an exhaustive depiction of this complex area of law. Counsel practicing family law should develop in-depth knowledge and ensure that their knowledge is up to date in the face of ongoing changes.

Given recent developments in family law, this list is divided into two sections: the first with a list of publications about family law in general, and the second with resources about the 2019 Divorce Act.

1. General Family Law Resources

The Law Society’s Practice Checklists Manual, a useful and frequently updated resource, is available online (www.lawsociety.bc.ca). The manual includes checklists for conducting family law client interviews, preparing agreements, and managing court proceedings.
There are several helpful publications from the Continuing Legal Education Society of BC:

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

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

- **Annual Review of Law and Practice** (softcover). An annual publication summarizing the law in 33 practice areas. The Annual Review covers major developments in family law, legislation and procedure, and provides annotated versions of the Supreme Court Civil Rules and the full text of the forms for the Supreme Court and Court of Appeal.

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

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

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

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

2. **2019 Divorce Act Resources**

The following are helpful resources about the 2019 Divorce Act:

- The Department of Justice’s online publication, “The Divorce Act Changes Explained,” contains a section-by-section comparison between the 1985 Divorce Act and the 2019 Divorce Act, and explains the reasons for the changes. This publication can be found at www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html, and it is referred to in various chapters of these materials. Additional Department of Justice materials, including a legislative background, can be found at https://www.justice.gc.ca/eng/fl-df/cfl-mdf/01.html.


Chapter 2

Introduction to Family Law Case Procedures

This chapter provides an overview of family law case procedures in the Supreme Court and Provincial Court of British Columbia. Subsequent chapters address specific topics in substantive family law and further procedural points.

The Supreme Court Family Rules, B.C. Reg. 169/2009 (the “SCFR”), govern family law procedures in the Supreme Court. The Provincial Court (Family) Rules (the “PCFR”) govern family matters in Provincial Court. Both sets of rules have been amended as a result of the coming into force of the Family Law Act (the “FLA”), and the SCFR will likely be amended when changes to the Divorce Act come into force.

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, S.C. 1985, c. 24. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date describe the legislation both before and after the amendments.

[§2.01] Which Statute to Apply?

In British Columbia, the Divorce Act and the Family Law Act (the “FLA”) govern most family law matters. The FLA came into force on March 18, 2013, repealing and replacing the Family Relations Act (the “FRA”). However, pursuant to s. 252 of the FLA, the FRA will continue to apply to property disputes that were commenced under the FRA prior to the coming into force of the FLA. It will also apply to disputes over property agreements between married spouses that were made when the FRA was in force.

The applicable legislation will depend on the marital status of the parties, the nature of the issues to be resolved, and the court selected to hear any litigation. The Supreme Court has jurisdiction to hear all matters under the Divorce Act and the FLA. The Provincial Court has jurisdiction to hear all matters under the FLA except for those set out at s. 193 (parentage, property and debt matters, pension matters, and matters related to children’s property). The Provincial Court does not have jurisdiction under the Divorce Act.

Only married spouses or formerly married spouses may invoke the Divorce Act, except that the Supreme Court may grant leave for someone who is not a spouse to make applications regarding children under the Divorce Act. Both married and unmarried parties may invoke the FLA.

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

As a result of the division of powers in ss. 91 and 92 of the Constitution Act, 1867, the property division provisions of the FLA generally do not apply to real property situated on First Nations reserve lands, except where the First Nation is a treaty First Nation and has the ability to alienate its land. When this exception applies, the First Nation will have standing in the proceeding under FLA s. 210, if so provided by its final agreement. Section 210 also directs the court to consider certain evidence and submissions from the treaty First Nation.

The Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c. 20 enables First Nations to enact their own matrimonial property laws under the Act, and contains provisional federal rules (applicable if the First Nation has not enacted its own laws) with respect to matrimonial real property situated on reserves.

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 Court—Supreme Court or Provincial Court

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

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This chapter only discusses the British Columbia Supreme and Provincial Courts.

1. Jurisdiction

Before commencing a proceeding, you must determine whether the court has jurisdiction to grant the remedy sought. The Supreme Court of British Columbia has jurisdiction to resolve all matters in a family law case. The Provincial Court has jurisdiction only over those matters specifically assigned to it by statute. Notably, the Provincial Court lacks jurisdiction to determine property issues under Parts 5 and 6 of the *FLA* and only the Supreme Court has inherent jurisdiction, including the *parens patriae* jurisdiction to make an order in the best interests of persons under a legal disability on an issue not governed by any legislation.

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

Both levels of court can make orders under the *FLA* respecting children, support, and all other matters provided for in the *FLA*, except as noted above. See the jurisdiction chart at Appendix 2.

Division 6, Part 5, of the *FLA* allows the Supreme Court to take jurisdiction and make orders affecting extraprovincial property in certain circumstances.

2. Disclosure and Discovery

Some mechanisms for disclosure under the SCFR are not available in the Provincial Court under the PCFR, including the examination for discovery of a party before trial, the examination of persons out of province, and the pre-trial examination of witnesses. These disclosure mechanisms may be essential for determining particular issues, such as a party’s income for the purpose of support payments. Therefore, counsel must carefully consider whether the additional discovery mechanisms available in Supreme Court make that court the better choice for the case.

3. Enforcement

Orders for child or spousal support, and for custody or access (under the 1985 *Divorce Act*) or for parenting time, decision-making responsibility or contact (under the 2019 *Divorce Act*) have legal effect and may be enforced throughout Canada (s. 20(2)). Such orders may be registered in the Supreme Court for enforcement purposes (SCFR 15-3(4)). Most provinces have legislation allowing the registration of similar orders made under the *FLA*.

The Provincial Court may enforce orders respecting parenting arrangements and contact with children made or registered by the Supreme Court in the same manner as it enforces its own orders for these matters (*FLA*, s. 195). It may also enforce support orders made or registered by the Supreme Court as if they were made by the Provincial Court under the *FLA* (SCFR 15-3(6)).

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

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

The Supreme Court of British Columbia has the power to punish for contempt when an order of this court is breached. The Provincial Court also has the power to punish for contempt, but only in the limited circumstances set out in the *Provincial Court Act* (s. 27.2), or when the contempt occurs “in the face of the court”; for instance, breach of a court order in front of the judge, or failure to deposit a document with the court (see e.g. *G.A.C. v. I.C.*, 2006 BCPC 380).

The enforcement mechanisms available under the *FLA* are available to both courts for the matters that are under their jurisdiction.

**[§2.03] Initiating Court Proceedings in Family Law Cases**

1. Supreme Court

   (a) Starting Family Law Cases

   The Supreme Court Family Rules govern “family law cases,” which are defined as proceedings in which a party seeks an order under the *Divorce Act*, the *FLA*, or the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, as well as an annulment, an adoption, or relief under trust or unjust enrichment claims that arise from a marriage-like relationship (SCFR1-1(1)).

   Most family law cases start when a party files a notice of family claim in Form F3 (SCFR 4-1(1)). However, several types of family law
actions must be started by filing a petition in Form F73 under SCFR 17-1 (SCFR 3-1(2.2)). Filing an agreement with the court by requisition also starts a family law case (SCFR 3-1(4.1)). See Halliday v. Halliday, 2015 BCCA 82 regarding the problems that can arise from procedural errors and confusion at the commencement of proceedings.

A person who starts an action with a notice of family claim is a claimant; a person who starts an action with a petition is a petitioner.

Other claims, such as claims in tort, equity or under the law of trusts, may be brought in a family law case under SCFR 3-1(5) and 21-3(1), provided the claims are related to or connected with 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 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 the named petition respondents (SCFR 4-1(2) and 17-1(3)). Pursuant to Rule 6-5(1) of the SCFR, notices of family claim and petitions may be served outside of British Columbia without leave if the court has jurisdiction in the family law case under any of the following:

- *Court Jurisdiction and Proceedings Transfer Act*, s. 10 (where a real and substantial connection with British Columbia exists);
- *FLA*, s. 74 (extraprovincial orders for guardianship, parenting arrangements or contact); or
- 1985 *Divorce Act*, ss. 3 or 4 and 2019 *Divorce Act*, ss. 3–6 (divorce proceedings and corollary relief proceedings).

Once served, respondents and petition respondents may contest jurisdiction by filing a jurisdictional response in Form F78 (SCFR 18-2(1)), without submitting to the jurisdiction of the court (SCFR 18-2(5)).

Absent a jurisdictional challenge, a respondent must 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 advancing a claim must file a counterclaim in Form F5 within the same time period (SCFR 4-4(2)); then the claimant must file a response to counterclaim in Form 6 within 30 days.

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: on being served with a copy of the filed petition, residents of Canada must respond within 21 days, residents of the United States within 35 days, and residents of anywhere else within 49 days.

Filed responses to family claims and counterclaims, and responses to petitions, are served on claimants and petitioners by ordinary service under SCFR 6-2 at the address for service set out in the notice of family claim or petition. Ordinary service is effected by leaving the document at the person’s address for service; mailing to the address for service; faxing to the fax number for service, if provided; or emailing to the email address for service, if provided. Note SCFR 6-2(3) for when service by each method is deemed to be effected.

(b) Interim Orders

Parties may seek interim (non-final) orders relating to various issues in the proceedings, including the care of children, child and spousal support, protection orders, and orders to restrain dealings with property. At the Supreme Court, these applications are brought in chambers. It is important to remember that a party to a family law case cannot apply for an interim order without first attending a judicial case conference (SCFR 7-1(2)), unless the court waives the requirement for a judicial case conference (SCFR 7-1(4)) or the subject matter of the application falls within the narrow range of exemptions set out in SCFR 7-1(3).

See Chapter 6 for more on interim applications in family law cases.

(c) Final Orders

When a family law case is undefended (usually when a respondent fails to file a response to family claim) a party may apply for a final order at trial or by requisition under SCFR 10-10(2) (SCFR 10-10(1)). See §10.01.

In a defended family law case, a party may obtain a final order following trial or may apply for the final order in chambers by summary trial under SCFR 11-3 (SCFR 10-11(1)).

(d) Form F8 Financial Statements

Supreme Court Family Rule 5-1 requires disclosure of financial information in certain contested family law cases. See §7.02.
2. Provincial Court (Family)

The Provincial Court (Family) Rules ("PCFR") are on the BC Laws website (www.bclaws.ca) and the Court’s website (www.provincialcourt.bc.ca). Note that changes to the PCFR and court procedures are expected, and a public consultation concluded in December 2019. Also note that some registries operate pilot projects that modify their procedures. This section describes the “regular” provincial court process under the PCFR.

A Provincial Court proceeding begins by filing an application to obtain an order in PCFR Form 1 or an application respecting existing orders or agreements in Form 2, together with a financial statement in Form 4 where there is a claim for support (see PCFR 4), 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, otherwise the respondent will not be entitled to notice of any part of the proceedings. Note that unlike the Supreme Court forms, which have separate forms for response and counterclaim, PCFR Form 3 includes both the response and the counterclaim. If a counterclaim is made, then the applicant must file a response to counterclaim.

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

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

(a) Family Justice Registries (PCFR 5)

Pursuant to PCFR 1, the registries at Kelowna, Surrey, Nanaimo and Vancouver (Robson Square) are “family justice registries” subject to PCFR 5. Under PCFR 5, the parties to a contested proceeding must meet with a family justice counsellor before a first appearance date can be set, except in case of emergency.

Either party may then request an appearance before a judge by filing PCFR Form 6.

(b) Parenting After Separation Designated Program Registries (PCFR 21)

Pursuant to PCFR 21, when the parties have children and the proceeding is commenced in the registries at Abbotsford, Campbell River, Chilliwack, Courtenay, Kamloops, Kelowna, Nanaimo, New Westminster, Penticton, Port Coquitlam, Prince George, Richmond, Surrey, Vancouver, Vernon, or Victoria, the parties to a contested proceeding involving the care of children or child support must attend the Parenting After Separation program (“PAS”), unless one of the exceptions listed in PCFR 21(4) to (6) applies or a judge grants an exemption or deferral under PCFR 21(7).

When attendance at a PAS program is required, at least one of the parties must attend the program and file a certificate of attendance before a first appearance date can be set (PCFR 21(8)), and both parties must attend and file a certificate of attendance before the first court appearance (PCFR 21(9)), subject to the exceptions under SCFR 21(4) to (7).

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

(c) Interim Orders

The Provincial Court can make interim orders about the issues within its jurisdiction, including parenting arrangements, child and spousal support, and protection orders.

Interim applications in Provincial Court are brought by notice of motion in PCFR Form 16, filed and served at least seven days before the date of the hearing. Evidence on interim applications may be given orally or, if permitted by the judge, by affidavit (PCFR 12(3)); it is usually faster to present evidence by affidavit than by oral testimony. If affidavit evidence is to be relied on, the applicant must serve a filed copy of the affidavit on the other party together with the notice of motion (PCFR 12(1)). There is no specific form under the PCFR to reply to an application, but PCFR Form 3 may be used if needed.

2 The registry of Port Coquitlam treats itself as a family justice registry and will apply to proceedings commenced in that court.
(d) Consent Orders

Parties can apply for a consent order at any point in the process (PCFR 14) by filing all of the following:

- a draft of the order sought, in Form 20, signed by both parties or their counsel;
- a request in Form 18 signed by one of the parties or a party’s counsel;
- a consent in Form 19, signed by both parties with witnesses; and
- affidavits in support of the order, as necessary.

A consent order that does not meet these formal requirements may be invalid (Amanat v. Markazi, 2011 BCSC 249; however, note that this decision was based not only on the PCFR but also on s. 10(1) of the FRA, which has not been preserved in the FLA).

§2.04 Urgent Matters

Matters that must be addressed more quickly than the rules of court normally permit may arise before or after proceedings have commenced. In family law cases, urgent matters typically involve protecting 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 the lawyer fails to secure the client’s interest in the family property, even if a cause for urgency is not evident.

1. Status of Litigation

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

2. Preservation of Property

Typically, the client will want to prevent property from being dissipated, encumbered, or sold pending settlement or trial, whether the assets are held jointly or in the other party’s name alone. Such property may include bank accounts and investments, the contents of safety deposit boxes, chattels and other movables, and real property.

There are several steps that can be taken to preserve real property:

- File a certificate of pending litigation under s. 215 of the Land Title Act (married and unmarried parties).

- File an entry under the Land (Spouse Protection) Act (married and unmarried spouses). Entries under the Land (Spouse Protection) Act are obtained through an administrative process and may be obtained without commencing proceedings.

- Apply for court orders:

  - Orders restraining the use, sale or encumbrance of property. (In proceedings under Part 5 of the FRA, this is available under s. 67 for married spouses only. In proceedings under Part 5 of the FLA, this is available under s. 91 for married or unmarried spouses.)

  - Orders protecting and preserving property under SCFR 12-1 and 12-4, or under s. 39 of the Law and Equity Act (married and unmarried parties).

Applications to protect property are discussed further in §6.04(7).

3. Protection of Persons

The client or the parties’ children may need to be protected in a variety of circumstances, including when there is a history of family violence, a threat that the children will be removed from the jurisdiction, or evidence of child neglect. The FLA provides for a number of restraining and protection orders.

Under s. 64 of the FLA, the court may make an order prohibiting the removal of a child from a specified geographic area.

Under s. 183, an “at-risk family member”—a family member whose safety is, or is likely, at risk from family violence—may obtain a protection order. Protection orders may include a variety of terms designed to protect the at-risk family member from harm, including limits on physical contact and communication, limits on attendance at specified locations, limits and prohibitions on weapons, and directions to a police officer to remove the other family member from a residence or other specified locations. At-risk family members may obtain such orders on their own application, an application brought on their behalf, or on the court’s own initiative.

Applications to protect persons are discussed further in §6.04(4).

4. Injunctive Relief Under the SCFR

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

Conduct orders are governed by ss. 222–228 of the FLA. Section 222 sets out the purposes for which a conduct order may be made. Sections 223–227 set out the specific types of conduct orders, which include the following:

- orders regarding communications between the parties;
- orders regarding a residence, including requiring a party to pay expenses for the residence (such as mortgage payments and taxes), requiring a party to supervise the removal of belongings, and prohibiting a party from terminating utilities for the residence; and
- orders requiring a party to do or not do something in relation to a purpose listed in s. 222.

While conduct orders may regulate the conduct of the parties and some financial matters, they are not intended to replace protection orders or orders for protection of property under s. 91. They may be made in addition to these orders or on their own. See s. 228 for enforcement of conduct orders.

6. Applying for 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)). In proceedings without notice, counsel have a duty to disclose all facts known to them that may affect the granting of the relief sought, whether those facts favour their client’s application or not.

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

Applications are discussed in more detail in Chapter 6.

§2.05 Variation Proceedings

Applications to vary final or non-final orders are brought when there has been a change in circumstances since the making of the order and the party seeking the variation argues that the original order is therefore no longer appropriate. The change has to be a “material change” of circumstances.

The test to vary an order depends on the legislation the order was made under and on the subject matter of the order. The individual chapters of the Practice Material: Family set out specific tests and legislative provisions for the variation of orders on specific subject matters. In addition to these specific tests, note the following:

- Section 215 of the FLA provides that a court may, on application by a party, change, suspend or terminate an order if there has been a change in circumstances since the order was made. Note that s. 215(2) precludes a court from varying orders made under Part 5 (property) or 6 (pensions), except as specifically set out in those parts.
- Section 216 of the FLA provides that the court may change, suspend, or terminate an interim order if there has been a change in circumstances or if evidence of a substantial nature that was not available has become available. For an analysis of this section, see e.g. B.K. v. J.B., 2015 BCSC 1481.

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

1. Supreme Court

An application to vary an order of the BC Supreme Court is brought by notice of application in Form F31 in the proceeding in which the order was made (SCFR 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. Note the different service requirements for applications to vary interim and final orders.

2. Provincial Court

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

3. Extraprovincial Orders

(a) Divorce Act Provisions

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 Supreme Court family law proceeding within which it is appropriate to bring the application (SCFR 3-1(2.4)).

If a party applies to vary a 1985 Divorce Act support order made outside BC 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, unless both parties consent to the jurisdiction of the court or the other party living in the other province has accepted the jurisdiction of the court (1985 Divorce Act, ss. 17-19). The 2019 Divorce Act attempts to simplify these procedures.

(b) **Interjurisdictional Support Orders Act**

For orders that were not made under the Divorce Act, applications to vary support orders of a court of another province or reciprocating jurisdiction are made under the Interjurisdictional Support Orders Act (“ISO”). When the applicant is in British Columbia, the process depends on whether the other jurisdiction is a reciprocating jurisdiction that requires a provisional order.

If a provisional order is not required, the applicant must submit certain prescribed forms to the designated authority for BC, who forwards those forms to the designated authority in the originating jurisdiction. In BC, the designated authority is the Ministry of the Attorney General. 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.

For variation under ISO in other situations, including when the reciprocating jurisdiction requires a provisional order or when the applicant is outside of BC, see the provisions of ISO.

[§2.06] **Divorce Proceedings**

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

(a) the spouses having lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding (but note that the spouses can resume cohabitation for the purpose of attempting reconciliation for no more than a total of 90 days—consecutive or not—during that year, without having to start the one-year separation period anew);

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

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

In order to grant a divorce, the court must be satisfied that there is no collusion in relation to the application for divorce, and it will dismiss the application if it finds there was collusion (Divorce Act, s. 11(1)(a)). Collusion is defined as “an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence to deceive the court” (1985 Divorce Act, s. 11(4); the 2019 Divorce Act contains modified wording but preserves its substance).

Adultery or cruelty may not be used to establish marriage breakdown if the behaviour was forgiven or was planned by the innocent spouse (Divorce Act, s. 11(1)(a) and (c)). Only the innocent spouse may pursue a divorce on these grounds. In McPhail v. McPhail, 2001 BCCA 250, the Court of Appeal stated that, because a finding of cruelty bears a stigma, it should be avoided when the divorce can be granted on the basis of separation for at least one year and the finding of cruelty serves no purpose (see also Aquilini v. Aquilini, 2013 BCSC 217, which extended the reasoning in McPhail to adultery). The courts have granted divorces on the basis of cruelty where the parties had not been separated for at least one year (see Paheerding v. Palihati, 2009 BCSC 557 and Kaler v. Dhanda, 2002 BCCA 631).

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 reason for marriage breakdown, and that “reasonable arrangements” are in place for the support of any children of the marriage (s. 11(1)(b)). Child support in accordance with the CSG is presumed to be “reasonable arrangements.” If the support arrangements are different than the CSG, evidence should be adduced about how they are reasonable.

As with service of all notices of family claim, the notice of family claim in a divorce proceeding must be personally served on the respondent by someone other than the claimant (SCFR 6-3(2)(a)). An affidavit of personal service in Form F15 will be required to prove service if no response is filed (SCFR 6-6(1)(a)).

The affidavit of service must show the means by which the person effecting service identified the respondent. If the respondent is not known to the person effecting service, identity may be confirmed by examining the respondent’s driver’s licence or other photo identification; the server should also be provided with a photograph of the respondent to confirm identity, which will then be attached as an exhibit to the affidavit of personal service. When no response has been filed, the registry currently requires that if the person to be served is identified by a
photograph, then the supporting affidavits must include a statement by a person who is personally familiar with the respondent that the person in the photograph is the respondent. This situation often arises when the only claim is for a divorce and the claimant applies for a desk order. (See also Chapter 10 regarding undefended divorces.)

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

Section 22 of the Divorce Act deals with the recognition of foreign divorces. Note that while the wording of this section was amended in the 2019 Divorce Act, the amendments do not change the substance of this section. A divorce granted in another country is recognized if it was made by a “competent authority” (2019 Divorce Act) or an authority “having jurisdiction” to make a divorce order (1985 Divorce Act), and either spouse was resident in that country for at least one year immediately preceding the commencement of the divorce proceedings.
Chapter 3

Parenting Arrangements and Care of Children

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act…, S.C. 2019, c. 16. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date describe the legislation both before and after the amendments.

[§3.01] Applicable Legislation

Parenting arrangements and the care of children may be governed by both the federal Divorce Act and the provincial Family Law Act, depending on the marital status of the parties:

- The Divorce Act addresses parenting arrangements as corollary relief to a divorce. Accordingly, it applies when the parties are married and a claim is made for a divorce, or when the parties have already divorced under the Act. As a result, in the case of married parents (or formerly married parents who divorced under the Divorce Act), both the Divorce Act and the Family Law Act may apply.
- The FLA applies to married and unmarried parties, including parties who were divorced under foreign legislation and parties who are married but are not seeking a divorce.

If an order is silent about which act it is made under, it is presumed to have been made under the Divorce Act (C.K.B.M. v. G.M., 2013 BCSC 836). This is because of the doctrine of paramountcy, which holds that federal legislation is paramount over provincial legislation. However, the doctrine of paramountcy does not prevent the court from making orders under the FLA too, if there are no “operational inconsistencies” between the statutes (see Hansen v. Mantel-Hansen, 2013 BCSC 876; B.D.M. v. A.E.M., 2014 BCSC 453; and N.U. v. G.S.B., 2015 BCSC 105). The court can therefore make orders under the Divorce Act that are supplemented by orders under the FLA. As a lawyer you should be sure to identify the applicable legislation when you draft any order or agreement.

The 1985 Divorce Act and the FLA have different frameworks and use different terminology with respect to parenting arrangements. The 1985 Divorce Act uses the terms “custody” and “access” for parenting arrangements; the FLA uses the terms “guardianship,” “parental responsibilities,” “parenting time,” and “contact.” The 2019 Divorce Act uses language that is similar to the FLA’s language, including the terms “decision-making responsibility,” “parenting time,” and “contact.” Counsel likely will continue to encounter many orders and agreements made under the 1985 Divorce Act and should be familiar with both the prior and amended legislation.

Note that other amendments to the Divorce Act include provisions for the implementation of the 1996 Convention on Parental Responsibility and Protection of Children, which concerns cross-border recognition and enforcement of orders regarding parenting arrangements. These amendments not scheduled to come into effect on July 1, 2020 and are not discussed in this chapter.

[§3.02] Parenting Arrangements and Care of Children under the Family Law Act

The FLA uses the concepts of “guardianship,” “parenting responsibilities,” “parenting time” and “contact” to address parenting arrangements and the care of children. The core principle of the FLA is that “[i]n making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only” (s. 37). Section 37(2) lists the factors that the court must consider in assessing the best interests of the child. This is not an exhaustive list and the court can consider any other relevant factor:

(a) the child’s health and emotional well-being;
(b) the child’s views, unless it would be inappropriate to consider them;
(c) the nature and strength of the relationships between the child and significant persons in the child’s life;
(d) the history of the child’s care;
(e) the child’s need for stability, given the child’s age and stage of development;
(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

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

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

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

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

Under s. 37(3), an agreement or order is not in a child’s best interests unless “it protects, to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being.”

Lastly, s. 37(4) provides that the court “may consider a person’s conduct only if it substantially affects [a factor in s. 37(2)], and only to the extent that it affects that factor.”

Note that s. 38 of the FLA contains the following additional requirements for consideration in relation to family violence (for the purpose of s. 37(2)(g) and (h)):

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

(g) the harm to the child’s physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter.

When considering the best interests of the child under ss. 37 and 38, keep in mind the definition of “family violence” (s. 1 of the FLA; see §1.05(1)).

1. Guardianship

(a) Parents as Guardians

The FLA distinguishes between “guardians” and those who are not “guardians.” Under s. 39(1) of the FLA, parents who live together are the guardians of the child; they continue to be the guardians after separation unless otherwise provided in an order or an agreement.

A parent who has never lived with the child is presumed not to be a guardian unless one of the following applies:

- the parent is appointed guardian by an agreement made between all of the child’s guardians (FLA, s. 39(3)(a));

- the parent regularly cares for the child (FLA, s. 39(3)(b));

- the parent is appointed guardian by court order (FLA, s. 51); or

- s. 30 of the FLA, dealing with assisted reproduction, applies to the parent.

Case law has been developing about what constitutes “regularly” caring for the child under s. 39(3)(b) of the FLA. This case law should be carefully reviewed when advising about whether a parent is a guardian. Note that the term “parent” under s. 39 of the FLA refers to biological parents only and does not apply to step-parents.

(b) Court-Appointed Guardians

A person who is not a guardian under s. 39 may apply to be appointed by the court as a guardian of a child (FLA, s. 51). Such persons typically include parents who are not guardians, grandparents, and other caregivers.

Applicants must give notice of the application to each parent and guardian of the child and to each adult with whom the child lives and who cares for the child (s. 52). If the child is a Nisga’a or other treaty First Nation child, notice must be given to the First Nation government pursuant to ss. 208 and 209.

If the application is being made in the Provincial Court, the applicant must comply with PCFR 18.1 and complete a special affidavit in Form 34. In the Supreme Court, the applicant must comply with SCFR 15-2.1 and complete an affidavit in Form F101. Both affidavits require information relating to the applicant’s relationship with the child, the applicant’s history of caring for other children, and any civil or criminal proceedings relevant to the safety of the child. Recent police, protection order
registry, and child protection records checks must be provided with the affidavit.

(c) Standby Guardians

Under s. 55(1) of the FLA, a guardian who is facing permanent mental incapacity or terminal illness may appoint a person to become a child’s “standby guardian,” in addition to the appointing guardian, while the appointing guardian is alive. A guardian appointed as a standby guardian must consult with the appointing guardian to the fullest extent possible regarding the care and upbringing of the child (FLA, s. 55(4)).

A standby guardian is appointed by completing a document called “Appointment of Standby or Testamentary Guardian” (Form 2 of the FLA Regulation; see Appendix 3). Section 55 of the FLA sets out the conditions that must be met in order for the appointment to be effective. These conditions include that the form must be signed by the guardian and two or more witnesses, present at the same time, who sign in the presence of each other and the guardian. The form must also state what conditions must be met for the appointment of the standby guardian to take effect.

The appointing guardian can only give the standby guardian the same parental responsibilities that the appointing guardian has with respect to the child (FLA, s. 56). The appointing guardian, while still capable, may revoke the standby guardianship appointment. If the appointing guardian does not revoke the standby guardianship appointment, then the standby guardian will continue as the child’s guardian on the death of the appointing guardian, despite what a will made by the appointing guardian might state (FLA, s. 55(5)).

(d) Successor/Testamentary Guardians

Under s. 53 of the FLA, a guardian may appoint a successor guardian (also called a “testamentary guardian”) in a will or by completing a document called “Appointment of Standby or Testamentary Guardian” (Form 2 of the FLA Regulation; see Appendix 3). When a testamentary guardian is being appointed, the form indicates that the appointment takes effect on the death of the appointing guardian. As noted above, the form must be signed by the guardian and two or more witnesses, present at the same time, who sign in the presence of each other and the guardian.

A guardian appointing a successor guardian must consider only the best interests of the child when making the appointment. The appointing guardian cannot grant the successor guardian greater parenting responsibilities than the appointing guardian actually has with respect to the child (FLA, s. 56).

(e) Death of a Guardian

If a child’s joint guardian dies without having appointed a successor guardian and if there is a surviving guardian who is also the child’s parent, that surviving parent guardian becomes the child’s sole guardian. The surviving guardian will have all of the parental responsibilities for the child, unless a court orders otherwise (FLA, s. 53(3)).

If a child’s sole guardian dies or a child’s joint guardians die and the child has no remaining guardian, s. 51 of the Infants Act provides for default guardians. It states that where a child otherwise has no guardian, the Director under the Child, Family and Community Service Act becomes the personal guardian of the child and the Public Guardian and Trustee becomes the property guardian of the child. Their guardianship continues unless and until another appropriate person is appointed by the court to become the guardian of the child in their place (FLA, s. 51).

(f) Pre-FLA Guardianship Agreements and Orders

Parties who have custody or guardianship of a child under an order or agreement made prior to the coming into force of the FLA are automatically guardians under the FLA, on the terms set out in the order or the agreement.

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

2. Parental Responsibilities

Under s. 40 of the FLA, only a guardian may exercise “parental responsibilities” and have “parenting time” with a child. Unless an order or agreement provides otherwise, each guardian of a child may exercise all of the parental responsibilities in relation to the child, in consultation with the other guardians, unless consultation would be unreasonable or inappropriate.
Parental responsibilities are listed in s. 41:

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

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

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

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

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

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

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

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

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

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

(k) subject to any applicable provincial legislation,

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

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

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

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

The presumption of guardianship under s. 39(1) means that if a parent seeks to be the only guardian, the guardianship of the other parent must be terminated. Case authorities indicate that guardianship will be terminated in extreme cases only, and the court will first consider whether the issues can be addressed by allocating some or all of the parental responsibilities to one parent while maintaining the guardianship status of both parents (see e.g. *M.A.G. v. P.L.M.*, 2014 BCSC 126).

3. Parenting Time and Contact

The *FLA* describes the time a guardian spends with a child as “parenting time.” During a guardian’s parenting time, the guardian has the responsibility for making day-to-day decisions for the child, subject to any order or agreement allocating responsibility for certain decisions to another guardian.

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

4. Parentage

The *FLA* introduced new provisions for the determination of parentage, including in cases of assisted reproduction, which is defined as “a method of conceiving a child other than by sexual intercourse” (s. 20). Generally, the following apply for the purposes of BC law (s. 23):

- a person is the child of his or her parents;
- a child’s parent is the person determined under Part 3 of the *FLA* to be that child’s parent; and
- the relationship of parent and child and kinship relationships flowing from the parent-child relationship must be determined under Part 3 of the *FLA*.

Sections 26–30 then sets out the provisions for determining parentage. Note that s. 25 provides that in the case of adopted child, the *Adoption Act* applies rather than ss. 26–30.

Section 31 deals with applications for orders declaring parentage when there is a dispute. The Supreme Court may make an order declaring parentage, and the Provincial Court may do so only if the order is necessary to determine another family law dispute over which the provincial court has jurisdiction (i.e. parenting arrangements and support).

Sections 34–36 address the recognition of extraprovincial orders that declare a person’s parentage. For orders made in other provinces, s. 35 provides that the court must recognize the order unless evidence becomes available that was not available at the time the extraprovincial order was made, or that order was obtained by fraud or duress. For non-Canadian orders, s. 36 sets out when the court must...
recognize the order and when the court may decline to recognize it.

On recognition, an extraprovincial order has the same effect as if made under s. 31.

5. Extraprovincial Matters Respecting Parenting Arrangements

Sections 72–79 of the FLA address parenting matters when both BC and another province or country may be involved. The purpose of these provisions is to ensure that applications about children are determined based on the best interests of the child only, to avoid having orders made in multiple jurisdictions, to discourage child abduction, and to provide for recognition and enforcement of non-BC orders (s. 73).

Section 74 applies when orders about parenting matters may be made in more than one jurisdiction. The section provides that the BC court has jurisdiction only if the child is “habitually resident” in BC (s. 74(a)), or if enumerated circumstances apply (s. 74(b)). Sections 75 and 76 address recognizing and superseding extraprovincial orders; s. 77 addresses the wrongful removal of a child; and ss. 78 and 79 address extraprovincial evidence.

[§3.03] Parenting Arrangements and Care of Children Under the 1985 Divorce Act and the 2019 Divorce Act

Under the 1985 Divorce Act, the care of children is managed by orders for “custody” and “access.” These terms do not apply to parenting arrangements under the 1985 Divorce Act; instead, the applicable terms are “parenting order,” “contact order,” “decision-making responsibility,” and “parenting time.”

A “child of the marriage” is defined in the Divorce Act as 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 due to illness, disability, or being in full-time attendance at a university or college. The significance of the definition of “child of the marriage” for adult children usually relates only to whether child support must be paid, as adult children will generally not be subject to custody and access orders (for a discussion about custody and access for disabled adult children, see e.g. Ross v. Ross, 2004 BCCA 131). Stepchildren may also qualify as children of the marriage (s. 2(2) and Chartier v. Chartier, [1999] 1 S.C.R. 242).

The amendments to the Divorce Act did not change the definition of “child of the marriage,” but the definition of “spouse” has been amended to include former spouses, for the purposes of listed sections (2019 Divorce Act, s. 2(1)).

1. Applications by Non-Spouses

Under the 1985 Divorce Act, a person who is not one of the spouses may not apply for custody of, or access to, a child without leave of the court (s. 16(3)).

Under the 2019 Divorce Act, parenting orders may be made on application by either spouse or by “a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent” (s. 16.1(1)). Applicants for a parenting order who are not a spouse must first obtain leave from the court to make the application (s. 16.1(3)).

2. Jurisdiction

Jurisdiction provisions in general are set out at Chapter 2. Below are specific provisions that relate to the jurisdiction to make orders about parenting arrangements.

(a) 1985 Divorce Act

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

(b) 2019 Divorce Act

If an application is made for a parenting order or a variation of a parenting order, and the child in question is habitually resident in another province, the court may transfer the proceedings to that province (on the application of either party or the court’s own motion; s. 6(1) and (2)).

If the court is seized of an application for a parenting order, it also has jurisdiction regarding applications for contact orders for that child (s. 6.1(1)).

The court in the province in which the child is habitually resident has jurisdiction to hear applications for contact orders and for variation of parenting orders or contact orders, provided that there are no pending variation proceedings in another province, and unless the court is of the opinion that the court of another province is better placed to hear and determine the application (s. 6.1(2)).

Section 6.2 addresses jurisdiction when a child has been removed from or retained in a prov-
ince contrary to the provisions of the 2019 Divorce Act or provincial legislation. In general, the court of the child’s habitual residence retains jurisdiction despite the removal or retention, subject to specified exceptions.

Section 6.3 addresses jurisdiction when the child is habitually resident outside of Canada. Subject to exceptions, a court in a province only has jurisdiction to make or vary orders regarding such a child in “exceptional circumstances” and if the child is present in that province. Section 6.3(2) sets out factors for consideration in determining whether there are “exceptional circumstances.”

3. The “Best Interests of the Child” Test

(a) 1985 Divorce Act

Section 16(8) of the 1985 Divorce Act provides that, in making an order for custody or access, the court will consider only the best interests of the child, as determined by reference to the condition, means, needs, and other circumstances of the child.

Section 16(9) provides that 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.

Section 16(10) requires the court to give effect to the principle that a child “should have as much contact with each parent as is consistent with the best interests of the child,” and to take into account the willingness of each person seeking custody to facilitate that contact. These provisions are often referred to as the “maximum contact principle” and the “friendly parent rule.” The “maximum contact” principle is not absolute: it is an important factor but has to be balanced with all the other circumstances (Gordon v. Goertz, [1996] 2 S.C.R. 27).

Although the 1985 Divorce Act does not contain a list of factors to be considered when determining the best interests of the child, the BC Supreme Court has held that the factors listed at s. 37 of the FLA can be a helpful framework (E.M.A v. M.A.A., 2014 BCSC 1084; the s. 37 factors are discussed above in §3.02).

The determination of custody under the 1985 Divorce Act is individualized and turns on the facts of each case. There is no exhaustive list of factors that the court may consider. Some common factors that have emerged from case law include the following:

- the history of the care of the children and the respective parenting skills of each party;
- substance abuse and addictions;
- violence; and
- ability to cooperate and co-parent.

The best interests of the child are not determined on the basis of the physical comfort and material advantages available at one parent’s home. The psychological, spiritual and emotional environment of the parents’ households will also be considered.

It is generally considered to be in the best interests of siblings to keep them together. When the circumstances indicate otherwise, 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 will also consider the Indigenous or cultural heritage of a child when determining what is in the best interests of the child. For a review of appropriate evidence to lead on this factor, see L.(A.) v. K.(D.), 2000 BCSC 480, aff’d 2000 BCCA 455.

Although the 1985 Divorce Act is silent on whether to consider the views of a child, Canada is a signatory to the United Nations Convention on the Rights of the Child, and so the court must ensure that children are afforded the opportunity to be heard in any judicial proceeding affecting their interests (art. 12(2)). The court is not bound by the views and wishes of children but may consider them.

(b) 2019 Divorce Act

As the 2019 Divorce Act was not yet in force at the time these materials were prepared, there is no case law applying this new statutory framework. Counsel should keep a close eye on case law development once the Act is in force. Given the similarities between some of the parenting provisions of the 2019 Divorce Act and the FLA, it is possible that decisions under the FLA may be considered.

As in the 1985 Divorce Act, the 2019 Divorce Act provides that the “best interests of the child” are the only consideration for the court in making parenting orders or contact orders (s. 16(1)). A key change from the 1985 Divorce Act is the addition of detailed factors that the court must consider when determining the best interests of the child. The legislation also specifies how these factors are to be applied.

The mandatory factors to be considered are as follows (s. 16(3)):
In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child’s needs, given the child’s age and stage of development, such as the child’s need for stability;

(b) the nature and strength of the child’s relationship with each spouse, each of the child’s siblings and grandparents and any other person who plays an important role in the child’s life;

(c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;

(d) the history of care of the child;

(e) the child’s views and preferences, giving due weight to the child’s age and maturity, unless they cannot be ascertained;

(f) the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child’s care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

There are many similarities between these factors and those set out in s. 37 of the *FLA*, but there are also differences. For example, factors (c) and (i) above (the willingness of each spouse to support the child’s relationship with the other, and the ability and willingness of each party to cooperate with the other) are not factors under the *FLA*.

Section 16(4) sets out the factors that the court must consider when considering the impact of family violence under s. 16(3)(j):

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

(e) any compromise to the safety of the child or other family member;

(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

(h) any other relevant factor.

The structure of ss. 16(3) and 16(4) of the 2019 *Divorce Act* is similar to ss. 37 and 38 of the *FLA*: s. 16(3) of the *Divorce Act* and s. 37 of the *FLA* list the factors that must be considered in determining the best interests of the child, which include family violence; s. 16(4) of the *Divorce Act* and s. 38 of the *FLA* then set out additional mandatory considerations when family violence is present.

Section 2(1) of the 2019 *Divorce Act* defines “family violence” (see §1.05(2)).

Section 16(2) aims to resolve potential conflicts between the 16(3) factors by providing for a “primary consideration”:

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child’s physical, emotional and psychological safety, security and well-being.
Note that the aspects of the child’s well-being are the same as those in s. 37(3) of the FLA, but the wording about their application differs between the statutes.

Whether the various differences between the FLA’s s. 37 and the 2019 Divorce Act’s ss. 16(1)–(3) will lead to a different application of the best interests of the child principles will be seen as case law develops.

Similar to the 1985 Divorce Act and the FLA, the 2019 Divorce Act provides that the court will not consider past conduct of any person “unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order” (s. 16(5)).

There are some changes to the provisions about allocating parenting time, when compared to the 1985 Divorce Act. Section 16(6) of the 2019 Divorce Act provides that in allocating parenting time, the court shall give effect to the principle that a child should have “as much time with each spouse as is consistent with the best interests of the child.” The marginal note for this provision has changed from “maximum contact” (under the 1985 Divorce Act) to “Parenting time consistent with the best interests of the child,” to better reflect the intent of the provision (see “The Divorce Act Changes Explained,” available on the Department of Justice’s website). The “friendly parent rule” (the willingness of the spouse to facilitate the child’s relationship with the other spouse), which was joined with the “maximum contact” principle in the 1985 Divorce Act, is now reflected in s. 16(3)(c) as just one of the factors to be considered in assessing the best interests of the child.

Overall, the allocation of parenting time is subject to the primary consideration of “the child’s physical, emotional and psychological safety, security and well-being” (s. 16(2)). This is also consistent with the interpretation of the maximum contact principle in Gordon v. Goertz, which stated that the maximum contact principle is important but not absolute, and must be balanced with all other factors.

4. Types of Orders

(a) 1985 Divorce Act

Under the 1985 Divorce Act, the care of children is managed by orders for “custody” and “access.”

Joint and Sole Custody Orders

In a joint custody arrangement, both parties participate in making decisions about the child, subject to any other terms that the court orders. Joint custody does not mean that the parties have equal time with the child. The child may reside primarily with one of them and have access with the other parent.

In a sole custody arrangement, the custodial parent has the full bundle of rights and responsibilities with respect to the child, and may make all the decisions regarding the child, subject to any rights and responsibilities granted to the non-custodial parent. In a sole custody arrangement, the child typically resides primarily with the custodial parent and has access with the non-custodial parent.

Access Orders

While “access” is not a defined term under the Divorce Act, access generally refers to the time with the child that is allocated to the parent with whom the child does not primarily reside. 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 (1985 Divorce Act, s. 16(10); see comments in §3.03(3)(a)). 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.)).

(b) 2019 Divorce Act

In the 2019 Divorce Act the concepts of “decision-making responsibility,” “parenting time” and “contact” replace the concepts of “custody” and “access” from the 1985 Divorce Act.

Parenting Orders

Parenting orders (ss. 16.1 to 16.4) may provide for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage. These orders may allocate parenting time and decision-making responsibilities between parties, include terms for communications between the child and the persons who have parenting time or decision-making responsibilities, and provide for other matters that the court considers appropriate (s. 16.1(4)).

Parenting orders may be made for a set or indefinite period of time and “impose any terms, conditions and restrictions that [the court] considers appropriate” (16.1(5)).
The 2019 Divorce Act also expressly provides for specific terms that the court may order:

- supervision of parenting time (16.1(8));
- parenting time schedule (16.2(1)); and
- prohibition on the removal of a child from a specified geographic area (16.1(9)).

Note that these types of orders were being made under the 1985 Divorce Act as well, but under the umbrella of “additional terms and conditions” that the court was authorized to order.

Section 16.2(2) provides that a person who has parenting time has the exclusive authority to make “day-to-day decisions” about the child during their parenting time, unless otherwise ordered by the court. Section 16.2(3) permits the court to allocate other decision-making responsibilities to one or more of the persons who may apply for parenting orders.

Persons who have parenting time or decision-making responsibilities are entitled to information concerning the child’s well-being, health, and education from other persons who have parenting time with or decision-making responsibilities about the child, and from third parties. This entitlement is subject to other applicable laws (for example, provincial privacy laws) and to the court ordering otherwise.

**Contact Orders**

The court may order contact with a child to a person who does not have parenting time with that child, for example, for grandparents and other family members. Contact may be by way of visits or specified communications (16.5(5)).

An applicant for a contact order must first obtain leave of the court to make the application.

As with parenting orders, the only consideration is the best interests of the child, and the court has to consider all relevant factors, including whether the applicant can have contact with the child other than by a contact order (s. 16.5(4)). For example, a grandparent might be able to have contact with the child during the parenting time of one of the parents (by agreement with that parent), rather than by having an independent contact order.

The court may impose terms and conditions that the court considers appropriate as part of the contact order (s. 16.5(6)). This general provision is in addition to the specific terms that the court may order, such as supervision and prohibition on the removal of a child from a specified geographic area.

When a contact order is made after an order for parenting time had been made, the court may modify the parenting time to accommodate the terms of the contact order (16.5(9)).

**Parenting Plans**

A parenting plan means “a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree” (16.6(2)).

If the parties submit a parenting plan to the court, the court must include it in the parenting order or contact order (as applicable), unless the court considers it to be not in the best interests of the child. In that case, the court may modify the parenting plan and include the modified parenting plan in the parenting or contact order (16.6(1)).

The Department of Justice has developed an online Parenting Plan Tool to assist parties with preparing a parenting plan (www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/form/form.html).

**[§3.04] Parenting Arrangements: Additional Practice Points**

1. **Parenting Schedules**

   Whether the FLA or the Divorce Act applies, the amount and scheduling of time that a person has with the child is governed by the best interests of the child. In crafting parenting schedules, it is important to consider the practical aspects of the schedule, including the child’s age and any specific needs, where each parent lives, the locations and schedules of schools and activities, transportation between the parties, specific holidays and events that may be of particular importance to the parties or the child, quality time with the child, and the amount of time that the child will tolerate being away from the child’s primary caregiver or from each of the parents. Common schedules include primary residence with one parent and some combination of weekend and weekday time with the other parent; equal parenting time with each parent with some transitions during the week, and alternating weeks with each parent.

2. **Terms and Conditions**

   If there are concerns about a party’s conduct or ability to care for the child, the order or agreement can include terms tailored to address these concerns. For example, a party may be required to complete parenting courses, attend specified counselling, refrain from consuming alcohol or other substances before and during parenting time, and
refrain from driving with the child. The court may order that a person’s parenting time or contact with the child be supervised by a third party, though this ordinarily requires evidence that to do otherwise would put the child at risk of harm (see F.K. v. M.K., 2010 BCSC 563 and later decisions regarding supervised access or parenting time).

3. Evidence

In drafting affidavits or preparing oral evidence for a hearing on these matters, counsel should identify the applicable legal test and ensure that the evidence presented addresses the test. For example, s. 37 of the FLA and s. 16.1(3) of the 2019 Divorce Act each list the factors to be considered in assessing the best interests of the child; counsel should carefully assess which of these factors apply to the specific case and lead evidence about them, as well as about any other factors that are not listed in those sections but which may be relevant to the specific case.

Reports under s. 211 of the FLA are often very useful in negotiating an agreement on parenting arrangements and, failing agreement, will be presented as expert evidence at trial. See §7.05 for more information on s. 211 reports and other reports concerning children.

§3.05 Variation of Parenting Arrangements and Contact Orders

Applications to vary orders respecting parenting arrangements and contact are brought when there has been a change in circumstances since the making of the order and the party seeking the variation argues that the original order is therefore no longer appropriate.

The test on an application to vary an order depends on the legislation the order was made under and the subject matter. Overall, any variation of a family law order concerning children must be based only on the best interests of the child.

1. 1985 Divorce Act

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

In Gordon v. Goertz, the leading case on the variation of custody orders, the court set out a two-stage inquiry when a change is sought (at para. 9):

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.

A “material change” is a “change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the needs of the child” (Gordon v. Goertz at para. 13).

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. As with initial orders, any order varying custody or access must be tailored to the specific circumstances of the child, taking into account the child’s best interests (Gordon v. Goertz; Robinson v. Filyk, (1996), 28 B.C.L.R (3d) 21).

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

- the relationship between the child and the parent with whom the child primarily lives;
- the relationship between the child and the other parent;
- the views of the child; and
- 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.

Section 17(9) requires that the court give effect to the same “maximum contact principle” included in s. 16(10) and, if the variation would give custody to a person who does not currently have custody, must consider that person’s willingness to facilitate contact with the other spouse. As with initial orders, however, these principles are not absolute and the governing principle remains the best interests of the child.

2. 2019 Divorce Act

Before varying an existing parenting or contact order, the court must be satisfied that there has been a change in the circumstances of the child since the existing order was made (s. 17(5)).

If the required change is demonstrated, then the court may vary the initial order, based on the same principles that apply for an initial order with respect
to parenting or contact under ss. 16-16.6. (For the applicable principles, see §3.03(3)(b) above.)

3. Family Law Act

The FLA permits applications to change, suspend or terminate orders respecting parenting arrangements and contact. This includes the allocation of parental responsibilities and parenting time among guardians and the amount of contact of a person who is not a guardian. The court must be satisfied that since making the order there has been a change in the needs or circumstances of the child, including if the change occurs because another person’s circumstances changed. In Williamson v. Williamson, 2016 BCCA 87, the Court of Appeal determined that the change must be a “material change in circumstances,” similar to the required change under the Divorce Act.

The applicable provisions of the FLA include the following:

- Section 47 of the FLA provides that a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child including a change brought about because of a change in the circumstances of another person.
- Section 60 of the FLA provides that a court may change, suspend, or terminate an order respecting contact with a child if there has been a change in the needs or circumstances of the child.
- Section 215 of the FLA provides generally that a court may, on application by a party, change, suspend or terminate an order if there has been a change in circumstances since the order was made.
- Section 216 of the FLA provides that the court may change, suspend, or terminate an interim order if there has been a change in circumstances or if evidence of a substantial nature that was not available has become available. For an analysis of this section, see e.g. B.K. v. J.B., 2015 BCSC 1481.

[§3.06] Relocation and Mobility

Relocation cases, which arise when a parent wishes to move with the child, are some of the most difficult cases in family law. The court’s decision may have profound consequences to everyone involved. Further, it is usually difficult or impossible to find a “middle ground” between the parties’ positions, especially when the proposed relocation is to a distant place.

Although relocation cases under both the 1985 Divorce Act and the FLA are determined based on the best interests of the child, the analytical framework under each of these statutes is markedly different. The relocation provisions of the 2019 Divorce Act are more in line with the FLA, but there are still some differences. It is important in any event to be clear about which statute applies.

1. Relocation and Change of Residence Under the Family Law Act

Under the FLA, a different framework applies to the relocation case depending on whether or not there is already an order or agreement about parenting arrangements in place at the time that one of the parents seeks to relocate with the child. The FLA refers to the situation as a “change of residence” (under s. 46) if there no prior order or agreement in place, and as a “relocation” (under Part 4, Division 6) if there is a prior order or agreement in place. (Note that when the existing order is an interim order made after the proceedings began, s. 46 rather than Division 6 applies: K.W. v. L.H., 2018 BCCA 204.)

Section 46 applies when a guardian wants to change the residence of a child, there is no order or agreement in place about parenting arrangements, and there is an application for an order for parenting arrangements. To determine whether to allow the move, the court must consider the best interests of the child pursuant to s. 37, and the reason for the proposed move. The court must not consider whether the guardian who is planning to move will do so without the child.

Part 4, Division 6—Relocation (ss. 65-71) applies when a guardian wants to relocate and there is an order or agreement for parenting arrangements or contact in place. Under s. 66, where a guardian plans to move, with or without the child, and the move will have a “significant impact” on the child’s relationship with a guardian or another person who plays a significant role in the child’s life, the guardian must give notice of the place and date of the proposed move at least 60 days in advance. On application by the relocating party, the court may exempt that party from the notice requirements if notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or there is no ongoing relationship between the child and the other guardian or the person having contact with the child.

After notice is given, s. 68 provides that the child’s other guardians have 30 days to file an application in court to prevent the relocation, failing which the guardian may relocate with the child on or after the date set out in the notice.

Where an objection is filed, s. 69 sets out the test to be applied by the court, which depends on whether
or not the parties have substantially equal parenting time.

If the guardians do not have substantially equal parenting time, then unless the objecting guardian can show otherwise, the move is presumed to be in the best interests of the child under s. 69(4), if the relocating guardian shows the following:

- the relocating guardian has proposed reasonable and workable arrangements to maintain the child’s relationship with other guardians and persons with contact; and
- the proposed move is made in good faith.

If the guardians do have substantially equal parenting time, then under s. 69(5) the relocating guardian must show the following:

- the relocating guardian has proposed reasonable and workable arrangements to maintain the child’s relationship with other guardians and persons with contact;
- the proposed move is made in good faith; and
- the proposed move is in the best interests of the child.

A non-exhaustive list of factors to be taken into account in assessing good faith are set out in s. 69(6). They include the reasons for the move, whether the move will enhance the child’s quality of life, and whether there is an agreement or order that purports to prevent relocation.

As in s. 46, the court making a decision under Division 6 must not consider whether the party seeking to relocate would still relocate without the child if the relocation is not allowed.

See Fotsch v. Begin, 2015 BCCA 403, in which the court stated that the relocation provisions are a “complete code” for the required analysis.

2. Relocation Under the 1985 Divorce Act

The 1985 Divorce Act has no specific provisions concerning relocation. As a result, these cases have been decided based on principles developed in case law. Gordon v. Goertz, [1996] 2 S.C.R. 27 is the leading case on relocation (and the only Supreme Court of Canada case to date on relocation). It varied a prior custody order to allow the mother to move from Canada to Australia with the child.

Because Gordon v. Goertz was a variation case, the principles enunciated in it have been somewhat modified for relocation cases in which the relocation matter is considered as part of the initial custody determination. See for example S.S.L. v. J.W.W., 2010 BCCA 55 (the first BC Court of Appeal case on an original application for custody in which one of the parents sought to relocate), and subsequent decisions of the BC courts.

Among the principles emerging from the 1985 Divorce Act case law was the prohibition on considering whether the parent seeking to relocate would do so without the child if the relocation of the child was not allowed. This principle arises from the “double bind” concern: if the parent seeking to relocate says that they would not relocate without the child, then the court may determine that the relocation is unnecessary and disallow it; if the parent says that they would relocate without the child, that parent may be perceived as not devoted to the child.

3. Relocation Under the 2019 Divorce Act

One of the significant changes from the 1985 Divorce Act to the 2019 Divorce Act is the introduction of specific provisions for relocation (ss. 16.9–16.96). As these are brand new provisions, it will be particularly important to follow the development of case law applying them. The following summarizes their overall structure.

Section 2(1) defines relocation:

**relocation** means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a significant impact on the child’s relationship with

(a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or

(b) a person who has contact with the child under a contact order;

Overall, the general framework governing relocation resembles the FLA’s Division 6: it sets out a 60-day notice requirement (with possible exemptions or modifications), a 30-day period after notice for the other party to object to the relocation, and factors to be considered by the court when determining whether or not to allow the relocation. Also similar to the FLA is the prohibition on considering whether the party seeking to relocate would do so without the child.

However, there are also important differences between these statutes. For instance, the party receiving the notice of relocation may object by serving a prescribed form (not provided for in the FLA), as well as bringing an application in court (as in the FLA).

The burden of proof for a relocation case is also different under the 2019 Divorce Act. It is set out in s. 16.93:
• the relocating party has the burden of proof to show that the relocation is in the best interests of the child if “the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party” (s. 16.93(1));

• the party opposing the relocation has the burden of proof to show that the relocation is not in the best interests of the child if “the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child” (s. 16.93(2)); and

• in all other cases, both parties have the burden of proof to show whether the relocation is in the best interests of the child (s. 16.93(3)).

In determining the best interests of the child, the court must consider the factors set out in s. 16(3), as well as specified additional factors (listed in s. 16.92).

4. Change of Place of Residence Under the 2019 Divorce Act

Sections 16.7 and 16.8 apply to changes of place residence, which are distinguished from “relocations.” This section addresses moves that do not fall within the definition of “relocation” (that is, the change in the place of residence would not have a significant impact on the child’s relationship with the other parent). An example would be a move that is to a residence in the same geographic area.

The moving parent has to give 60 days’ notice to “any other person who has parenting time, decision-making responsibility or contact under a contact order” of the intention to move, with specified information. As with notice of relocation, the court may grant an exemption or modify the notice requirement, including due to a risk of family violence.

Unlike with relocation, there are no provisions for the person receiving the notice to object to the move.

[§3.07] Transition from the 1985 Divorce Act to the 2019 Divorce Act

Given that the 1985 Divorce Act has been in force for over 20 years, it is important to understand how ongoing proceedings started under that act will conclude.

Section 35.3 of the 2019 Divorce Act provides that a proceeding started under the 1985 Divorce Act which has not concluded on the date the 2019 Divorce Act comes into force will continue under the 2019 Divorce Act. This means the parties, counsel, and the court will have to continue the case under the new provisions, using the new terminology and applying any new or amended legal tests.

Sections 35.4 and 35.5 deal with orders already made under the 1985 Divorce Act. Section 35.4 provides that, unless the court orders otherwise:

• persons who have “custody” under the 1985 Divorce Act are deemed to have “parenting time” and “decision making authority”; and

• persons who are spouses or former spouses who have “access” under the 1985 Divorce Act are deemed to have “parenting time.”

Section 35.5 provides that, unless the court orders otherwise, a person who is not a spouse or former spouse and who has “access” under the 1985 Divorce Act is deemed to have “contact.”

Section 35.6 provides that a person who is deemed to have parenting time and decision-making authority, and who was permitted under an existing custody order to change the residence of the child without giving notice to another person, may still do so.

Section 35.7 provides that the coming into force of the Act doesn’t constitute a change of circumstances for the purpose of making a variation application.

Lastly, s. 35.8 provides that the 2019 Divorce Act will apply in applications to vary custody or access orders made under the 1985 Divorce Act, as if the order were a parenting order or a contact order.


Canada and all provinces and territories are signatories to the Hague Convention on Civil Aspects of International Child Abduction (the “Hague Convention”) along with about 90 other contracting states. The Hague Convention provides a procedure for the return of children who have been abducted and taken to a contracting state.

Under the Hague Convention, the removal or retention of a child is considered wrongful where it is in breach of rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal or retention, and where those custody rights were actually exercised. This definition does not require a court order to have been made. Under the Convention, each state has a Central Authority, which in BC is the Attorney General of BC (FLA, s. 80(3)). Counsel should contact the Central Authority whenever international abduction has occurred or is suspected, whether the client’s child is abducted to or from BC. An in-depth discussion of the Hague Convention is beyond the scope
of these materials, but family law lawyers should familiarize themselves with its principles, which are markedly different from those applicable to determinations about parenting arrangements either under the *Divorce Act* or the *FLA*.

Section 80 of the *FLA* addresses international child abduction as well. Section 80(4) provides that the provisions of the *Hague Convention* have the force of law in BC. Section 80(7) also addresses situations in which there has been a wrongful removal of a child but the Hague Convention does not or might not apply, for example, if the other jurisdiction involved is a country that is not a party to the Hague Convention (see s. 80(7) for a full list). In such situations, the *FLA*’s provisions on extraprovincial orders (in ss. 72–79) apply.
Form 2 (Family Law Act Regulation, section 23)

APPOINTMENT OF STANDBY OR TESTAMENTARY GUARDIAN

1 I, ........................................... [name], of ......................................................... [address], am the guardian of ................................................................. [name(s) of child(ren)] born ................................................ [birthdate(s) of child(ren)- mmm/dd/yyyy].

2 After considering the best interests of the child(ren) referred to in section 1, I appoint ................................................. [name], of ...................................................... [address], to be the guardian of the child(ren) and

[Check one or both of the following boxes as applicable and provide any required information.]

[ ] this appointment takes effect on my death

[ ] I am facing terminal illness or permanent mental incapacity and this appointment takes effect when, as a result of that illness or incapacity, I am unable to care for the child(ren), [add, if applicable, as certified by ................................................................. [name or official title] ].

The appointed guardian must consult with me to the fullest possible extent regarding the care and upbringing of the child(ren).

3 On this appointment taking effect, the appointed guardian has the same parental responsibilities that I currently have [add, if applicable, subject to the following conditions and restrictions:

.........................................................................................................................................
........................................................................................................................ [specify] ]

Date: .................... [mmm/dd/yyyy] .................................................................

Signature of appointing guardian

This appointment was signed in the presence of

WITNESSES [The witnesses to this appointment must be at least 19 years of age and must not be the person appointed as guardian.]

Name: .............................................................. ....................................................

Address: .......................................................... Signature of witness

Occupation: ...................................................

Name: .............................................................. ....................................................

Address: .......................................................... Signature of witness

Occupation: ...................................................
Chapter 4

Child and Spousal Support

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act..., S.C. 2019, c. 16. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date describe the legislation both before and after the amendments.

[§4.01] Child Support

The Federal Child Support Guidelines, SOR/97-175 (the “CSG”) regulate child support under both the FLA and the Divorce Act, and have been adopted for provincial purposes by regulation (B.C. Reg. 347/2012) (The CSG are discussed in §4.01(6)).

Parties may also make agreements about child support; see Chapter 12 for a discussion of family law agreements.

The principles governing child support under the FLA are similar to those under the Divorce Act. As noted earlier in the Practice Material: Family, many changes to the Divorce Act will come into effect on July 1, 2020; these amendments do not change the substantive law of child support but do change various procedural matters. Other changes will come into force at a yet-to-be-fixed future date. These planned changes are briefly noted at the end of this chapter in §4.07, but a full discussion of them is beyond the scope of these materials.

1. Divorce Act

Child support can be claimed under the Divorce Act as corollary relief in a divorce proceeding, or in a proceeding for corollary relief alone after the divorce is granted under the Act. At least one of the parties must be ordinarily resident in the province where the proceeding is brought (s. 4). The 1985 Divorce Act and 2019 Divorce Act have somewhat different provisions regarding jurisdiction when proceedings are commenced in two different provinces; see ss. 4(2) and (3) and ss. 5(2) and (3).

The amount of child support payable is presumed to be the amount provided for by the CSG (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 CSG 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), provided that it is satisfied that reasonable arrangements have been made for the support of the child.

2. Family Law Act

Under s. 150 of the FLA, child support orders are to be determined in accordance with the CSG. Under s. 150, the court may order a different award of child support in the following circumstances:

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

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

3. Tax Impact

Child support paid under an order or agreement made after May 1, 1997 is tax neutral, in that payments are neither tax-deductible for the payor nor taxable for the recipient.

4. Eligible Children

Under the Divorce Act, to be eligible for support the child has to fall within the definition of a “child of the marriage.” This is defined as a child of two spouses or former spouses who is under the age of majority (19 in BC), or over the age of majority but unable to withdraw from the charge of the spouses or former spouses because of illness, disability or other cause (s. 2(1)). “Other cause” has been interpreted in the case law to include full-time attendance at a post-secondary educational institution.

Under the FLA, a “child” for the purposes of support is defined under s. 146 in a manner that is consistent with the definition of a “child of the marriage” in the Divorce Act. Pursuant to s. 147, each
parent and guardian has a duty to provide support for a child. However, where the child is a spouse or is under the age of 19 and has voluntarily withdrawn from the care of that child’s parents or guardians, the child may be not entitled to support “except if the child withdrew because of family violence or because the child’s circumstances were, considered objectively, intolerable” (FLA, s. 147(1)(b)).

5. Persons Responsible for Child Support
   (a) Divorce Act

Under the Divorce Act, the spouses or former spouses who are responsible for child support include not only the child’s parents but also any person who stands in the place of a parent for the “child of the marriage.” This is because “a child of spouses or former spouses” includes, under s. 2(2):

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

The leading case on whether a stepparent “stands in the place of a parent” is Chartier v. Chartier, [1999] 1 S.C.R. 242, which has been applied in many subsequent decisions. Chartier states that the applicable period to determine whether the stepparent “stood in the place of a parent” is during the relationship of the parent and the stepparent rather than post-separation. The determination is objective and the factors to be considered include the following:

- whether the child participates in the family as a biological child would;
- whether the stepparent provides financially for the child;
- whether the stepparent disciplines the child as a parent;
- whether the stepparent represents to the child, the family, or the world, either explicitly or implicitly, that the person is a parent to the child; and
- the nature or existence of the child’s relationship with the absent biological parent.

Note, however, that a stepparent’s child support obligation is not necessarily the full amount payable under the CSG. This is discussed in §4.01(6).

(b) Family Law Act

Under ss. 146 and 147, persons qualifying as parents or guardians are liable to pay child support, but the extent of their liability varies, as described below. For the purposes of Part 7, the definition of “parent” includes the following:

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

“Stepparent” is defined as follows (s. 146):

[A] person who is a spouse of a child’s parent and lived with the child’s parent and the child during the child’s life.

Pursuant to ss. 147(3) and (5) of the FLA, stepparents and any guardian who is not a child’s parent have a support obligation that is secondary to the obligations of the child’s parents. A stepparent’s duty extends only as appropriate on considering standards of living and the length of time the child lived with the stepparent (s. 147(5)). Note that a guardian is not liable to pay child support at all if the guardian is not a parent and only has a parental responsibility respecting the child’s legal and financial interests (FLA, s. 146).

If parentage is at issue in an application for child support under the FLA, then the court may make one or both of the following orders, whether or not an application has been made to declare parentage:

- an order respecting the child’s parentage in accordance with s. 31 of the FLA; and
- an order for parentage tests under s. 33(2) of the FLA.

6. The Child Support Guidelines (CSG)

The CSG set out rules for the calculation of income and child support, income disclosure requirements, and the apportioning of children’s special expenses between parents.

The CSG provide child support tables (at Schedule I) setting out child support payable based on province, the number of children support is paid for, and the payor’s income. These table are used to determine the base amount of child support payable. The 2011 child support tables were updated in November 2017 by SOR/2017-224, but support owing for
amounts before that time will still be calculated using the 2011 tables. The changes to the Divorce Act have not changed the CSG.

In most cases, the following steps will be applied when determining the child support payable:

1. Determine the number of eligible children.
2. Determine the income of both parents (see CSG, ss. 15 to 20 and Schedule III).
3. Determine the base amount of child support payable according to the child support tables (often called the “table” amount or “basic” amount). Consider whether any of the enumerated exceptions apply (exceptions are described below).
4. Determine which of the children’s expenses qualify as special or extraordinary expenses within the meaning of ss. 7(1) and (1.1) of the CSG. These expenses typically include the following:
   - childcare expenses;
   - medical, dental and health-related expenses not covered by insurance;
   - extraordinary extracurricular activities;
   - extraordinary educational costs; and
   - post-secondary education costs.
5. Determine the cost of qualifying special or extraordinary expenses, net of any third-party subsidies and any contributions made by the children.
6. Allocate the special or extraordinary expenses between the parties in proportion to their respective gross incomes. When the recipient also receives spousal support, the spousal support will be deducted from the payor’s income and included in the recipient’s income.

There are exceptions to this general process. Common exceptions in the CSG are as follows:

- Section 3(2)(b) allows the court to make a child support order in an amount different than the table amount where the child for whom support is paid is over the age of majority (19, in BC). (These cases typically involve adult children with a disability or who pursue post-secondary education.)

- Section 4 gives the court discretion to depart from the table amount where the income of the payor is over $150,000 per year.

- Section 5 relates to persons who stand in the place of a parent (e.g. stepparents). In those cases, the court has the discretion to determine the appropriate amount of child support, taking into consideration the CSG and “any other parent’s legal duty to support the child.” The court may order an amount of support less than the table amount, may find that no support is payable at all (Fedoruk v. Jamieson, 2002 BCSC 304), or may treat stepparent’s obligations as a means of “topping up” child support paid by a biological parent (H.(U.V.) v. H.(M.W.), 2008 BCCA 177).

- Section 8 provides that in situations of “split custody,” where each parent provides the primary residence of one or more of the children, the amount to be paid is the difference between the table amounts each parent would pay to the other for the care of the children in the other parent’s care.

- Section 9 gives the court the discretion to depart from the table amount in situations of “shared custody,” where each party has the children for 40% or more of the time. In such cases the amount of the child support order has to be determined by taking into account the factors listed at s. 9(a) to (c):
  - (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.

There is no presumption that child support in shared custody cases must be the table amount or less, although courts commonly reduce the table amount and often order the set-off amount (that is, the difference between the table amounts the parents would otherwise have to pay if they did not have shared custody). There is also no presumption that the set-off amount will be ordered; it is a starting point only. Parties must provide comprehensive evidence about the circumstances of the child at each household,
and detailed financial information, including financial statements or budgets. See the leading case on s. 9, *Contino v. Leonelli-Contino*, 2005 SCC 63.

- Section 10 allows the court to deviate from the table amount where either party establishes that payment of the table amount would cause “undue hardship.” Typically, payors invoke this section to attempt to reduce the amount of child support payable, but it also allows the recipient to ask for an amount higher than the table amount on the basis that the table amount is too low. Most cases about this section relate to the first scenario and establish that the threshold to meet the “undue hardship” test is very high: the party claiming undue hardship must demonstrate not only that circumstances giving rise to hardship exist, but also that the resulting hardship is “undue” (*Van Gool v. Van Gool* (1998), 44 R.F.L. (4th) 314 (B.C.C.A.)), and that the party’s household has a lower standard of living than the other party’s household, taking into account all the income available to the household (*Reiter v. Reiter* (1997), 36 R.F.L. (4th) 102 (B.C.S.C.); CSG, Schedule II). Even if the court finds undue hardship, the court may still decline to reduce the amount of child support payable.

- Sections 21–25 of the CSG set out the disclosure requirements and the consequences of non-compliance. Note that the Supreme Court Family Rules set out additional disclosure requirements.

The starting point for determining income for child support purposes is the total income as shown on the most recent income tax return of the applicable party (line 150). However, ss. 17 to 20 of the CSG address situations in which using the line 150 income is inappropriate:

- Section 17 permits the court to determine income based on the payor’s pattern of income in the three most recent years. It also deals with non-recurring losses.

- Section 18 permits the court to include additional income when the spouse is a shareholder, director, or officer of a corporation, either by including pre-tax corporate income or by adding “an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation’s pre-tax income” (see e.g. *Hausmann v. Klukas*, 2009 BCCA 32).

- Section 19 lists situations in which the court may impute income. Imputing income means that support is set based on a higher income than the line 150 total income. For example, this might be done when the court determines that a spouse is intentionally under-employed (see e.g. *Hanson v. Hanson*, 1999 CanLII 6307 (B.C.S.C.)).

- Section 20 of the CSG provides that the income of foreign payors is determined as if the payor was a resident of Canada. Where the payor lives in a jurisdiction with a higher tax rate, the payor’s income is the amount that the court determines to be appropriate taking the tax rate into account; where the payor lives in a jurisdiction with a lower tax rate, income may be imputed pursuant to s. 19(1)(d).

Orders and agreements on child support usually provide for annual exchanges of income information and adjustments, if applicable, to the base amount of child support and the parties’ shares of s. 7 expenses.

### §4.02 Spousal Support

The general principles governing spousal support are consistent between the Divorce Act and the FLA. The 2019 Divorce Act has not changed the substantive law of spousal support, but does introduce new provisions regarding interjurisdictional matters, access to information, and various other significant procedural and administrative matters. These changes are briefly noted in §4.07, but a full discussion of them is beyond the scope of these materials.

Parties may make agreements about spousal support; see Chapter 12.

#### 1. Jurisdiction and Limitation Periods

##### (a) Divorce Act

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

At least one of the parties must be ordinarily resident in the province where the proceeding is brought (s. 4). Note that the 1985 Divorce Act and 2019 Divorce Act have somewhat different provisions regarding jurisdiction when proceedings are commenced in two different provinces (1985 Divorce Act, ss. 4(2) and (3); 2019 Divorce Act, ss. 5(2) and (3)).
(b) *Family Law Act*

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

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

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

2. Tax Impact

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

3. Entitlement to Spousal Support and Amount of Support

Spousal support is generally payable when one spouse is financially disadvantaged as a result of the relationship or the end of the relationship, or demonstrates financial need, and the other spouse can afford to pay. Whether support will be paid, and, if so, how much, depends entirely on the circumstances of each case.

(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)).

Section 15.2(6) sets out the objectives of a spousal support, providing that 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.

Note that s. 15.3 of the *Divorce Act* provides that child support has priority over spousal support. As a result, a spouse may be entitled to spousal support but receive a reduced amount or none at all if the payor’s income is insufficient to meet both child support and spousal support obligations.

(b) *Family Law Act*

Part 7 of the *FLA* governs spousal support applications under the *FLA*. Sections 161 and 162 set out the objectives and factors for consideration:

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

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

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

(c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
162. The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

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

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

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

(c) Case Law

The leading Supreme Court of Canada cases respecting entitlement to spousal support are Bracklow v. Bracklow, [1999] I.S.C.R. 420 and Moge v. Moge, [1992] 3 S.C.R. 813. The Court’s decision in Miglin v. Miglin, [2003] 1 S.C.R. 303 is the leading case on treating applications for spousal support when there is a pre-existing agreement with different terms for spousal support.

In Moge and Bracklow, the Court 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 addressed the “compensatory” basis for spousal support. The “compensatory” basis recognizes that marriage entails an economic merger that may visit lifelong consequences upon a financially dependent spouse that may not be adequately addressed by short-term orders for spousal support. The Court used the term “compensatory support” in Moge to describe entitlement to spousal support based on the financial consequences suffered by a spouse as a result of decisions made in the marriage. These decisions may have resulted in a spouse leaving the workforce, giving up opportunities for post-secondary education and professional training, leaving or limiting a career to raise children, losing opportunities for promotions and advancement, and suffering diminished employability. All of these result in economic hardship to that spouse when the marriage ends. The purpose of compensatory support is to address these adverse consequences, to the extent possible. Of note, the Court recognized that even when both spouses worked during the marriage, one of them could still have suffered adverse economic consequences (for example, when one spouse’s career took precedence over the other’s) that would result in entitlement to spousal support. Accordingly, the Court stated that “in the proper exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefitting the other upon its dissolution.” A summary of BC cases respecting compensatory support is in the Family Law Sourcebook for British Columbia (Vancouver: CLEBC), Chapter 3.

In Bracklow, the Court described three conceptual grounds for entitlement to spousal support: 1) compensatory; 2) non-compensatory, based on the recipient’s financial needs; and 3) contractual, based on an agreement to pay support. The Court found that both the Divorce Act and the FRA (which was the BC provincial legislation at the time) accommodated these models. The Court held that where a spouse is financially dependent on the other following separation, support may be payable to address that need even without grounds for a compensatory award. The Court also recognized that the spouses can create, modify or negate spousal support obligations by contract, as in 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 in the following circumstances:

(1) 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.

(2) The terms of the agreement substantially comply with the objectives of the Divorce Act. However, the agreement will not necessarily be set aside for noncompliance alone if the agreement reflects the parties’ expectations of their marriage and future circumstances.

(3) The agreement continues to reflect the parties’ intentions and is in substantial compliance with the objectives of the
4. The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines (the “SSAG”) were developed by Professors Carol Rogerson and Rollie Thompson with funding from the Department of Justice. The SSAG propose a number of mathematical formulas to calculate the amount and duration of spousal support. The SSAG do not address whether a spouse is entitled to spousal support (see the discussion on entitlement above); the SSAG only become relevant if entitlement has been established.

Although the SSAG are not legislated, the SSAG have been embraced by the Bench and Bar in British Columbia and in other provinces and territories. Counsel routinely prepare SSAG calculations when litigating or negotiating spousal support. 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” that 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 was an appealable error.

The SSAG propose two basic formulas, one that is used when there is no child support obligation, and another that is used when there are children for whom child support may be payable. Both formulas generate a range of results for quantum (amount) and duration (the length of time for which support will be paid). Note that there are specific formulas for some situations, such as when the custodial parent has to pay spousal support to the other party (the “custodial payor formula”) and when the children of the marriage are adults.

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

The “with child support” formula is much more complex and varies depending on the child support arrangements. In general, the “with child support” formula divides the parties’ disposable incomes, once statutory income deductions and the effect of government benefits and credits and taxes have been taken into account, including the tax impact of the payment and receipt of spousal support. The basic “with child support” formula, the recipient is intended to be left with 40 to 46% of the combined net disposable income of the parties. Duration is calculated by reference to the dates the youngest child will enter or leave full-time school, and the length of cohabitation. Duration is potentially indefinite when the length of cohabitation plus the age of the recipient equals 65.

The calculations for the “with child support” formula are complicated. They demand a detailed knowledge of government benefits and credits, and the income tax and statutory deduction rules applicable to different types of income. Support calculations under this formula require the use of software designed for the purpose. The software can also be used for the “without child support” formula.

It is beyond the scope of this chapter to delve any deeper into the SSAG. When using the SSAG, it is critical to also review the “Spousal Support Advisory Guidelines: The Revised User’s Guide.” See also John-Paul E. 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. Both publications are available on the federal government’s Spousal Support Advisory Guidelines website (www.justice.gc.ca/eng/rp-pr/flf/spousal-epoux/spag/s-p/p1.html).

[§4.03] Variation of Child or Spousal Support

A party may bring an application to vary a support order where there has been a change in circumstances since the making of the original order and the party argues the original order is no longer appropriate. The overall test under both the Divorce Act and the FLA is whether there has been a “material change” in circumstances since the making of the original order. The specific test applicable depends on the legislation and whether the application relates to child support or to spousal support.

Common changes of circumstances in applications to vary support include increases or decreases in the income of either spouse, changes in the residence of the children, and (for spousal support variations) retirement.

1. Divorce Act

Section 17 of the Divorce Act deals with variation of orders in general. Section 17(4) deals specifically with variation of child support and s. 17(4.1) deals specifically with variation of spousal support.

Section 14 of the CSG sets out three situations that constitute a “change of circumstances” for the purpose of variation of child support under section 17(4).

For spousal support, 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)). If a variation order is made, the order should meet the same objectives as in an original application for spousal support (i.e. it should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; apportion between the parties any financial consequences arising from the care of any child of the marriage over and above any child support obligation; relieve any economic hardship to the spouses arising from breakdown of the marriage; and promote each spouse’s economic self-sufficiency) (s. 17(7)).

A spousal support order for a fixed duration cannot be extended after the expiration of the period of support unless the extension is necessary to relieve economic hardship caused by a change in circumstances that is related to the marriage, such that it would likely have resulted in a different order had the changed circumstances existed when the original order was made (s. 17(10)).

See Miglin v. Miglin, [2003] S.C.R. 303, for the principles on an application to vary spousal support in the face of an agreement on the issue (discussed in §4.02(3)(c)).

2. Family Law Act

Section 152 of the FLA deals with changes to child support orders, and s. 167 deals with changes to spousal support orders.

Under s. 152(2), the court may change, suspend, or terminate an order respecting child support if at least one of the following exists:

- a change in circumstances, as provided for in the CSG, has occurred since the order respecting child support was made;
- evidence of a substantial nature that was not available during the previous hearing has become available;
- evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Under s. 167(2) of the FLA, a court may change, suspend, or terminate a spousal support order, if at least one of the following exists:

- a change in the conditions, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
- evidence of a substantial nature was not available at the previous hearing and has since become available;
- evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

Spousal support may be varied if there is a material change in circumstances, such that if it had been known at the time of the original order, it would likely have resulted in a different order (B.(G.) v. G.(L.) (1995), 15 R.F.L. (4th) 201 (S.C.C.). The law that developed under the Divorce Act with respect to material changes generally applies to determining whether there has been a material change under s. 167(2)(a) of the FLA (see A.B.Z. v. A.L.F.A., 2014 BCSC 1453).

[§4.04] Retroactive Child and Spousal Support

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

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

The court usually limits the retroactive reach of a retroactive order to the date when effective notice of the recipient’s intention to seek a variation of support was given, to a maximum of three years, unless there has been blameworthy conduct by the payor.

The principles of D.B.S. apply to retroactive spousal support as well, but the analysis and the weight to be
given to each factor may be different (Kerr v. Baranow, 2011 SCC 10).

[§4.05] Arrears of Child and Spousal Support

Arrears are unpaid amounts of support that were due pursuant to a court order or agreement. A payor in arrears who applies to cancel arrears has to meet a high threshold, especially for arrears of child support. See Earle v. Earle, 1999 CanLII 6914 (BC SC) for general principles regarding cancellation of arrears of child support).

[§4.06] Interjurisdictional Support Orders Act

The Interjurisdictional Support Orders Act (“ISO”) governs applications for support and recognition of support orders when the parties live in two different provinces. All other Canadian provinces and territories except Quebec also have in place such legislation. ISO also applies between BC and specified countries. ISO does not apply to orders under the Divorce Act. See also §2.05(3).

[§4.07] New Provisions Under Bill C-78

Bill C-78, An Act to Amend the Divorce Act..., includes various amendments affecting procedures for child and spousal support. Some of these changes come into force on July 1, 2020, and others come into force on a day to be fixed by order of the Governor in Council.

The amendments coming into force on July 1, 2020 include amended and new provisions regarding the following:

- Provincial child support services

  The Minister of Justice may enter into agreements with provinces to allow for the administrative calculation of child support. The authority of these services is expanded under the 2019 Divorce Act to include the calculation of initial child support amounts, in order to reduce the need for court proceedings and orders. The calculation by the provincial child support service is called a “child support decision,” and it has effect throughout Canada and the same force as a child support order (s. 20(2)). See ss. 25.01–25.1(7) of the 2019 Divorce Act.

- Interjurisdictional proceedings

  The 2019 Divorce Act contains new procedures respecting application, variation, and recognition of support orders when the parties reside in different provinces, with the aim of streamlining the process that was in place under the 1985 Divorce Act. See ss. 18–19.1 of the 2019 Divorce Act.

Other amendments are set to come into force on a day to be fixed by order of the Governor in Council (not yet fixed at the time of writing):

- Amendments to the Divorce Act will implement the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, an international convention for the cross-border recognition and enforcement of support orders.

- Amendments to the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act are intended to improve information sharing for the purpose of determining payors’ income. These changes concern the provision of information from federal authorities to courts and provincial child support services.
Chapter 5

Division of Property and Responsibility for Debt

The division of property and debt falls within provincial jurisdiction. Therefore, the Divorce Act does not contain provisions for these issues. The applicable legislation is the Family Law Act, which came into force in March 2013, replacing the Family Relations Act.

[§5.01] Overview of Division of Property and Debt Under the Family Relations Act

Parts 5 and 6 of the former FRA governed the division of assets between spouses upon the breakdown of a marriage. Although Parts 5 and 6 of the FRA were repealed with the coming into force of the FLA on March 8, 2013, they continue to apply to cases started under the FRA prior to that date and to challenges to property agreements made between married parties while the FRA was in force (unless the parties agree to apply the FLA). Because of the significant differences between the property division regimes of the FRA and the FLA, it is important to apply the correct legislation.

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

[§5.02] Overview of Division of Property and Debt Under the Family Law Act

Unlike the FRA, the statutory property division provided under the FLA applies not only to married spouses, but also to unmarried spouses who have lived together in a marriage-like relationship for a period of at least two years.

Two key terms in the property division regime of the FLA are “family property” (s. 84) and “excluded property” (s. 85). “Family property” is broadly defined as all real and personal property that:

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

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

Section 84(2) of the FLA provides specific examples of family property.

On separation, each party acquires an undivided one-half interest in all family property (s. 81).

The definition of family property is subject to s. 85, which excludes pre-relationship property, and certain categories of property acquired during the relationship, from the otherwise broad “family property” definition in s. 84. The categories of excluded property are as follows:

- property acquired by a spouse before the relationship between the spouses began (s. 85(1)(a));
- inheritances received by a spouse (s. 85(1)(b));
- gifts to a spouse from a third party (s. 85(1)(b.1));
- settlements and damage awards, unless the settlement or award represents lost income of a spouse or a loss to both spouses (s. 85(1)(c));
- money paid under non-property insurance policies (s. 85(1)(d));
- excluded property held in trust for a spouse (s. 85(1)(e));
- property held in a discretionary trust, provided certain conditions are met (s. 85(1)(f)); and
- property derived from excluded property or the disposition of excluded property (s. 85(1)(g)).

Section 85(2) places the burden to prove that the property is excluded on the spouse seeking to have the property excluded. The standard of proof is the civil standard of proof on the balance of probabilities.

The extent of the exclusion is limited by s. 84(2)(g). Section 84(2)(g) provides that the growth in the value of excluded property that occurred since the later of the commencement of the relationship or the acquisition of the property is family property. That growth is therefore subject to the provisions for division of family property.

An important issue raised by the provisions of the FLA is whether excluded property becomes family property if the owner spouse transfers it to the other spouse or into the joint names of the spouses (for instance, if the owner of excluded funds uses them to purchase a family home that is registered in the names of both parties). Counsel should carefully review the case law on this issue, as it remains in flux (see McManus v. McManus, 2019 BCSC 123 at para. 50).

A related issue in the case law is how the FLA’s property division regime affects the common law presumption of advancement—that is, the presumption that a transfer from husband to wife constitutes a gift. In V.J.F. v. S.K.W., 2016 BCCA 186, the Court of Appeal found that

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the FLA had not eliminated the common law presumption of advancement, and unless the evidence rebutted the presumption, a transfer of excluded property from husband to wife would result in the property losing its excluded status. At issue in that case was whether the proceeds of the sale of excluded property used to purchase property that was registered in the name of the wife alone were the excluded property of the husband or were family property. Both the trial court and the Court of Appeal determined that the sale proceeds were family property, and the Court of Appeal stated that the presumption of advancement continues to apply in BC. However, see Lahdekorpi v. Lahdekorpi, 2016 BCSC 2143, which distinguished V.J.F. v. S.K.W. on its facts, and, more recently, H.C.F. v. D.T.F., 2017 BCSC 1226, where the Supreme Court held that the presumption of advancement has no place under the FLA. Subsequent BCSC decisions have also declined to apply the presumption of advancement, on various grounds; see e.g. C.J.B. v. A.R.B., 2017 BCSC 1682 and McManus v. McManus, 2019 BCSC 123.

See also Venables v. Venables, 2019 BCCA 281, in which the Court of Appeal determined that a home that the spouse acquired prior to the relationship lost its excluded status after the spouse transferred it into the spouses’ joint names. (However, the Court divided the property unequally in recognition of the spouse’s pre-relationship ownership.)

In light of the shifts in this area of law, when advising a client in a new or ongoing relationship about potential property division in the event of separation, counsel should advise the client of the risk of losing the excluded status of property, and of the benefits of clearly addressing this issue (and any other) in a written agreement.

Another important term in the FLA is “family debt,” which is defined as debt incurred by a spouse during the relationship, or incurred after the relationship ends in order to maintain family property (s. 86). Similar to family property, spouses are presumptively responsible equally for family debt, but this does not affect the rights of creditors (s. 82).

| §5.03 | Unequal Division Under the Family Law Act |

Under the FLA, a court may divide family property or responsibility for family debt unequally, but only where it would be “significantly unfair” not to do so with regard to the factors set out in s. 95(2) and (3), which are as follows:

(2) (a) the duration of the relationship between the spouses;
(b) the terms of any agreement between the spouses, other than an agreement described in s. 93(1) [setting aside agreements respecting property division];
(c) a spouse’s contribution to the career or career potential of the other spouse;
(d) whether family debt was incurred in the normal course of the relationship between the spouses;
(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
(g) the fact that a spouse, other than a spouse acting in good faith,
   (i) substantially reduced the value of family property; or
   (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse’s interest in the property or family property to be defeated or adversely affected;
(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness;

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

Courts have repeatedly noted the higher bar set by the requirement of “significant” unfairness as compared to “fairness” under the FRA. Determining whether equal division would be significantly unfair remains highly discretionary and dependent on the facts.

Recently, in Singh v. Singh, 2020 BCCA 21, the Court of Appeal reiterated: “The threshold for “significant unfairness” is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division” (para. 134). The Court of Appeal also established that s. 95(2)(i), “any other factor,” refers to “a limited class, namely, the economic characteristics of a spousal relationship,” rather than including any factor without limitation (para. 138).
[§5.04] Specific Assets

Unless they fall within the definition of excluded property, pensions and registered retirement savings plans (RRSPs) are family property under s. 84(2)(e). These can be extremely valuable assets and must not be overlooked.

1. Pensions

Part 6 of the FLA governs pension division. Pension division is complex and counsel should seek expert assistance whenever needed. Guidance is also available from a number of CLE publications, including the Family Law Sourcebook and Family Law Agreements—Annotated Precedents.

There are a number of different mechanisms for dividing pensions, depending on the type of the pension being divided. First, determine whether the pension is a local plan (s. 110) or an extraprovincial plan (s. 123).

(a) 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 “local plan” is defined in s. 110 of the FLA and includes the following circumstances:

- the plan is registered in another province and has members in BC;
- the plan is registered with the BC Pension Benefits Standards Act; or
- the plan is, by its own terms or the terms of the legislation governing it, subject to Part 6 of the FLA.

When a pension plan is administered outside British Columbia, write to the pension administrator and confirm that the plan is bound by Part 6 of the FLA. Ask the administrator about the specific language to use in an order or agreement to divide the particular pension.

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

Defined benefit plans provide a fixed income on retirement determined by a formula, usually a multiple of years of service and a percentage of the plan’s earnings. A defined benefit plan is divided by making the non-member spouse a limited member of the plan and allocating his or her share of the member’s plan to the new plan. The limited member may wait until the member retires and then receive a separate pension. Alternatively, the limited member may direct the plan to transfer his or her share to a locked-in retirement vehicle, such as a LIF or LIRA, at any time after the member becomes eligible to retire.

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

There are also hybrid plans that combine features of defined benefits and defined contribution plans. Local hybrid plans are dealt with in s. 116 of the FLA.

The Division of Pensions Regulation (B.C. Reg. 348/2012) outlines the formulas for determining the non-member spouse’s share of a local plan. The commencement date for the calculation of the non-member’s share of the pension is the date specified in the order or agreement as the date on which the relationship between the parties began within the meaning of the FLA, or a different date if specified in the order or agreement as the beginning date of the applicable period (Division of Pensions Regulation, s. 1).

(b) Extraprovincial Plans

Extraprovincial plans are defined as all plans that are not local plans. They are dealt with in s. 123 of the FLA. If the plan has a method for satisfying the interest of the non-member spouse, then that method applies (unless the court orders otherwise). Otherwise, the non-member spouse is entitled to receive from the administrator during the member’s lifetime a proportionate share of benefits paid under the
plan, until the death of the spouse or the termination of benefits. Section 123 also sets out the obligations of the spouse who is the member of the pension plan and the orders the court may make if the division method of the extra-provincial plan would operate unfairly.

The court can also generally make orders or give directions to facilitate or enforce the division of the pension (s. 130).

(c) Plans Exempt From Part 6

The division of some pension plans is based legislation other than the FLA. 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 is 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.

2. Canada Pension Plan

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

When a spouse is receiving Canada Pension Plan disability benefits, counsel should enquire in advance about the impact, if any, of the equalization of credits on the disability benefits.

3. RRSPs

RRSPs can be divided on a tax-deferred basis under the rollover provisions of the Income Tax Act. In this procedure, funds are transferred directly from the RRSP of one spouse to the RRSP of the other, the transfer is effected through a specific form (currently T2220) and executed by the respective financial institutions. The purpose of the rollover is to allow for RRSP division without the immediate tax consequences of withdrawals from the RRSP. Note that the rollover can only be done if the RRSP division is pursuant to a written separation agreement or a court order.

[§5.05] Property on Reserve Lands

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

In general, the provisions of the FLA dealing with ownership and possession of land do not apply to land on reserve on the principle that provincial legislation cannot trench on areas assigned exclusively to federal authority by virtue of s. 91 of the Constitution Act, 1867 and the doctrine of paramountcy (Derrickson v. Derrickson, [1986] 1 S.C.R. 285, and Darbyshire-Joseph v. Darbyshire-Joseph, 1998 CanLII 3522 (B.C.S.C.)). The same analysis prevents the court from issuing an exclusive occupancy order for property on reserves pursuant to s. 124 of the FRA or s. 90 of the FLA (Hageman v. Gladstone (26 March 2004), Vancouver E040753, unreported (B.C.S.C.)). The FLA may apply to reserve lands where the First Nation is a “treaty First Nation” within the meaning of Interpretation Act, s. 29.1 and is entitled to alienate its lands. Where reserve lands are at issue in a proceeding under Part 5 and at least one spouse is a member of a treaty First Nation, under FLA, s. 210, the First Nation has standing in the proceeding and the court must consider the First Nation’s laws concerning the alienation of treaty land.

When there is a family home on a reserve, and at least one party is a First Nation member, the Family Homes on Reserves and Matrimonial Interests or Rights Act applies. The Act applies both to married spouses and to those who meet the definition of common-law partners under the Indian Act (meaning they have lived together in a marriage-like relationship for at least one year). The first part of the Act allows First Nations to make their own laws about family property on reserves. The second part of the Act states that if a First Nation does not make its own laws, or until it makes its own laws, the federal government’s provisional rules apply.

The provisional rules cover three main areas: emergency protection orders, occupation of the family home, and division of the value of the family home.

1. Emergency Protection Orders

A judge can make an emergency protection order to protect a spouse or common-law partner. The order can allow one partner to stay in the home and require the other person to leave the home and stay away. The order can last up to 90 days and can be renewed.

2. Occupation of the Family Home

Both partners have the right to be in the family home during the relationship, whether or not the
partner is Indigenous. If the partner who owns the home dies, the other partner (even if not Indigenous) can live in it for up to 180 days.

3. Division of the Value of the Family Home

When a relationship breaks down, each partner is entitled to half of the value of the family home. If the family home is on a reserve, and one partner is not Indigenous, the court can require the Indigenous partner to pay the other partner to compensate him or her for half of the property’s value.

[§5.06] Property Agreements

Under the *FLA*, the court may not make an order dividing family property or family debt where parties have a written agreement respecting the division of property or debt, unless the court first sets the agreement aside (s. 94(2)). See Chapter 12 for more on this topic.
Chapter 6

Interim Applications in Family Law Matters

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act, S.C. 2019, c. 16. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date are to the legislation both before and after the amendments.

[§6.01] Introduction

Interim applications address issues in a family law court matter on a temporary basis pending a final disposition of all issues at trial. These applications are also known as applications for non-final orders, interlocutory applications, or chambers applications.

The Supreme Court has jurisdiction over all matters in interim applications; the Provincial Court may only hear interim applications on those matters that are within its jurisdiction (see §2.02). Section 216 of the Family Law Act (“FLA”), ss. 15.1(2) and 16(2) of the 1985 Divorce Act and s. 16.1(2) of the 2019 Divorce Act allow either party to apply for interim relief in family law cases.

Interim applications are important tools in managing a family law case. They are typically brought to obtain orders setting necessary interim arrangements in place, such as interim parenting arrangements, interim child and spousal support, and occupancy of the family home. While the orders made in these applications are interlocutory in nature and are not binding on the trial judge, they often influence settlement discussions, trial preparation and final outcomes.

In the Supreme Court, masters and judges in chambers hear applications for interim orders under the Supreme Court Family Rules (the “SCFR”). The jurisdiction of masters is set out in Practice Direction 50, and includes the jurisdiction to make orders for interim corollary relief (custody, access, child and spousal support) under the Divorce Act, interim orders under the FLA, interim restraining orders, and orders for exclusive possession of the family home under the FLA. A master does not have inherent jurisdiction, including equitable jurisdiction to grant restraining orders that are not specifically authorized by statute. A judge has jurisdiction over all matters.

[§6.02] Application Procedures

In Supreme Court proceedings, interim applications are made in chambers. Supreme Court Family Rules 10-1 to 10-9 govern these applications.

In general, a party to a family law case may not bring an application before a judicial case conference (“JCC”) has taken place in the proceedings (SCFR 7-1(2)). This restriction does not apply to any of the following:

• an application for an order under s. 91 of the FLA restraining the disposition of property;
• an application for an order under s. 32 or s. 39 of the Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada) or under a First Nation’s bylaw made pursuant to that Act and concerning an equivalent matter;
• an application for a consent order;
• an application without notice;
• an application to change, suspend or terminate a final order;
• an application to set aside or replace the whole or any part of an agreement; and
• an application to change or set aside the determination of a parenting coordinator.

SCFR 7-1(3)

For applications that do not fall within one of these exceptions, a judge or a master may waive the requirement for a JCC on the application of the party (see SCFR 7-1(5) and Supreme Court Family Practice Direction, FPD-13 for application requirements, and SCFR 7-1(4) for the circumstances in which the court may waive the JCC requirement).

A party makes an interim application by filing and serving a notice of application in SCFR Form F31, with supporting affidavit material (Form F30). A party who files a notice of application is an applicant. A party who files an application response is an application respondent.

Under SCFR 10-6(3), the notice of application filed by the applicant must:

• describe the orders sought, or attach a draft order;
• summarize the factual basis of the application;
• set out the statutory provision or rule relied upon and any legal argument on which the orders sought should be granted;
• list affidavits and other documents relied upon;
• set out the applicant’s time estimate for the hearing;

• set out the date and time for the hearing of the application (subject to subrules (4) and (5) regarding applications longer than two hours and the dates the court hears particular applications);

• set out the place for the hearing in accordance with SCFR 10-2, which is normally the registry in which the underlying action is brought; and

• provide the data collection information required in the appendix to the form.

See Dupre v. Patterson, 2013 BCSC 1561 for what the notices of application and application responses should contain. Note the court’s statement in that case that “Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed” (at para. 56).

SCFR 10-6(4) provides that an application must be set for 9:45 a.m. on a date on which the court hears applications. Counsel should consult with the particular registry to find out on what days there will be chambers sittings. If the applicant’s time estimate for the hearing exceeds two hours, the registrar must fix the date and time of hearing (SCFR 10-6(5)). In some registries other than Vancouver and New Westminster, applications with a time estimate of over one hour must also be set through scheduling. Counsel should be realistic about their time estimates, allowing sufficient time for each side.

The timelines for service, and which application materials must be served, depend on the type of application. The applicant must serve on each of the parties (and on every other person who may be affected by the orders sought) a copy of the filed notice of application and a copy of the filed version of each of the affidavits and documents referred to in the notice of application that have not already been served on that person. Additional materials must be served if the application is brought under SCFR 11-3 (summary trial), if it relates to the determination of a parenting coordinator filed under SCFR 2-1.1(1), or if it relates to an arbitration award or agreement in a family law case (see SCFR 10-6(6)).

SCFR 10-6(7) sets out the timelines for service of application materials: for interim applications, at least 8 business days before the date set for the hearing; for a summary trial, at least 12 business days; and for applications to change a final order, at least 21 business days (note that these applications must be personally served). “Business days” are defined in SCFR 10-6(1), and the calculation of time is governed by the Interpretation Act.

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

An application response must be in SCFR Form F32; it cannot exceed 10 pages. Under SCFR 10-6(9), it must:

• set out the application respondent’s position on each order sought;

• summarize the factual and the legal basis on which the orders sought should not be granted;

• list the affidavit and other materials relied upon in opposition to the relief sought; and

• set out the application respondent’s time estimate.

For interim applications, the application response and supporting materials must be filed and served within 5 business days after service of the notice of application and affidavit materials (8 business days in the case of a summary trial application and 14 for applications to change a final order).

The applicant must file an application record with the registry no later than 4:00 p.m. on the business day that is one full business day before the date set for the hearing. An application record combines all documents the court will need to refer to, bound in a ring binder or in some other form of secure binding (SCFR 10-6(14)). See SCFR 10-6(14) and (16) for required contents.

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

§6.03  Applications Without Notice and on Short Notice

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

When proceeding without notice, the application material should explain why the applicant is not giving notice. For example, there may be safety concerns or urgency, or there may be a concern that notice will result in the dissipation of assets. Take care to bring applications without notice only when absolutely necessary.

Counsel have a duty in proceedings without notice to inform the court of all material facts known to them that will enable the court to make an informed decision, even if the facts are adverse to the interests of the client or lessen the likelihood of the order being made.
If the court grants an order on an application brought without notice, the order will usually be limited in scope and will be either time-limited, with a date on which the applicant may apply to extend the order on notice to the respondent, or will contain a term allowing the application respondent to apply to set aside the order on limited notice to the applicant.

Leave is required to have an interim application heard on short notice to the application respondent. An application to proceed on short notice may be made by requisition in Form F17, and can be made without notice or on extremely short notice (see SCFR 10–9(2)) and Short Notice Applications—Family (FPD-6)). If leave is granted, the court will impose terms governing service of the application materials and fix the date on which the main application will be heard (SCFR 10–9(4)).

[§6.04] Types of Interim Applications in Family Law Cases

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

1. Interim Orders Regarding Care of Children and Parenting Arrangements

See the 1985 Divorce Act, s. 16(2), with respect to interim orders for custody and access. See the 2019 Divorce Act, s. 16.1(2), with respect to interim parenting orders, and s. 16.5, with respect to interim contact orders. See the FLA, ss. 45 and 52, with respect to orders allocating parental responsibilities, parenting time and contact (whether interim or final); see the FLA, s. 216, with respect to interim orders.

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

Because interim orders are made based on affidavit evidence, without the full enquiry that takes place at a trial, the court should take a cautious approach and take into account the status quo. Ultimately, however, the only test is the best interests of the children (see C.T.H. v C.H.H., 2018 BCSC 189 for a summary of applicable principles).

Affidavits relied upon should be complete, accurate and coherent. In addition to identifying information about the parties and the children, affidavits may include the following, depending on the circumstances of the case and the orders sought:

- a brief history of the parents’ relationship;
- a history of the child’s care during the relationship and since separation;
- the individual needs of the child, including any health or educational problems;
- the nature and strength of the relationship between the child and the significant persons in their lives;
- the existing and proposed living arrangements of the parties and the children;
- details concerning the children’s day care, schools, schedules, eating, discipline, etc.;
- details concerning the spouse’s schedule either away from home or at work or in the evenings;
- any concerns about the other parent that are related to the best interests of the children;
- the views of the children, if the children are mature enough to express their views (although care should be exercised if these views have been reported by a party or a witness for a party rather than a neutral professional or third party); and
- occurrences of, or a pattern of, family violence (considering the factors under s. 38 of the FLA).

Lawyers should explain to their clients that the focus of the evidence and the analysis is on what is in the best interests of the child, and not on the interests of the parent.

Depending on the circumstances, it may be preferable to wait until an expert report has been prepared regarding the needs and views of the children and the appropriate parenting arrangements before proceeding with an interim application. (See §7.05 for more on those reports.)

2. Interim Support for a Spouse or Child

The court may make interim orders for child support and spousal support under the FLA, ss. 149, 165, 216, and the Divorce Act, ss. 15.1, 15.2 and 15.3.

The general guidelines for child support are the same on interim applications as they are on final applications. Applications for interim spousal support orders tend to rely more heavily on the short-term need of the proposed recipient, whereas the basis for the proposed recipient’s entitlement to support is usually scrutinized more thoroughly at trial. (The application materials should still set out the necessary evidence to establish entitlement to spousal support on any basis that applies to the client.)
Applications for interim support for a spouse or child are heard in chambers. As a year or more often passes before a matter finally proceeds to trial, the financial effect of an interim support order can be very important. It is essential to obtain as much financial disclosure as possible before proceeding with an interim support application. Without proper financial disclosure, it is impossible to determine the needs and means of the proposed recipient and the capacity of the proposed payor to pay. When a party fails to provide proper financial disclosure, counsel may take advantage of the provisions of s. 213 of the FLA and SCFR 5-1(28).

Counsel must be alert to the disclosure provisions in the Child Support Guidelines and SCFR 5-1. See ss. 21-25 of the Child Support Guidelines regarding the obligations of the parties to provide ongoing disclosure during and after court proceedings.

It is possible to obtain an order for interim support that applies retroactively. See D.B.S. v. S.R.G.; J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37; L.S. v. E.P., 1999 BCCA 393; and Kerr v. Baranow, 2011 SCC 10. However, the court will often adjourn a claim for retroactive support to trial, and limit interim support orders to interim ongoing support.

See Chapter 4 for a general discussion of support.

3. Appointment of an Expert by the Court

This section addresses the appointment of an expert under SCFR 13-5. The court may also appoint a person to prepare a report specifically on the needs of a child, the views of the child, and the ability and willingness of a party to satisfy the needs of a child; those reports are addressed in §7.05.

Supreme Court Family Rule 13-5 provides that the court may, on its own initiative, appoint an expert at any stage of the proceedings. Under SCFR 13-5(8), the court, after consultation with the parties, must:

(a) settle the questions to be given to the expert under this rule,

(b) give the expert any directions the court considers appropriate, and

(c) give the parties any directions the court considers appropriate to facilitate the expert’s ability to provide the opinion.

The order appointing an expert must contain the directions referred to in SCFR 13-5(8), and the court may make additional orders to enable the expert to carry out the directions including, on application by a party, an order under SCFR 9-5 for an examination with respect to the physical or mental condition of a party, or to inspect property (SCFR 13-5(9)).

The expert’s remuneration must be fixed by the court and consented to by the expert. It may include a fee for the report (and any supplementary reports) required under SCFR 13-6, and a sum for each day that the expert is required to attend court (SCFR 13-5(10)).

Part 13 of the SCFR also includes rules regarding experts appointed by one or both of the parties, and general rules that apply to all types of expert reports and expert evidence.

See also §7.04.

4. Protection Orders

Part 9 of the FLA deals with protection orders. The applicant must be an “at risk family member,” defined in s.182 as a person whose safety and security is, or is likely, at risk from family violence carried out by a family member (note the definition of “family member” in s. 1 of the FLA to ensure that Part 9 applies).

“Family violence” is broadly defined in s. 1 of the FLA. It includes psychological or emotional abuse and direct or indirect exposure of a child to family violence. It does not include reasonable measures taken in self-defence. Courts have generally interpreted “family violence” broadly, and it includes financial abuse. However, the applicant must provide evidence of the likely risk.

Section 183(1)(b) provides that an order under this section need not be made in conjunction with any other proceeding or claim for relief under the FLA.

A protection order may include any of the following terms, set out in s. 183:

(a) a provision restraining the family member from

(i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

(ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,

(iii) following the at-risk family member, or

(iv) possessing a weapon, a firearm or a specified object, or

(v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member,
including specifying the manner or means of communication or contact;

c) directions to a police officer to

(i) remove a family member from the residence immediately or within a specified period of time,

(ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or

(iii) seize from the family member [any weapons or firearms and related documents];

d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

e) any terms or conditions the court considers necessary to

(i) protect the safety and security of the at-risk family member, or

(ii) implement the order.

In determining whether to grant a protection order under s. 183, the court must consider at least the following factors (s. 184(1)):

(a) any history of family violence by the family member against whom the order is to be made;

(b) whether any family violence is repetitive or escalating;

(c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;

(d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

(e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member’s perception of risk to his or her own safety; and

(g) any circumstance that may increase the at-risk family member’s vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Counsel applying for protection orders should carefully consider practical matters, including the impact on all persons directly affected by the orders, the ease of enforcement, and whether to allow for any limited communications between the parties (for example, about children) or through counsel, all based on the history and safety concerns in the case at hand.

Unless otherwise ordered by the court, protection orders expire after one year. In practice, many protection orders are made for a shorter period. Protection orders obtained without notice often expire after a fairly short period of time or provide that the application respondent has leave to apply to set aside or vary the order on short notice to the applicant.

British Columbia has a central registry for protection orders. It is prudent to advise the client to have copies of the order on their person, in their vehicle, and at the locations that the opposing party is restrained from attending.

Protection orders must be in a specified form and separate from any other orders, even if additional orders were sought in the notice of application and granted at the same time.

At present, the court registry, rather than counsel, drafts protection orders (practice may vary between the Supreme Court and Provincial Court and among different registries).

In addition to the court rules and practice directions, counsel should be familiar with the practice at the registry in which the application is made, especially in respect to urgent and without notice applications, as practice may vary among registries.

It is crucial to remember that protection orders are enforced under s. 127 of the Criminal Code, and not under the FLA. Breaching a protection order is a criminal offence, so criminal law principles apply, including the following:

- The accused must have had knowledge of the order at the time of the breach. If the accused did not, then the breach itself is not a criminal offence. If the respondent was present when the order was made, ensure that the order states that. If the respondent was not present, prompt service in person and proof of service are highly important.

- The standard of proof for a breach is the criminal standard of “beyond a reasonable doubt.” Vague terms are therefore problematic. For example, prohibiting the person from attending “near” a certain location may be too vague; a specified distance would be preferable.
Clients obtaining a protection order should be advised of these issues and should not be given a false sense of safety merely because they have obtained a protection order. Community organizations can help with general safety planning. Familiarize yourself with local organizations so you can refer your clients to such services.

5. Exclusive Occupancy

Section 90 of the FLA provides for the exclusive occupancy of a family residence by one spouse, or the exclusive use of property stored there by one spouse. This relief is not available in the Provincial Court.

The test for exclusive occupancy requires the applicant to prove that shared use of the matrimonial home is a practical impossibility, and that, on the balance of convenience, the applicant is the preferred occupant (see e.g. Pelley v. Pelley, 2014 BCSC 473).

The practical impossibility test is objective, not subjective (see Dennis v. Regehr, [1996] Civ. L.D. 120 (BCSC)). When there are children, “the principal factor in determining which party to grant exclusive occupancy to must be the best interests of the children” (Pelley v. Pelley).

Additional relevant factors that are weighed in these applications include the following:

- the conduct of the parties, such as the presence or absence of a serious dispute complicated by such matters as violence, alcoholism or drug abuse;
- the respective economic positions of the parties;
- whether alternative living arrangements are available in the home to modify or minimize contact between the parties; and
- the parties’ past acquiescence to sharing the home despite the tensions between them.


However, if the home is situated on First Nations reserve lands, and at least one of the parties is a First Nation member, the Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c. 20 applies. The Act provides that First Nations may make their own laws about matrimonial real property on reserves, and if a First Nation has not enacted its own laws, the provisional federal rules apply. Section 20 of the provisional federal rules enables the court to grant an order for exclusive occupation of the family home.

6. Conduct Orders

Part 10, Division 5 of the FLA allows the court to make orders concerning conduct. The court may make the orders set out in this Division for the purposes of facilitating settlement, managing behaviour that might frustrate the resolution of a dispute, and facilitating arrangements pending the final determination of a family law dispute (s. 222).

For instance, the court may make orders to assist in case management (such as adjourning a proceeding while the parties attempt to resolve an issue) (s. 223). The court could also make orders requiring parties to attend family dispute resolution or attend counselling or other programs (s. 224), or make orders restricting communications between spouses, such as ordering parties to communicate only by email in order to minimize conflict.

Section 226 the FLA permits the court to make orders about a residence, including requiring a party to pay expenses for a residence (e.g. rent, mortgage, insurance), prohibiting a party from terminating utilities, and requiring a person to supervise the removal of personal belongings from the residence.

See s. 227 for additional types of conduct orders and s. 228 for their enforcement.

7. Restraining the Use, Disposition or Encumbrance of Property

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

The following steps may be appropriate to preserve property:

- filing, concurrently with the commencement of proceedings, a certificate of pending litigation against real property under the Land Title Act;
- filing an entry under the Land (Spouse Protection) Act, whether litigation has commenced or not;
- obtaining an order under s. 91 of the FLA restraining the use, disposition or encumbrance of assets; and
- obtaining an order protecting and preserving property under SCFR 12-1 and 12-4 or s. 39 of the Law and Equity Act.

Certificates of pending litigation are available to married and unmarried spouses where a claim about
the property is made under the *FLA*, Part 5. Filing a certificate of pending litigation does not, in itself, create substantive rights—it only defeats the *Land Title Act’s* protection of *bona fide* purchasers for value and warns potential lenders that title to the property may change hands. Further, a certificate holder does not automatically gain priority over other competing claims simply because the certificate holder subsequently establishes an interest in property. See *Antenen v. Antenen* (1992), 68 B.C.L.R. (2d) 300 (S.C.).

Filing an entry under the *Land (Spouse Protection) Act* can be helpful; it allows married and unmarried spouses to preserve an interest in a “homestead” (usually the family home) without starting court proceedings. “Homestead” is defined in s. 1:

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

Section 91 of the *FLA* can be used to protect real property and personal property (including chattels). An order under this section restraining the use, sale or encumbrance of assets protects not only assets that fall within the *FLA’s* definition of “family property” but “other property at issue” as well.

The court must make an interim order pursuant to s. 91 of the *FLA* on the application of a party, unless the other party establishes that the relief sought by the applicant will not be defeated or adversely affected by the disposal of that family property or other property. This application may be brought without notice, in which case counsel should be prepared to explain why notice should not be given. The supporting affidavit material should set out a reasonable belief that the property at issue will be disposed of, causing specified prejudice to the applicant. To defeat the application, the onus is on the application respondent to show that the relief sought by the claimant will not be defeated or adversely affected by the disposal of the property (see *T.C.T. v. S.L.T.*, 2015 BCSC 1602 and *Varelas v. Varelas*, 2015 BCSC 2245).

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

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

Note that the effect of a s. 91 order can be extremely broad, and may prevent the application respondent from accessing funds to deal with routine expenses. Counsel may wish to include a term permitting the use of funds as may be necessary to meet the application respondent’s reasonable day-to-day living expenses (and possibly legal fees). The court may require some exemptions for living expenses, particularly when the application is made without notice. In practice, however, counsel should be aware that financial institutions may not agree to assume the liability of distinguishing between permitted and prohibited uses of funds, and may therefore “freeze” accounts completely on receipt of the order, even when the order permits some use of funds.

8. Interim Distribution of Assets and Sale of Property

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

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

(a) family dispute resolution;

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

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


Supreme Court Family Rule 15-8 allows the court to make an order for the sale of property in a family law case where it appears necessary or expedient. The court may also make directions for the purpose of effecting a sale, which can include requiring payment of the purchase price into court or to trustees or to other persons (SCFR 15-8(1) and (3)). The court’s willingness to order the sale of property, in advance of a trial, is limited. The onus is on the applicant to show that the sale of the property before trial is necessary or expedient (see *Reilly v. Reilly* (1992), 44 R.F.L. (3d) 72 (B.C.C.A.) and *K.J.M. v. P.D.A.*, 2011 BCSC 1729).
9. Pre-Trial Examination of Witnesses

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

10. Appointment of Receiver or Receiver Manager

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

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

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

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

11. Security for Costs

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

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

A judge may also order security for costs under his or her inherent jurisdiction.

12. Applications for Findings of Contempt

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

A contempt application seeks a finding that a person is in contempt of court. A party may apply for a finding of contempt where, among other circumstances, the opposing party has:

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

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

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

Contempt is a remedy of last resort. It supplements the remedies for non-compliance set out in SCFR 21-5 and 21-6 and the FLA. The conduct must generally be repeated and ongoing before the court will find a party in contempt.

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

The standard of proof in a contempt application is the criminal standard of beyond a reasonable doubt, and care must be taken to ensure that all of the evidence relied on is admissible. See Friedlander v. Claman, 2016 BCCA 434, a family law case in which a mother was found guilty of multiple counts of contempt, but her appeal was allowed on some of them because the standard of proof and evidentiary requirements were not met.
Chapter 7

Pre-Trial Investigation and Preparation

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act...S.C. 2019, c. 16. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date describe the legislation both before and after the amendments.

§7.01 Discovery and Disclosure of Documents

Rules and procedures regarding discovery and disclosure of documents in a family law case are generally similar to those in any civil case. Section 212 of the FLA gives the court authority to order disclosure of information by parties at any stage of the proceeding, in accordance with the Supreme Court Family Rules, B.C. Reg. 169/2009 (the “SCFR”) or the Provincial Court (Family) Rules. This chapter focusses on procedures under the SCFR.

The pre-trial procedures for document disclosure are set out in SCFR 9-1, with additional provisions for financial disclosure at SCFR 5-1. Disclosure requirements depend on the issues in dispute. Common issues include parenting arrangements, the ability of a financially dependent spouse to work and become independent, the ability of a payor to earn a given income, and claims with respect to property or debt. Some cases also involve tort claims or other areas of law. The following are examples of documents that counsel may demand:

- the child’s school records, report cards and attendance records;
- medical records, such as reports from doctors, physiotherapists, and psychologists;
- information about any criminal or civil proceeding that relates to the child’s safety;
- documents relating to ownership, acquisition and disposition of property and to the incurring of debts;
- employment contracts and business contracts; and
- résumés and proof of attempts to secure employment, including rejection letters.

The party receiving the information must not disclose the information obtained under the order, except where it is necessary to resolve the family law dispute and on such terms as the order provides (FLA, s. 212).

§7.02 Financial Disclosure

Supreme Court Family Rule 5-1 requires disclosure of financial information in family law cases in which a party seeks an order for support under the 1985 Divorce Act or the FLA, property division under Part 5 of the FLA, the review or variation of a support order, or an order under the Family Homes on Reserves and Matrimonial Interests or Rights Act (SCFR 5-1(2)). It is expected that the requirements of Rule 5-1 will continue to apply when the orders are sought under the 2019 Divorce Act.

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

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

If the information contained in documents filed and served under SCFR 5-1 is rendered inaccurate or incomplete by a material change, the party whose information has changed must serve on all other parties a written statement or a revised Form F8 financial statement containing the accurate and complete information (SCFR 5-1(15)). As well, if a party’s most recent statement was served more than 91 days before the start of the trial or hearing at which it will be relied on, the party must serve an updated financial statement between 63 and 28 days before the trial or hearing (SCFR 5-1(18)).

1. Content of the Form F8 Financial Statement

Form F8 contains 6 parts:

Part 1: Income
Part 2: Monthly Expenses
Part 3: Property (Assets and Debts)
Part 4: Special or Extraordinary Expenses
Part 5: Undue Hardship

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Part 6: Income of Other Persons in Household

The form contains instructions about which parts the parties must complete, based on the claims they are advancing or defending.

2. Attachments

A party who serves a Form F8 must attach the relevant “applicable income documents” defined at SCFR 5-1(1).

These income documents include personal income tax returns and related Canada Revenue Agency notices of assessment and reassessment, property assessments, corporate financial statements and tax returns, pay stubs, and other documents listed in Form F8. The required attachments include the documents that must be disclosed under s. 21 of the Child Support Guidelines.

Counsel often request other documents in addition to those required under SCFR 5-1, such as pension statements or other documents concerning employment benefits, accountants’ files and working notes, bank and credit card statements, and applications for mortgages and loans.

3. Enforcement and Disclosure

Supreme Court Family Rule 5-1(28) lists the enforcement mechanisms available when a party fails to comply with a requirement under SCFR 5-1, including ordering that a Form F8 and applicable income documents be filed, dismissing an application, striking out a responding document, drawing an adverse inference against the party, punishing for contempt of court, imposing a fine, and attributing income in an amount the court considers appropriate.

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

Section 7.4 of the 2019 Divorce Act requires parties to proceedings under the Act to provide “complete, accurate and up-to-date information if required to do so under this Act.” This requirement also applies to any other person subject to an order under the 2019 Divorce Act.

The Child Support Guidelines include disclosure requirements at s. 21 and mechanisms to compel the required disclosure at ss. 22–24.

4. Agreement on Income

Where the only issue is child support, financial disclosure under the SCFR or the Child Support Guide-

lines will not be required when the parties are able to agree on the payor’s income and sign and file an agreement to that effect in Form F9 with the required attached documents (SCFR 5-1(8)).

5. Particulars

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

6. Disclosure of Business Interests

If a party has business or corporate interests, they must be disclosed in the Form F8. The party receiving the information can then request disclosure of documents to verify the disclosing party’s income or the value of the party’s interest (SCFR 5-1(19)). If a party fails to make sufficient disclosure, SCFR 5-1(19) to (26) provide mechanisms to compel production from third parties, including businesses.

7. Practice Tips for Completing Financial Statements

The Form F8 financial statement may be modified (while still complying with the formal and content requirements) to add supplemental information, figures and calculations, and explanatory notes, where the information will assist the court and the opposing party. The point is to provide clear, complete, and accurate information.

The client must indicate on the statement whether he or she anticipates any significant changes in the information provided.

Income and Monthly Expenses

- Income and expenses may be estimated, with care. The client should indicate when an amount is an estimate and explain the basis for it.
- Reported income and expenses are presumed to reflect current amounts. If an amount will vary, or if an expense will be incurred in the future, then say so.
- List the sources of income in as much detail as possible.
- Pay attention to any disparity among a party’s reported annual income, annual expenses, assets, and debts.

Value of Assets

- The value of non-monetary assets is rarely certain. If the value is unknown, the party may give an estimate and the basis for that
estimate; if no reasonable estimates are available, the party may list the value as “undetermined” or “unknown.”

- For property values, use the appraised value when it is known, and the assessment authority’s value pending an appraisal. Indicate the source of the value.
- If current values are not available for bank accounts, investments, and RRSPs, then use the most recent written statement and include the statement date. Values are otherwise assumed to be current.
- 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. Indicate the source of the value.
- 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. Report the value of the business as “unknown” until a valuation is obtained.
- Indicate whether each asset is in the client’s name only or is held jointly with other persons, and when each asset was obtained.

**Debts**

- List the entire amount of any joint and personal debts, indicating for each debt whether it is joint or personal.
- Distinguish between those debts brought into the relationship, incurred during the relationship, and incurred after separation by indicating when the debt was incurred.

### §7.03  Examinations for Discovery

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

Examinations for discovery are limited to five hours for each party adverse in interest, but this limit may be extended by consent of the party or by court order (SCFR 9-2(2)). On an application to extend the time limit, the court must consider the factors in SCFR 9-2(3), including the conduct of the examining party and of the party being examined.

To ensure that you have all the necessary information, when possible, prepare and exchange documents and experts’ evidence before holding examinations for discovery. The production of additional documents can be demanded at the examination, and the examination can be adjourned pending production.

### §7.04  Expert Witnesses and Reports

**1. General**

In many family law cases, opinion evidence is needed in order to make determinations about contested issues or to assist the parties to reach an agreement. Only experts may give opinion evidence; lay witnesses, such as the parties, may only give evidence about the facts known to them. Accordingly, when opinion evidence is needed to determine an issue, it must be presented by someone qualified as an expert in the relevant field and in the manner mandated by the court rules.

Part 13 of the SCFR sets out the rules regarding expert evidence. Some of the rules under this part apply to all experts, whereas some only apply to specific types of expert evidence.

Supreme Court Family Rule 13-2, which applies to all expert reports, sets out the duty of an expert witness to assist the court and to not be an advocate for any party. Experts must certify in their expert reports that they are aware of this duty, made the report in conformity with this duty and, if giving testimony, will do so in conformity with this duty.

Unless the court otherwise orders, an expert report (other than a report pursuant to s. 211 of the FLA) must be served on every party at least 84 days before trial, along with written notice by the party that intends to introduce the expert’s report at trial or, if a jointly appointed expert, by each party who intends to tender the report at trial (SCFR Rule 13-6). If a party intends to introduce an expert’s report to respond to an expert witness, that responding report must be served at least 42 days before trial under SCFR 13-6(4), along with written notice that the responding report is being served under SCFR 13-6.

Supreme Court Family Rule 13-6(9) requires that after the appointment of the expert or after the trial date has been obtained, whichever is later, the party who is required to serve the expert report must promptly inform the expert of the trial date and that the expert may be required to attend for cross-examination at the trial. A report pursuant to s. 211 must be filed and served by the author at least 42 days before the trial in Supreme Court (the deadline in Provincial Court is 30 days before the trial).

Counsel should arrange for appropriate experts so that the best evidence with the most probative value is presented. For example, an expert preparing a business valuation may need to consult expert reports from other professionals (such as real estate appraisers) in preparing the business valuation.
Counsel have a duty to the client to ensure that proper retainer arrangements are made with each expert. It should be clear at the outset who will be responsible for paying the expert—either the law firm or the client—and how much the expert’s report is likely to cost. If counsel will be paying the expert, it is prudent to have sufficient funds in trust from the client, in advance. Otherwise, counsel should assist the client in making arrangements directly with the expert. If the client does not have sufficient funds to pay the expert, consider a court application for an interim distribution of assets to finance the report.

2. Property and Financial Experts

Property and financial experts commonly include the following:

- real estate appraisers;
- actuaries for the valuation of pensions;
- certified business valuators; and
- appraisers for chattels, including art, collections, and antiques.

Supreme Court Family Rule 13-3(1) requires that expert opinion evidence on a “financial issue” must be presented by a jointly appointed expert. “Financial issues” are defined in SCFR 13-3(1) and include all matters arising under Parts 5 and 6 of the Family Law Act (property, debts, and pensions). This requirement applies unless the parties agree or the court orders otherwise. See SCFR 13-4 for the rules for jointly appointed experts.

[§7.05] Reports and Assessments Regarding Children

1. Reports Under s. 211

Under s. 211 of the FLA, the court may appoint a person to assess and report on any or all of the needs of a child, the views of a child, and the ability of a person to meet the child’s needs, for the purposes of a proceeding under Part 4 (care of and time with children). The author of the report must be a family justice counsellor, a social worker, or another person approved by the court (s. 211(2)(a)), usually a psychologist or registered clinical counsellor.

Reports under s. 211 of the FLA may be very useful in cases where there is a serious dispute about the best parenting arrangements; there are contested allegations of violence, abuse, or alienation; or there are other high-conflict parenting relationship issues.

Though these reports are prepared under the FLA, they can also be used when parenting arrangements will be determined under the Divorce Act. Section 211 reports can assist the parties in reaching a settlement or narrowing the issues in dispute, and, failing agreement, will be presented as expert evidence at trial.

Section 211(1) permits the court and the parties to define the scope of the report and the issues to be addressed. At present, the two most common types of reports pursuant to s. 211 are a comprehensive investigation into all matters concerning the care of the children, and a report limited to assessing the views of the children.

For a comprehensive report, the author conducts a broad study: observing the children with each parent; interviewing each parent; interviewing the children independently (when appropriate); interviewing collateral witnesses (such as teachers, care providers, and the parents’ new partners); reviewing court materials and other documents; and conducting psychological testing of the parents (if the assessor is qualified to do so; for example, family justice counsellors may not administer psychological testing). The report sets out the author’s observations and the information gathered, and provides recommendations about parenting arrangements.

In contrast, a “views of the child” report is limited to reporting the views of the child, and does not include recommendations about parenting issues. Such reports about the views of the children can be evaluative, meaning that the author will not only report what the child said but also provide an opinion on, for instance, whether the child was unduly influenced or has independent views on the issues. Alternatively, these reports can be non-evaluative, with the assessor simply reporting what the child said and what the assessor observed, without further analysis (such reports might not be considered reports under s. 211 because they only “report” what the child said and do not “assess” any matter, including the views of the child).

Counsel should determine in advance what type of report would be of the most assistance to the court under the circumstances.

The Court of Appeal noted in K.M.W. v. L.J.W., 2010 BCCA 572 that “[t]he facts stated in the investigator’s report are prima facie evidence of their truth” (at para. 50). Counsel for the party disputing these facts has the onus to adduce evidence to refute the report and to call the author of the report for cross-examination. A party may also retain an expert to prepare a report critiquing the s. 211 report; however, such reports are expensive and the test for admissibility is stringent (see T.E.A. v R.L.H.C, 2018 BCSC 2515).

The assessor’s recommendations in the s. 211 report are not binding on the court; rather, the court will consider the report in the context of the evidence as a whole, and may accept or reject any portion of the report (see e.g. K.W. v. L.H., 2018 BCCA 204).
Section 211 reports can be costly, and counsel should consider whether they are necessary given the parties’ respective positions and ability to pay. The court may order that one party pay the costs of the report or that the parties share the costs (s. 211(5)). If clients cannot afford a report, the court may appoint a family justice counsellor to prepare a report at no cost to the litigants; however, there is a long wait list for these reports, and their scope may be more limited because the author is not a psychologist.

2. Non-Evaluative Views of the Child Reports

Non-evaluative reports can be agreed to by the parties or ordered by the court under ss. 37(2)(b) and s. 202, which require the court to consider the child’s views, and permit the court to admit reliable hearsay evidence of a child who is absent or to give any other direction the court considers appropriate concerning the receipt of a child’s evidence.

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

If a witness is not responsive, consider obtaining an order for pre-trial examination under SCFR 9-4. Note the restriction on pre-trial examination of the other party’s expert under SCFR 9-4(2).

[§7.07] Interrogatories and Notices to Admit

Interrogatories and notices to admit are also available as a form of discovery in family law cases at the Supreme Court. They may be an efficient and inexpensive way to obtain evidence relating to financial information and admissions on allegations. SCFR 9-3 provides that a party may serve interrogatories on any other party, or on a director, officer, partner, agent, employee or external auditor of a party, if the party consents or if the court grants leave. SCFR 9-6 deals with notices to admit (admissions).

The family rules on interrogatories and admissions mirror the civil rules, so see also Practice Material: Civil, Chapter 2, §2.05 (interrogatories) and §2.08 (admissions).

[§7.08] Schedules of Assets (“Scott Schedules”)

From the financial information the client provides to the lawyer, the lawyer can draw up what is known as a “Scott Schedule” for property and debts. The purpose of a Scott Schedule is to provide a list of assets and debts in a clear and concise format that can be easily referenced by counsel and the trial judge.

A Scott Schedule is usually prepared after there has been an examination for discovery and when the full particulars of all assets and debts are available. It includes the following items:

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

Shortly before trial, counsel should provide the Scott Schedule to opposing counsel for review and to identify areas of agreement and dispute. Opposing counsel may provide a Scott Schedule as well, and one or both of the schedules may be presented at trial. The presiding judge at a trial management conference (discussed further in Chapter 8) may also direct the parties to exchange Scott Schedules by a set date prior to the trial.
Chapter 8

Case Management Conferences, Settlement Conferences, and Alternatives to Trial

This chapter focuses on procedures under the Supreme Court Family Rules (the “SCFR”) that are designed to encourage settlement even though litigation has commenced, or to have a matter adjudicated without a full trial. For details on the procedures in the Provincial Court, see the Provincial Court (Family) Rules.

[§8.01] Judicial Case Conference

Under SCFR 7-1, the parties to a family law case are generally prohibited from serving a notice of application and affidavits on the opposing party unless a judicial case conference (“JCC”) has been held and the presiding judge has released the parties from the JCC program. Certain applications may be brought even though a JCC has not been conducted; they include applications for an order respecting protection of property under s. 91 of the FLA, applications for a consent order, applications made without notice, and applications to change a final order.

A party may apply to be relieved from the JCC requirement in the circumstances set out in SCFR 7-1(4). The application should be made by requisition pursuant to Family Practice Direction 13.

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

Counsel should ensure that their clients understand that the presiding judge or master may seek the clients’ participation and input during the JCC. Counsel should also ensure that their clients understand that the judge at the JCC can only make orders by consent (except for procedural orders).

Counsel should canvass the issues and any possible resolution to them with their clients and each other in advance of the JCC to maximize the potential utility of the JCC. Even if a resolution is unlikely, counsel should prepare goals for the JCC, which can include attempting to reach interim consent orders (for example, interim parenting arrangements and interim support payments), consent orders for disclosure, and orders about the next steps in the case.

At the conclusion of the JCC, the parties, their counsel, and the presiding judge or master will sign a case management plan prepared by the court clerk setting out any orders made at the JCC going by consent and any scheduling directions given by the master or judge.

In addition to the mandatory JCC requirement, the parties can request, or the court may direct, that another JCC take place at any point in the proceedings.

While a JCC brief is not required under the SCFR, it is good practice to prepare one, focussing on the issues in the proceedings, the issues that counsel aims to address at the JCC, and any background facts relevant to these matters. The JCC brief is not filed, but handed to the judge and opposing party at the JCC.

See also Supreme Court Family Practice Direction—Judicial Case Conferences (FPD-12).

[§8.02] Trial Management Conference

A trial management conference (“TMC”) must be held at least 28 days before the scheduled trial date, unless the court otherwise orders (SCFR 14-3). If reasonably practicable, the judge who will preside at the trial should conduct the TMC. Each party must prepare a trial brief and file and serve it at least 7 days in advance of the TMC (the registry will refuse to accept late briefs for filing, so a party who misses the filing deadline needs leave of the court to file the brief). The lawyers for each party must attend, and each party must also attend unless the party is represented by a lawyer at the TMC and the party (or an individual authorized by the party) is readily available for consultation during the TMC, either in person or by telephone (SCFR 14-3(4) and (6)).

At a TMC, the judge may consider and make orders on a large range of topics. Subjects of orders might include attendance at a settlement conference; amendments to pleadings; plans for conducting the trial; admissions of fact; admitting documents; time limits on direct examination and cross-examination of witnesses and opening or closing statements; parties providing summaries of the evidence of witnesses or directing witness evidence by way of affidavit; expert reports; written opening or closing statements; adjournment of the trial or the TMC; changes to the number of days set for trial; a further

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TMC; and any other matters that may assist in making the trial more efficient, resolving the family law case, or furthering the object of the SCFR. Note that under SCFR 14-3(11), the court may not hear applications at a TMC that require affidavit evidence.

[§8.03] Settlement Conference

The purpose of a settlement conference is to explore the possibilities for settlement with the assistance of a judge on a without-prejudice basis (SCFR 7-2(1)). Like a JCC, a settlement conference is a relatively informal meeting of the parties and their counsel before a judge. Proceedings at a settlement conference are recorded, but are not available to anyone without a court order (SCFR 7-2(2)).

The parties may request a settlement conference by jointly filing a requisition in Form F17, or a judge or master (including at a TMC or JCC) may direct the parties to attend a settlement conference (SCFR 14-3(9)(a) and 7-1(15)(n)).

At the settlement conference, the judge will expect counsel to provide a formal statement of the facts and law. Counsel should prepare a settlement conference brief to provide a formal statement of the facts and law. The judge will attempt to resolve the dispute through mediation, and may provide the parties with his or her perspective of the appropriate outcome for the case.

To get the most out of the conference, the lawyer should thoroughly prepare by reviewing pertinent affidavits, financial statements, pleadings, and discovery transcripts well ahead of the conference. The court’s views of each party’s prospects of success can be quite sobering to the litigants, and may encourage them to adopt more flexible positions that will be necessary to reach settlement.

[§8.04] Summary Trial

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

Summary trials are not suitable for all family law matters. Under SCFR 11-3(11), the court may dismiss the summary trial application if:

(i) the issues raised by the summary trial application are not suitable for disposition under this rule, or

(ii) the summary trial application will not assist the efficient resolution of the family law case.

Under SCFR 11-3(15), on the hearing of a summary trial application, the court may grant judgment unless:

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application.

Accordingly, summary trials may not be appropriate in disputes over parenting arrangements or contact, or when there are serious issues of credibility or disputes about critical facts that cannot be resolved on the materials. The existence of credibility issues does not automatically preclude the possibility of a summary trial—the court will determine whether it can resolve the credibility issues on the materials presented and whether it is in fact necessary to resolve them in order to adjudicate the matter. When the court is unable to determine an issue without oral evidence, the parties run the risk of incurring the expense of the summary trial only to have it rejected and remitted to the trial list.

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

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

A party may bring an application for a summary trial of a discrete issue or of all the issues in the proceedings (SCFR 11-3(2)). The court will decide whether or not to allow a summary trial on some issues only. For example, the court may agree to hear an application for a divorce and adjourn all other matters to a “regular” trial.

[§8.05] Offers to Settle

Offers to settle are governed by SCFR 11-1. Offers to settle must comply with the formal requirements of SCFR 11-1(1) and may not be disclosed to the court until after all the issues, except for costs, have been determined. Depending on the terms of the offer and the outcome of the proceedings, the court may do any of the following regarding costs (SCFR 11-1(5)):

(a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would have otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;

(b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;

(c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the
party would have been entitled had the offer not been made; and

(d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party’s costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

Because of this rule, offers to settle can be powerful tools to move a dispute toward settlement. The party making the offer must make a proposal that is reasonably capable of acceptance and falls within the range of probable outcomes at trial. The party receiving the offer must review the proposal carefully in light of the potential for costs or double costs. For a discussion about this rule (in the context of double costs), see *Hartshorne v. Hartshorne*, 2010 BCCA 327. For considerations of offers to settle in cases about parenting arrangements, see *Hansen v. Mantei-Hansen*, 2013 BCSC 1854; *J.L.H. v P.J.H.*, 2017 BCSC 2192; and *Bateman v. Thorneycroft*, 2016 BCSC 2318.
Chapter 9

Judgments and Enforcement of Orders and Agreements

References in this chapter to the “1985 Divorce Act” describe the Divorce Act prior to the coming into force of amendments under Bill C-78, An Act to Amend the Divorce Act, …, S.C. 2019, c. 16. References to the “2019 Divorce Act” describe the Divorce Act after the coming into force of the amendments (effective July 1, 2020, unless otherwise stated in the chapter). References to the “Divorce Act” without a preceding date describe the legislation both before and after the amendments.

§9.01 Judgments and Orders

Orders submitted to the courts must comply with the Rules of that court—the Provincial Court (Family) Rules (the “PCFR”) in Provincial Court, and the Supreme Court Family Rules (the “SCFR”) in Supreme Court.

In the Provincial Court, consent orders must be in Form 20, protection orders under Part 9 of the Family Law Act must be in Form 25, restraining orders under s. 46 of the Family Maintenance Enforcement Act must be in Form 25.1, and all other orders must be in Form 26 (PCFR 14 and 18).

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

(a) if the order is a final order,
   (i) in Form F33 if the order changes, suspends or terminates a final order and is made by consent;
   (ii) in Form F51 if the order changes, suspends or terminates a final order and is not made by consent;
   (iii) in Form F34 if the order is made under SCFR 10-8 without notice and without a hearing; or

(iv) in Form F52 in any other case [including final orders made following a hearing, trial or summary trial or in an undefended family law case];

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

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

(d.1) if the order is a protection order under s. 183 of the Family Law Act, in Form F54;

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

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

(d.4) if the order is made under SCFR 7-1(15) at a judicial case conference, in Form F51.1; and

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

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

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

A support order will include the following:

• the names of the parties, identifying who will pay and who will receive support;
• the amount to be paid, whether it is to be paid periodically or in a lump sum, the commencement date or payment date(s) as applicable, and the date on which subsequent payments are to be made (for example, on the first day of every month);
• the legislation under which the order is made;
• each party’s guideline income, including whether income is being imputed to the party;
• for child support orders,
  ▪ the names and birthdates of the children for whom support is paid;
  ▪ any extraordinary expenses (pursuant to s. 7 of the Child Support Guidelines), with the parties’ proportionate share of the extraordinary expenses and how those expenses are to be paid; and
  ▪ if the amount of child support is based on a finding of undue hardship, then the reason for the hardship and the amount to be paid;

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• whether the order is final or interim;
• whether the order is a variation of a previous order and what is being varied; and
• any terms providing for a review, adjustments based on changes in income, or termination after a specific period.

Note that support orders can be registered with the Family Maintenance Enforcement Program (the “FMEP”). Therefore, the order should include all information required by the FMEP to enforce it. (See §9.04(2) for more on this topic.)

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

• the name and birthdate of each child;
• the name of the party (or parties) who are guardians of the child(ren);
• the statute(s) under which the order is made;
• custody (under the 1985 Divorce Act) and/or guardianship terms (under the FLA);
• allocation of parenting responsibilities, if the order is made under the FLA and both parties are guardians;
• a schedule of parenting time (for guardians under the FLA), contact with children (for non-guardians under the FLA, and for people other than the divorcing spouses under the 2019 Divorce Act), or access (under the 1985 Divorce Act); and
• any terms of a parenting order or contact order under the 2019 Divorce Act.

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

• supervision terms for access, parenting time, or contact;
• terms regarding travel with the children or prohibiting a person from removing a child from a specified geographical area;
• the means for resolving future disputes about an order made by the court (such as parenting coordination);
• terms regarding the child(ren)’s school; and
• restrictions on consumption of alcohol or other substances, if there are concerns about substance abuse.

This list is by no means exhaustive, and orders respecting children should address the particular circumstances of each case.

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

• a description (in the order or in a schedule to the order) of each item of property and debt, such as its value or balance owing, its location (for real property), any particulars (for bank accounts), and how it is to be divided or allocated between the parties (some items can be described generally, such as, “each party will keep all personal and household items that are in that party’s possession”);
• a description as to the timing and any specifics regarding any sale, compensation payment, or transfer of property; and
• if applicable, a reference to the registrar for an accounting of family property and family debt.

For sample orders and provisions, see the British Columbia Family Practice Manual, Chapter 15; Family Law Agreements—Annotated Precedents; and the Supreme Court “Family Order Pick List” (www.courts.gov.bc.ca/supreme_court/practice_and_procedure/sc_family_law_orders.aspx).

§9.02 Effective Date of Orders

Unless the court orders otherwise, an order or judgment takes effect on the date it was pronounced, or, if made by a registrar, on the date it is signed by the registrar (SCFR 15-1(9)). This is true whether that order is entered or not. However, it is very difficult to enforce an order if it has not been entered. Furthermore, if a party does not obey an order of the court, the other party cannot proceed with a contempt application against the noncompliant party unless the party can show that the noncompliant party has had actual notice of the order. While it is not necessary, it is preferable to personally serve an entered copy of the order on a party who is not represented by counsel.

Note that a divorce takes effect 31 days after the judgment granting the divorce is rendered, unless otherwise ordered by the court (Divorce Act, s. 12).

§9.03 Enforcement of Restraining Orders Regarding Property

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

If you indiscriminately serve restraining orders on third parties such as brokerages, banks, or lending institutions, you may prejudice the financial position of the opposing party. Not only may you cause embarrassment, you may place the other party in a position where he or she will be unable to raise funds to settle with your client because of the nervousness of bankers and lending institutions. It
is important to advise the client of the risks associated with each course of action (namely, whether or not to obtain a restraining order), and to obtain instructions from the client as to which course to follow. As part of assessing the matter, consider whether you have sufficient knowledge of the other party’s finances and whether there are sufficient assets to satisfy your client’s claims that can be protected through other methods.

Counsel must be careful not to inadvertently cause or participate in a breach of a restraining order, for instance, by accepting payment from a client from funds that may be subject to an order.

[§9.04] Enforcement of Support Orders

1. Extraprovincial Support Orders

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

Section 18 of the 1985 Divorce Act provides a mechanism for obtaining or confirming a variation order for support made in another jurisdiction. When two former spouses reside in different provinces, the order may be made provisionally in one jurisdiction and then reviewed and confirmed in another jurisdiction where the other party resides. (See SCFR 15-3—Provisional and Extra-Provincial Orders.)

Sections 18 and 19 of the 2019 Divorce Act aim to simplify this process and eliminate the need for provisional orders, making the process more similar to the process under the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 ("ISO").

ISO provides a process for obtaining, varying, recognizing and enforcing support and maintenance orders between BC and other provinces and some non-Canadian jurisdictions. It does not apply to orders made under the Divorce Act. Under ISO, support orders from other provinces have the same effect as orders from a BC court when they are registered in BC. Parties may also apply in a BC court to cancel or vary orders that were made in another jurisdiction. The BC court will apply the law of the jurisdiction in which the children reside when determining the amount of support to be paid to children. ISO eliminates the two-step process of making a provisional order in BC and waiting for that order to be confirmed by a court in the other jurisdiction, and vice versa. However, in jurisdictions where provisional orders continue to exist, that process still needs to be followed. Refer directly to the legislation for details of the procedures and the authority of BC courts.

2. Family Maintenance Enforcement Act

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

The goal of the FMEP is to collect support monies and replace the inconvenience, cost and frustration of enforcing support orders privately.

To enrol with the FMEP, a person receiving support can obtain a filing kit online at the FMEP website (www.fmep.gov.bc.ca) or request one by mail. The filing kit contains a filing application, which asks for information about the payor and the history of payment. The application, along with a copy of the support order, should be sent to the FMEP Enrolment Office. Once the FMEP has received all of the necessary information, the FMEP will calculate any arrears owing to the recipient and complete the enrolment process. The FMEP will then send a Notice of Filing to the payor and recipient, telling them that their order or agreement has been enrolled with the FMEP.

The Director of Maintenance Enforcement may enforce support orders filed with the Director (s. 4), and can take whatever steps the Director considers advisable, including commencing, conducting, continuing or discontinuing any proceeding that may be taken by a creditor under Part 3 of the FMEA. As long as the order is filed with the FMEP, only the Director, and the creditor if so authorized by the Director, may take steps to enforce the order (s. 5(1)).

Default hearings are authorized by s. 21 of the FMEA. A debtor is summoned to court to show cause before a judge why the support order should not be enforced.

The FMEP may use various measures to collect arrears of support, including attaching any income or benefits owed to the payor, such as wages, pension benefits, bank accounts (including 50% of joint bank accounts), income tax refunds, GST credits or rental income; registering a lien against land or personal property; reporting to the credit bureau; obtaining an order to seize and sell property of the payor; instructing ICBC to refuse to issue or renew the payor’s driver’s licence or vehicle registration; and requesting the federal government to suspend or refuse to issue or renew federal licences, including the payor’s passport.
A payor may respond to enforcement proceedings by applying to the court for an order to change, suspend, or terminate the child support order under s. 152 of the Family Law Act, or to vary, rescind or suspend the child support order under s. 17 of the Divorce Act. On hearing the application, the court may cancel arrears, suspend enforcement of the support orders, or make any order that the court considers appropriate.

As well, if the support order is in favour of a child or spouse who is not a status Indian, a payor who is a status Indian can rely on s. 89 of the Indian Act, R.S.C. 1985, c. I-5 to resist enforcement proceedings for real property or personal property that is located or earned on reserve. This section does not prevent enforcement when the spouse or child for whom the support is ordered is a status Indian.

See the British Columbia Family Practice Manual for more information.

3. Family Law Act

Support orders may also be enforced under the general and extraordinary enforcement provisions of the FLA.

Under the general remedy at s. 230(2), on application by a party, the court may make an order to do one or more of the following:

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

(b) require a party to pay

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

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

(iii) a fine not exceeding $5,000.

Where no other order will secure a party’s compliance with an order, the court may take the extraordinary step of ordering that the party be imprisoned for up to 30 days under s. 231(2). Under s. 231(3), a person must first be given a reasonable opportunity to explain that person’s non-compliance and show why an order under this section should not be made. The section allows a court to issue a warrant for a person’s arrest for the purpose of bringing that person before the court to show why an order for imprisonment should not be made. Imprisonment of a person under this section does not discharge any duties of the person owing under an order made under the FLA.

4. Other Enforcement Procedures

Enforcement procedures are also available under the Supreme Court Family Rules and the provincial Court Order Enforcement Act. For a discussion of these procedures, see the British Columbia Family Practice Manual, Chapter 17 (Enforcing Orders and Agreements).

A party may also apply for a finding of contempt where the opposing party has disobeyed an order of the court. This remedy is discussed in §6.04(12).

[§9.05] Enforcement of Agreements

Written agreements that deal with the following matters may be filed at either the Supreme Court or the Provincial Court and then enforced as an order of that court:

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

The definition of “written agreement” in s. 1 of the FLA does not require the agreement to be witnessed, but it must be signed by the parties. Further, s. 6 of the FLA provides that written agreements are enforceable without consideration.
Chapter 10

Undefended Family Law Cases

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

§10.01 Undefended Family Law Cases—Generally

An undefended family law case is defined (in SCFR 1-1(1)) as a family law case to which one of the following applies:

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

If the case is undefended, pursuant to SCFR 10-10 a party may apply for a final order either by a trial or by filing a requisition with the materials listed at SCFR 10-10(2). This second option is usually called a “desk order,” which means that the materials are submitted to the court and reviewed by the judge, rather than having a hearing in court with the attendance of counsel and the parties.

The following materials must be filed under SCFR 10-10(2):

- a requisition in Form F35 setting out the order sought;
- a draft of the proposed order (this must be in the form required under SCFR 15-1(1));
- proof that the case is an undefended family law case (when a response has been filed, proof is typically obtained by the parties or their counsel filing a signed statement; when no response has been filed, proof is typically obtained by requisition requesting the registry search the file for a response to family claim or counterclaim);
- a certificate of pleadings, in Form F36, certifying that the pleadings and proceedings are in order;
- if necessary, proof of service of the notice of family claim or counterclaim under which judgment is sought;
- a child support affidavit in Form F37, if appropriate (that is, if the family law case includes a claim for divorce and there is a child of the marriage, or if the family law case includes a claim for child support); and
- if a divorce is sought, an affidavit in Form F38 sworn by the party applying for the divorce (see Supreme Court Family Practice Direction—Divorce Applications (FPD-11) for timing restrictions for swearing this affidavit).

The pleadings must be in order, and any supporting affidavits must be properly sworn and filed. The court registry staff will review the documents. If there are any errors or omissions, the registry will issue a rejection notice setting out what needs to be corrected. Any irregularity must be corrected before the registrar will sign the certificate. Once all of the materials are in order and the certificate of pleadings is signed, the registry staff will put them before a judge who reviews them in private chambers.

Other than in desk order applications for divorce only, it is good practice to give written notice to the other party that unless that party responds within a set period, you will apply for a final order (include in your notice the terms of the proposed final order).

Under SCFR 10-10(5), if the court is satisfied that it is appropriate to apply for an order by way of requisition, the court may give any directions it considers will further the object of the SCFR and may, without limitation:

(a) make an order or grant judgment without the attendance of lawyers or the applicant;
(b) direct the attendance of lawyers or the applicant; or
(c) direct that further evidence be presented.

Additional materials are required when a divorce order is sought in an undefended family case (either alone or with other relief).

When a divorce is sought, the claimant must file a registration of divorce proceeding form together with the notice of family claim. This form is then transmitted to the Central Divorce Registry in Ottawa to ensure that divorce proceedings have not already been instituted or concluded in BC or another province. No divorce order will be granted until the registry has received confirmation that no other divorce proceeding has been commenced (SCFR 15-2(1)).

When there are children of the marriage, the court has a duty, before granting a divorce, to satisfy itself that reasonable arrangements have been made for the support of the children of the marriage, and to stay the granting of the divorce until such arrangements are made (s. 11(1) of the Divorce Act). Accordingly, the affidavit in Form F38 must set out the particulars of the arrangements made for the care and support of the children. The applicant also must swear and file a child support affidavit in Form F37, and if the amount of child support sought differs from the applicable Child Support Guidelines table amount, the applicant must provide an explanation.

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

Unless the court otherwise orders, the party entering the order for divorce must, promptly after the order is entered, serve a copy of the entered order on each of the other parties that have an address for service, and if any of the parties does not have an address for service, mail a copy of the entered order to that party’s last known address (SCFR 15-2(4)).
Chapter 11

Other Proceedings

§11.01 Child, Family and Community Service Act

The Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, as amended (the “CFCSA”) outlines the practice and procedures governing state intervention in the well-being and safety of children.

The Provincial Court has jurisdiction over all proceedings under the CFCSA except appeals (s. 1, definition “court”).

While the CFCSA applies to Indigenous children both on and off reserve, it does not apply on reserves where bands have passed child welfare by-laws under s. 81 of the Indian Act.


Note as well that provincial legislation, the Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44, came into force in November 2019. It confirms that UNDRIP applies in British Columbia, and it requires the provincial government to review laws and policies to ensure they are consistent with UNDRIP. This legislation is expected to change provincial procedures concerning Indigenous children.

Federal and provincial legislative amendments reflect a concern that a disproportionately large number of Indigenous children are removed into care. Changes to the CFCSA were enacted following the 2016 report by Grand Chief Edward John, “Indigenous Resilience, Connectedness and Reunification—From Root Causes to Root Solutions: A Report on Child Welfare in British Columbia.” That report’s recommendations contributed to the Child, Family and Community Service Amendment Act 2018, S.B.C. 2018, c. 27, the last parts of which came into force on April 1, 2019.

Section 2 of the CFCSA details the guiding principles for interpreting the Act. Generally, the CFCSA must be interpreted and administered so that the paramount considerations are the safety and well-being of children. The section enumerates seven specific principles, including the following:

- children are entitled to be protected from abuse, neglect, and harm or threat of harm;
- a family is the preferred environment for a child; and
- Indigenous children are entitled to learn about and practise their Indigenous traditions, customs and languages.

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

Section 4 provides that, in determining the child’s best interests, all relevant factors must be considered. Factors include the child’s safety as well as the child’s physical and emotional needs, the importance of continuity in the child’s care, the quality of the relationship the child has with a parent or other person, the child’s cultural, racial, linguistic and religious heritage; and the child’s views.

Section 4(2) provides that if the child is Indigenous, “the importance of the child being able to learn about and practise the child’s Indigenous traditions, customs and language” and of belonging to the child’s Indigenous community must be considered in determining the child’s best interests.

Under Part 7, the Minister of Children and Family Development may enter into agreements with a First Nation, another Indigenous community, the Nisga’a Nation or a Nisga’a Village, the federal government, provincial governments or a foreign government, Community Living British Columbia, or “any person or group of persons” (s. 90). The Minister has delegated child protection services to family service agencies both on and off reserve. In Vancouver, the agency is the Vancouver Aboriginal Child and Family Services Society (www.vacfss.com). There are various agencies throughout the province.

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

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

A director can delegate to any person, or class of persons, any or all of the director’s powers, duties, or functions under the CFCSA (s. 92). Child protection social workers in British Columbia are delegates of the director.

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

1. Alternatives to Removal

   (a) Voluntary Agreements

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

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

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

   - 12 months, if the child is under age 5;
   - 18 months, if the child is age 5 or older but under age 12; and
   - 24 months, if the child is age 12 or older.

   Agreements can be made with a child’s family members or others. Section 8 of the CFCSA allows the director to make a written agreement with a person who has established a relationship with the child or who has a cultural or traditional responsibility toward a child. The director who has care of an Indigenous child may also make an agreement either before a presentation hearing (s. 33.01) or after (s. 48(1.1)) for care of the child by a parent or a person who has a relationship with the child or has a cultural or traditional responsibility toward a child (s. 8).

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

   (b) Take-Charge Provisions

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

   (c) Protective Intervention Orders

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

   (d) Non-Removal Supervision Orders

   A director may apply for a supervision order without first removing the child where there are reasonable grounds to believe that the child needs protection and a supervision order would be adequate protection (s. 29.1). A director must attend a presentation hearing no later than
10 days after applying for a supervision order (s. 33.1(1)).

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

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

- the child, if 12 years of age or over; and
- the person with care of the child.

In addition, the director must, if practicable, inform applicable people and entities outlined in s. 33.1(4); they may include the parents, the Public Guardian and Trustee, an applicable Indigenous organization, a Treaty First Nation, or the Nisga’a Lisims Government.

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

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

(e) Mediation

Section 22 provides a mediation mechanism by which a director and any person may resolve an issue about the child or a plan of care.

Section 24 confirms the confidentiality of the mediation process and that information obtained in mediation (or family conference or other alternative dispute resolution mechanism) must not be disclosed unless by consent, or to be reflected in an agreement, or the disclosure is necessary for the child’s safety or the safety of a person other than a child.

2. Removal

A director may, without a court order, remove a child if that director has reasonable grounds to believe that the child needs protection; the director must also believe that either the child’s health or safety is in immediate danger, or no less disruptive measure is available to adequately protect the child (s. 30). Note that s. 13 contains a broad definition of circumstances where a child needs protection. The circumstances include where there has been or is likely to be physical harm, sexual abuse or exploita-

tion, neglect, emotional harm, deprivation of necessary health care, deprivation of treatment for treatable conditions, or inadequate care.

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

If the child is Indigenous, and the director comes to an agreement with the parent or with a person who has established a relationship with the child, or who has a traditional responsibility toward the child, then the director may withdraw before the presentation hearing (s. 33.01).

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

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

Section 35 governs the material required at the presentation hearing. In the case of an Indigenous child, the director must present the steps to be taken to support the child to learn about and practise the child’s Indigenous traditions, customs and language and to belong to the child’s Indigenous community.

At the conclusion of the hearing, the court must make one of the following:

- an interim order for custody to the director;
- an interim order for return of the child to the parent under the supervision of the director;
- an order that the child be returned to or remain with the parent; or
- an interim order that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director’s supervision.

Except where the judge orders return to the parent without supervision, the court must set a protection hearing within 45 days. Section 38 requires at least
10 days’ notice of the protection hearing. For who must be served, see ss. 38(1) and 39.

At the protection hearing the court must:

- determine whether the child needs protection (s. 40); and if so,

- make an order (s. 41) that the child
  - be returned to or remain in the custody of the parent and be under the director’s supervision for up to six months;
  - be placed in the custody of a person other than the parent with the consent of the other person and under the director’s supervision, for a specified period in accordance with s. 43;
  - remain or be placed in the custody of the director for the specified period in accordance with s. 43; or
  - be placed in the continuing custody of the director, if the requirements of s. 41(2) are met.

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

- 3 months if any child in a group is under 5 years of age;
- 6 months if any child in a group is 5 to 11 years old; and
- 12 months if any child in a group is 12 years of age or older.

Sections 41 and 49 outline the procedures and time considerations for the director to apply for a continuing custody order. A continuing custody order places the child in the permanent care of the director. It is granted where the identity or location of a parent has not been found, or where a parent is unable or unwilling to resume custody of the child. Section 49 sets out the following criteria for the order: there is no significant likelihood that the circumstances that led to the child’s removal will improve within a reasonable period of time or that the parent will be able to meet the child’s needs. Section 41(2) sets out slightly different criteria: the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child’s best interests to be returned.

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

- the child reaches the age of 19;
- the child is adopted;
- the child marries;
- the court cancels the continuing custody order; or
- the custody of the child is transferred under s. 54.1.

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

Section 54.01 allows the director to apply to permanently transfer custody of a child to a person who had care of a child pursuant to an agreement made under s. 8 or a temporary custody order.

Section 70 of the CFCSA outlines the rights of a child who is in care. Indigenous children specifically have the right to receive guidance, encouragement and support to learn about and practise their Indigenous traditions, and to belong to their Indigenous communities.

Section 71 governs placement decisions about children after removal. Subsection 71(1) directs that the director must consider the best interests of the child when deciding where to place a child, and subsection 71(2) provides:

The director must give priority to placing the child with a relative or, if that is not consistent with the child’s best interests, placing the child as follows:

(a) in a location where the child can maintain contact with relatives and friends;
(b) in the same family unit as the child's brothers and sisters;
(c) in a location that will allow the child to continue in the same school.

Subsection 71(3) provides:

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

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

(b) with another Indigenous family, if the child cannot be safely placed under para. (a); or

(c) with a relative, or where the child can maintain contact with family and friends, if the child cannot be safely placed under paras. (a) or (b) of this subsection.

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

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

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

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

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

For more detailed information about proceedings under the CFCSA, see Chapter 19 of the British Columbia Family Practice Manual (Vancouver: CLEBC) and Chapter 14 of the Family Law Sourcebook (Vancouver: CLEBC). See also Annotated Family Practice (Vancouver: CLEBC).

[§11.02] Adoption Act

There are four types of adoption:

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

2. relative or stepparent adoptions;

3. ministry adoptions, by which children in the continuing custody of the Director of Child, Family and Community Services are adopted; and

4. custom adoptions of Indigenous children.

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

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

Under s.6(2), if the prospective adoptive parents reside in BC, the director or adoption agency can place a child with them only after they are approved on the basis of a home study completed in accordance with the Adoption Regulation. If the parents reside outside BC, they must be approved to adopt according to the laws of the jurisdiction in which they reside.

Under s.13(1), consents are required from the birth mother, the father (see the expanded definition in s. 13(2)), any person appointed as the child’s guardian, and from the child if 12 years of age or over. The consents of the birth mother and father are not required if the child is in the continuing custody of the director under the CFCSA, or if the director is the child’s guardian under the FLA. In special circumstances, a person’s consent may be dispensed with (s. 17). Those circumstances include where the person cannot be located or where the person is not capable of giving an informed consent. In addition, consent can be dispensed with where a person has abandoned or deserted the child, has not made reasonable efforts to meet their parental obligations to the child, or is not capable of caring for the child.

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

Section 46 of the Adoption Act recognizes custom adoptions:
On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

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

For more information on adoptions, see Chapter 20 of the British Columbia Family Practice Manual and Chapter 15 of the Family Law Sourcebook.
Agreements are an important tool for resolving disputes or potential disputes. They give control to the parties, avoid the emotional and financial cost of prolonged litigation, and can be adapted to suit the parties’ specific circumstances and needs. These are the most common types of family law agreements:

- marriage agreements, usually made by spouses at the beginning of their marriage or in anticipation of marriage (sometimes referred to as pre-nuptial agreements);
- cohabitation agreements, made by parties who live together or are planning on living together without necessarily marrying;
- separation agreements, made on the breakdown of a married or unmarried spousal relationship; and
- parenting agreements, made by parties whose only legal relationship is parenthood or who wish to deal with only the issue of parenting.

Family law agreements, like any contracts, are governed by contractual principles established by common law. The court will apply principles of contract law, such as the contra proferentem doctrine, to interpret agreements, and will apply common law principles to determine whether to set agreements aside, to the extent their application is consistent with the legislation.

Family law agreements are also governed by statutory provisions. Sections 65 and 68 of the now-repealed Family Relations Act (the “FRA”) allowed the court to vary agreements involving property in limited circumstances. Those provisions will continue to apply to family law agreements made by married spouses before the Family Law Act (the “FLA”) came into force. (The FLA’s transition provisions are discussed in the next section.) The FLA governs agreements entered into after it came into force, and is the focus of this chapter.

Checklists help in obtaining information from a client that is relevant to an agreement, in discussing the proposed terms of an agreement, and in drafting the agreement. See the checklists in the Law Society’s Practice Checklists Manual (www.lawsociety.bc.ca). Drafting techniques for family law agreements are beyond the scope of this chapter; for details of drafting such agreements, refer to Family Law Agreements—Annotated Precedents (Vancouver: CLEBC).

The FLA came into force on March 18, 2013, replacing the FRA. The FLA contains transition provisions for agreements that were made before the FLA came into force, about care of and time with children, and about property division.

Section 251 provides that if an agreement (or order) made before the FLA came into force provides a party with custody or guardianship, that party is a guardian of the child under the FLA with parental responsibilities and parenting time, and if the agreement provides the party with access only, the party has contact with the child under the FLA.

Section 252 concerns agreements respecting property division. It provides that, unless the parties agree otherwise, a proceeding to enforce, set aside, or replace an agreement respecting property division, where the agreement was made before the FLA came into force, must proceed under the FRA:

1. This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

2. Unless the spouses agree otherwise,
   a. a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
   b. a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

In other words, for married parties who made an agreement about property division prior to March 18, 2013, the FRA and the common law continue to apply to the determination of applications to vary or set aside those agreements, unless the parties agree to proceed under the FLA. However, for married spouses who make an agreement after March 18, 2013, the FLA and common law will apply.

For unmarried spouses who make or have made an agreement dealing with property, the FLA and the common law apply to a determination of an application to vary or set aside that agreement.

Counsel should carefully review the circumstances of the case to determine which act and time limitations

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apply (see Halliday v. Halliday, 2015 BCCA 82 for some of the numerous problems arising from confusion about these issues).

This chapter addresses agreements made under the FLA. For agreements governed by the FRA, and for varying such agreements, refer to CLEBC and other source material.

### §12.03 Statutory Framework—Family Law Act

The FLA expressly encourages out-of-court dispute processes to resolve family law disputes, including through the use of agreements. Subject to some exceptions, the FLA treats married spouses and unmarried spouses (if they meet the definition of “spouses” in s. 3(1)(b)) in the same way, so parties in either type of relationship can use agreements to resolve property matters.

The following sections of the FLA deal with agreements:

- s. 1 defines a “written agreement” as an agreement in writing and signed by all parties;
- ss. 6 and 7 deal with agreements generally;
- ss. 44 and 58 deal with agreements concerning parenting and contact with children;
- ss. 92, 93, 94, and 127 deal with agreements and setting aside agreements relating to property and debt; and
- ss. 148, 163, and 164 deal with agreements and setting aside agreements relating to child support and spousal support.

Section 6 of the FLA contains general provisions regarding agreements. It provides that two or more persons may make an agreement to resolve a family dispute, or with respect to matters that may become the subject of a family law dispute in the future (s. 6(1)). The agreement is binding on the parties whether or not there is consideration, the agreement was made with the involvement of a family law dispute resolution professional, or the agreement was filed with a court (s. 6(3) and (4)). The general provisions are subject to other provisions of the FLA (discussed later in this chapter), which require that the agreement be in writing, be signed, and be witnessed in order for it to be treated with deference by the courts.

Under both the common law and legislation, the courts have a duty to protect the rights and interests of children. Accordingly, if the court determines that an agreement about parenting arrangements is not in the best interests of the children, then the court must set it aside or replace it with an order (s. 44(4)).

The court may set aside an agreement about child support that deviates from the Child Support Guidelines (the “CSG”). The court may order child support in a different amount from the CSG, if agreed upon by the parties, only if the court is satisfied that reasonable arrangements have been made for the support of the children. The court will take the CSG into consideration in assessing the reasonableness of the arrangements. In addition, the court may consider that an agreement between the parties about their financial duties, or about the division or transfer of property, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, such that applying the CSG would be inequitable.

Agreements about parenting arrangements and child support are binding only if the parties make the agreement after separation, or if they make the agreement when they are about to separate, for the purpose of that agreement being effective on separation (ss. 44 and 148). If the spouses already have an agreement in place about spousal support that is in writing, signed by both parties, and witnessed by at least one other person, then the court will not make an order for spousal support unless the agreement is first set aside under s. 164. The agreement may be set aside for a lack of fairness in making the agreement, on consideration of the factors in s. 164(3), or for being “significantly unfair” on consideration of the factors in s. 164(5). The court may decline to set aside an agreement under s. 164(3) if, based on the evidence, it would not replace the agreement with an order that is substantially different from the agreement (s. 164(4)). The court has the discretion to apply s. 164 to an unwitnessed written agreement (s. 164(6)).

The balance of this chapter deals with property agreements between spouses, the area where family law agreements can have the most significant long-term effect.

### §12.04 Making Agreements About Property and Debt Under the Family Law Act

Section 92 of the FLA allows spouses (married or unmarried) to make agreements about the division of property and debt:

92 Despite any provision of [Part 5] but subject to s. 93, spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under s. 87.
If an agreement meets the requirements of s. 93(1), then under s. 94 the court may not make an order respecting the division of property and family debt without first setting aside that agreement under s. 93:

94 (1) The Supreme Court may make an order under this Division on application by a spouse.

(2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in s. 93(1), unless all or part of the agreement is set aside under that section.

Section 93(1) requires that the agreement be in writing, signed by each spouse, and witnessed by at least one person (though the court may exercise its discretion under s. 93(6) to apply s. 93 to an unwitnessed written agreement).

Sections 92, 93, and 94 need to be read together. In summary, they permit parties to draft agreements that do not follow the statutory division of property. If the agreement meets the requirements of s. 93(1) (or s. 93(6) applies), the court may not make an order regarding the property or debt that is the subject of the agreement unless the court first sets aside all (or the relevant provisions) of the agreement under s. 93(3) or (5). The bases for setting aside an agreement under s. 93 are discussed further below.

[S12.05] Setting Aside Agreements About Property and Debt Under the Family Law Act

Section 93 of the FLA governs the court’s authority to set aside an agreement (or part of an agreement) about dividing property and debt, or to replace it with an order.

Section 93 requires the court to consider the agreement in two steps:

1. First, whether there was unfairness in the making of the agreement, or a lack of procedural fairness; and
2. Second, whether there is significant unfairness in the operation of the agreement, or a lack of substantive fairness.

The first step of the test requires the court to consider whether the agreement was procedurally fair when it was made, based on s. 93(3). The second step requires the court to consider whether the agreement is “significantly unfair” considering the factors in s. 93(5).

1. Procedural Fairness Under s. 93(3)

Section 93(3) reads as follows:

93 (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
(b) a spouse took improper advantage of the other spouse’s vulnerability, including the other spouse’s ignorance, need or distress;
(c) a spouse did not understand the nature or consequences of the agreement;
(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

Historically, the procedural fairness bases for challenging family law property agreements were those provided by the common law defences to contracts. Section 93(3) of the FLA, in essence, codifies the common law procedural fairness bases for setting aside agreements (see e.g. Rick v. Brandsema, 2009 SCC 10). If the party challenging the agreement is successful in demonstrating one of the grounds set out in s. 93(3), then the court may set aside the agreement or replace it with an order. However, the court may decline to do so, even if one of the grounds of s. 93(3) has been proven, “if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement” (s. 93(4)).

See Bartch v. Bartch, 2019 BCSC 1643, for a recent discussion of these sections. The Court in Bartch set aside a separation agreement under s. 93(3) on the basis that it was made by an unfair process, and it could not be upheld under s. 93(4) because the Court would replace it with an order that was substantially different from the terms in the agreement.

2. Common Law Principles

The following are common law bases for challenging the procedural fairness of an agreement. In addition, fundamental common law principles about contract formation apply to family law agreements, to the extent their application is consistent with the legislation (for example, parties must have the capacity to contract and there must be certainty of subject matter and identification of the parties). This chapter does not consider when the court may disregard or set aside agreements on the basis of those fundamental contractual issues.

(a) Mistake

A mistake occurs when the agreement is made on a misapprehension of the facts or there is a failure to understand that a material term of an agreement is not accurately recorded. Such a
Duress occurs when threats of violence or actual violence are used to induce a person to consent to the agreement (Saxon v. Saxon (1976), 24 R.F.L. 47 (B.C.S.C.), aff’d [1978] 4 W.W.R. 327 (B.C.C.A.)). Threats of suicide may also constitute duress (G.C.G. v. M.J.T., 2016 BCSC 1277), and duress can be economic (see e.g. Stein v. Schommer, 2006 BCSC 1551 and C.M.M. v. D.R.M., 2014 BCSC 2123, for the applicable principles, although the court rejected the claim of economic duress in these cases).

Undue influence occurs when there is a special relationship of trust or confidence between two parties, giving one party influence over the other, which that party uses to that party’s own advantage. See Saxon v. Saxon (1976), 24 R.F.L. 47 (B.C.S.C.), aff’d [1978] 4 W.W.R. 327 (B.C.C.A.), and Donnelly v. Weekley, 2017 BCSC 529.

Unconscionability

Similar to duress and undue influence, unconscionability refers to situations of unequal bargaining power. The test for unconscionability is set out in Klassen v. Klassen, 2001 BCCA 445 at para. 59:

The elements required for a finding of unconscionability are: i) Proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the position of the stronger; and ii) Proof that the purchase was made from the ignorant party at a considerable undervalue.


Non-Disclosure

An agreement may be set aside because of a failure to disclose significant assets. In Rick v. Brandsema, 2009 SCC 10, the Court found that spouses have a duty to make full and honest disclosure of all relevant financial information when negotiating agreements, and that agreements made with full and honest disclosure were more likely to be respected by the court (at paras. 47-48). In determining whether to intervene when the duty of disclosure has not been met, the court will consider the extent of the defective disclosure, the degree to which it was deliberate, and the extent to which the agreement’s terms vary from the goals of the relevant legislation (Brandsema at para. 49).

As an initial step to effecting a reasonable level of disclosure when negotiating agreements, each party should prepare a financial statement using Supreme Court Form F8 financial statement (see §7.02). Counsel should ensure that the client provides full and accurate disclosure, and should carefully review the other party’s financial statement.

3. The Role of Independent Legal Advice

There is no requirement for independent legal advice in the FLA (or under the old FRA). In fact, s. 6 of the FLA specifically states that an agreement is enforceable absent the involvement of a family dispute resolution professional. However, courts will consider whether the parties obtained independent legal advice in determining whether an agreement was procedurally fair. The provision of independent legal advice vastly improves the likelihood that an agreement will be enforced, since it assists in addressing claims of duress, undue influence, unconscionability, and the factors set out in s. 93(3) of the FLA.

Pitfield J. described the important role of independent legal advice in family law agreements in Gurney v. Gurney, 2000 BCSC 6 at para. 29:

In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course.
Citing Gurney, the Court stated in Bradshaw v. Bradshaw, 2011 BCSC 1103, that independent legal advice in the family law context “ensures that the spouses are fully aware of their statutory and common law rights and obligations” and “redresses or at least minimizes disparity of bargaining power between [spouses]” (at para. 49).

4. Substantive Fairness Under s. 93(5)

Under s. 93(5), even if an agreement is procedurally fair, it may be set aside for a lack of substantive fairness, if the court finds the agreement is “significantly unfair” on consideration of three listed factors. Section 93(5) reads as follows:

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;
(b) the intention of the spouses, in making the agreement, to achieve certainty;
(c) the degree to which the spouses relied on the terms of the agreement.

By comparison, the test under s. 65 of the FRA for varying agreements based on substantive unfairness required a finding of “unfairness” in consideration of listed factors. The “significant unfairness” threshold is a higher threshold for judicial intervention and demonstrates greater deference to properly negotiated agreements (see e.g. Asselin v. Roy, 2013 BCSC 1681, where the court considered this threshold and stated that the FLA was intended to achieve greater certainty for parties and limit judicial discretion). For recent discussions of s. 93(5), see e.g. C.O.A.C. v. A.D.C., 2018 BCSC 2324, and T.A. v. B.A. Estate, 2018 BCSC 1273 (setting aside a marriage agreement).

When assessing whether an agreement is “significantly unfair,” it is also helpful to consider case law under s. 95 (unequal division of property and debt), as this provision also includes a test of “significant unfairness” (see e.g. Jaszczewska v. Kostanski, 2016 BCCA 286).

#### [§12.06] Limitation Periods

It is crucial to identify limitation periods: failure to do so may lead to missed limitation deadlines and a professional negligence claim.

Under the FLA, the time limits for setting aside an agreement are set out under s. 198:

1. Subject to this Act, a proceeding under this Act may be started at any time.
2. A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
   (a) in the case of spouses who were married, the date
      (i) a judgment granting a divorce of the spouses is made, or
      (ii) an order is made declaring the marriage of the spouses to be a nullity, or
   (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
3. Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
4. The time limits set out in subsection (2) do not apply to a review under s. 168 or 169.
5. The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in
   (a) family dispute resolution with a family dispute resolution professional, or
   (b) a prescribed process.

Pursuant to s. 198(3), the limitation period for setting aside an agreement is delayed in that it does not run until the spouse discovers (or ought reasonably to have discovered) grounds for the application.

#### [§12.07] Wills and Estates Considerations

The Wills, Estates and Succession Act, R.S.B.C. 2009, c. 13 (“WESA”), has replaced the Wills Variation Act, the Estate Administration Act, and the Wills Act, and has introduced significant changes in the area of wills and estates. Family law matters often intersect with wills and estates considerations, so it is important to be aware of these issues and to identify them for the client. That said, counsel should refer the client to a lawyer experienced in wills and estates law for advice on issues such as estate planning following separation or in anticipation of co-habitation or marriage, or the effect of the death of a separated spouse on the division of family property. That other lawyer’s advice should then be taken into account in the family law case so that the client’s family law case and estate planning are resolved consistently.
WESA has changed the definition of spouse to exclude separated spouses. This is because s. 2(2) states:

(2) Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

Once a person ceases to be a spouse under WESA they no longer have rights to make a claim to vary the will under Part 4, Division 6 of WESA. A separated spouse is also not entitled to make a claim for a spousal proportion of the estate on intestacy under Part 3. It is therefore particularly important to determine whether a couple has truly separated for family law purposes. In assessing this question, see s. 3 of the FLA and case law considering separation (see e.g. Ishebabi v. Temu, 2015 BCSC 1321 and Jaszczezska v. Kostanski, 2015 BCSC 727).

One of the changes under the FLA is that a former spouse can start an action under Part 5 of the FLA after the death of the other spouse, as long as the action is brought within the time limitations set out in the FLA (see Howland Estate v. Sikora, 2015 BCSC 2248).

Under WESA, a marriage no longer revokes a will. When acting for a client who intends to get married, counsel should find out if the client has a will and plans to revise it in light of the marriage. Similarly, counsel should check whether a client who has recently separated from his or her spouse has a will, and advise the client to make a will or change an existing will.

Under ss. 170(g) and 171 of the FLA, support orders can be made binding on the estate of the payor. See the Family Law Sourcebook of British Columbia, Chapter 13 for a discussion and case law on this issue.

§12.08 Minutes of Settlement and Consent Orders

As an alternative to, or in conjunction with, a separation agreement, the parties may resolve issues by way of minutes of settlement.

Minutes of settlement record the settlement of a family law case, often reached on the eve of trial. Minutes of settlement can also record the terms agreed upon at mediation. They are often hastily prepared and, as such, record a general outline of the settlement with the expectation that the terms will be stated in more detail in a subsequent separation agreement or a consent order based on the minutes.

Minutes of settlement should deal with each claim made in the case so that nothing is left for further litigation. There is a risk that the settlement may unravel if, for instance, specific points have not been addressed, or if the terms are so broad that the parties disagree about their meaning or operation.

While it is beyond the scope of this chapter to set out complete best practices for drafting agreements, minutes of settlement, or consent orders, keep in mind the following considerations:

- When dealing with assets or debts, specify them clearly.
- When an action or transaction is to take place, specify when or by what deadline it has to be completed. In some situations, it may be prudent to also specify the consequences for non-compliance.

Counsel alone will often sign the minutes, especially when pressed for time. However, the parties should sign the minutes whenever possible—both to reduce the chances of future attempts to resile and to prevent claims that counsel lacked the authority to reach settlement.

It can be complicated to choose between minutes of settlement and a separation agreement, and to subsequently determine which of the terms (if any) to include in a consent order. The complexity arises from the intertwining doctrines of res judicata, merger and election. If proceedings are ongoing, counsel should follow minutes of settlement with a consent order. In some situations, typically where an agreement is unusually complex or contains contingent terms that cannot be incorporated into an order, it will be best to combine the consent order with a separation agreement or minutes of settlement, keeping in mind the doctrine of merger and ensuring the continuation of terms that are intended to continue operating after the order is made. Bear in mind that consent orders and agreements that are vague or uncertain may be difficult (if not impossible) to enforce.

Parties who agree on the terms of an order may obtain an order by consent without a court appearance. Affidavit evidence will be required where a term requires the court to exercise discretion, particularly with respect to child support, or when a divorce is sought (For guidance on this process, see Desk Order Divorce: An Annotated Guide (Vancouver: CLEBC)). A consent order cannot be appealed, nor can a court vary the property provisions absent a successful defence based on the common law of contracts (Partridge v. Partridge, 2018 BCSC 1687).