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JP Boyd on Family Law

Resolving family law disputes in British Columbia

4th Edition, 2024

FOUNDING AUTHOR
John-Paul Boyd, KC

GENERAL EDITOR
Nathaniel R. Russell

SENIOR EDITOR
Trudy Hopman

CONTRIBUTING EDITORS

Beatrice McCutcheon, Elizabeth Cameron, Elham Jalilian, Jane DePaoli, Julie Brown, Justin Werb, Kenneth Craig, Kim Hawkins, Mark Norton, Maryam Sodagar, Matthew Ostrow, Negin Saberi, Rosanna Adams, Rosemary Gallo, Shannon Beebe, Stephanie Pesth, Tannis Baradziej, Vandana Sood, Yun Chen

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Getting Started

Introduction to JP Boyd on Family Law

Welcome to the fourth edition of *JP Boyd on Family Law*.

Whether you're facing your own family law challenges, supporting others, or seeking a better understanding of how family law works in British Columbia, this resource is made for you. In this edition, we delve into the major areas of family law while addressing the evolving landscape of family justice in British Columbia. We begin with an overview, as in previous editions, of how the legal system for family law matters works in this province. This is the focus of much of the discussion in the Getting Started part of this wikibook, and Introduction to Family Law in British Columbia provides a very high-level overview, followed by some information about the main legislation. The chapter on Understanding the Legal System for Family Law Matters rounds out our introduction, introducing you to the courts, the common law system, the role of lawyers, and includes a new section for this edition which talks about access to family justice.

As in previous editions, we then dive into chapters focused specifically on certain topics: people and family relationships, separation and divorce, alternatives to going to court, going to court, family law agreements, children and parenting after separation, child and spousal support, property and debt, and family violence. At the end of the wikibook you will find over 50 stand-alone articles or guides, all updated, which we used to call our *How Do I?* section and now refer to as *Helpful Guides & Common Questions*.

I want to point out that this edition came together quite differently than previous editions. It's unique in a couple of ways.

The first difference is that I updated most of the chapters myself. Not all, but most of them. In this respect, the fourth edition of *JP Boyd on Family Law* is more like the first edition, which I had written between 2012 and 2013 when the *Family Law Act* was about to replace the *Family Relations Act*, changing family law as we knew it. Before teaming up with Courthouse Libraries BC to create the wikibook, I had published free family law information on my old BC Family Law Resource website. I reworked the content from that website, painstakingly revised it for the *Family Law Act*, and released it with Courthouse Libraries BC as the first edition of *JP Boyd on Family Law*. The wikibook was born, taking physical form as a thick printed book for libraries and simultaneously existing as a website through Clicklaw Wikibooks, accessed by hundreds of thousands of people every year. At that point, in 2013, the wikibook was still all my own work and writing. One of the major benefits of going with Clicklaw Wikibooks, however, was that it made it possible to invite other family law lawyers to help share the load. As you might have noticed, the Clicklaw Wikibooks platform is based on the same technology that powers Wikipedia. This open-source platform is perfect for writing and editing content with a larger group of editors. As soon as the first edition was printed, Courthouse Libraries BC and I were able to recruit other family law lawyers to assist with updating the wikibook. Megan R. Ellis, KC, generously stepped up as the senior editor, and was indispensable in managing dozens of volunteer editors, assigning them chapters to revise, and ultimately successfully producing two more editions in 2017 and 2019. I cannot overstate how critical Megan's assistance was over those years.

Soon after finishing the third edition of *JP Boyd on Family Law* in the summer of 2019, we got news that the federal government was planning a major overhaul of the *Divorce Act*, to take effect in the summer of 2020. Despite having just finished the third edition of *JP Boyd on Family Law*, I felt that this major change meant we should try for a fourth edition as soon as possible. Since this would require revising almost every chapter, I thought it would be a good opportunity to step in, as the founding author, and give everything a once-over, from start to finish. The volunteer editors we'd relied upon in 2019 had only just recently finished their work, and, because my revisions

would mostly be aimed at the *Divorce Act* amendments, it didn't make much sense to ask our contributors to do even more work.

And so we charted out what we thought would be a new 2020 edition, right on the heels of the 2019 edition. What we didn't know was that we were on the brink of a global pandemic.

This brings me to the second major difference between this edition and previous ones. It took more than three years longer than initially planned. Some, though not all, of this delay is due to the Covid-19 pandemic. But in February 2020, as we mapped out a plan for a next edition, amendments to the *Family Law Act* were announced. These mostly involved family law arbitration, and were manageable. That wasn't the end of it. Once the pandemic struck and we came under a provincial state of emergency, a huge amount of uncertainty descended over court operations. The *Divorce Act* amendments were put on hold by lawmakers. For a while everything just froze. Virtual court hearings were not a serious topic of discussion before March 2020, but the public health crisis forced the legal system's hand, and a flurry of radical changes were made so the courts could continue to operate. People were suddenly appearing in court from their living rooms. Our chief judges, understandably unrehearsed, were developing rules on the fly. It took a lot of time to get to the point where anyone could say "this is how a hearing is held, and these are the procedures." The period during 2020, 2021, and even 2022 was *not* a good time to write a guide on going to court.

The public health crisis coincided with something else, a desire, especially within the Provincial Court, to give court participants in family law proceedings a better experience. Most of the changes in response to the pandemic were temporary. But there were other, more deliberate, changes to court processes that we could not have anticipated when we were planning the 2020 edition. We certainly didn't expect the totally new set of Provincial Court family rules and forms that took effect on 17 May 2021. And it's clear that the Provincial Court isn't quite done experimenting with different types of procedures a different registries.

This leads me to a third major difference in this edition, which is that we have left the bulk of our chapter Resolving Family Law Problems in Court to the website version of this resource. In light of the changes to date and those that are yet to come, it seemed unwise to provide a book with information that is very likely to be out of date by the time we get it back from the printer. For this edition, you'll see that the Resolving Family Law Problems in Court chapter is much shorter, providing only an overview with directions to the online version of the chapter to get more information. It's so much easier and quicker to update information on the website, and that's where you'll find more detailed information about processes in the Provincial Court and the Supreme Court.

- John-Paul Boyd, KC

Access to family justice

There are a couple other changes to this fourth edition of *JP Boyd on Family Law*. The challenges and opportunities in access to family justice are discussed in a new section on Access to Family Justice. We talk about the barriers to justice and the array of responses from courts, governments, and legal communities. We explore innovative solutions and initiatives that have emerged to tackle these challenges, from alternative dispute resolution methods to legal aid services, and listed some great resources that you should know about.

Family violence and property & debt chapters

We have also paid special attention to the Family Violence chapter, which has been revised in consultation with Rise Women's Legal Centre. Additionally, updates to the *Family Law Act* have prompted important revisions in the Property and Debt in Family Law Matters chapter, ensuring that our readers are well-informed about the latest changes. I want to thank Trudy Hopman for stepping up to help on the property-related updates, and Beatrice McCutcheon for her review of the pages on Family Law Agreements.

Your guide through family law in BC

As always, the goal of this resource is to demystify family law and provide practical, understandable help. From navigating court procedures to understanding legal rights and alternatives to litigation, *JP Boyd on Family Law* serves an important purpose in this province. I encourage you to explore the chapters that fit with your needs and interests.

Please share your thoughts and suggestions at editor@clicklaw.bc.ca [1].

Thank you for turning to *JP Boyd on Family Law* as your trusted source for family law information in British Columbia.

References

[1] mailto:editor@clicklaw.bc.ca

Introduction to Family Law in British Columbia

This section offers a short introduction to family law in British Columbia and the ways that family law problems are resolved. It's written in easy-to-understand language and is meant for people who have never had to deal with the legal system before and for people who are new to Canada.

This section is meant to be read as a whole, from start to finish. The main chapters of this wikibook go into each subject in a lot more detail. When you're done with this section, the chapter Understanding the Legal System for Family Law Matters has a more complete introduction to family law and resolving family law disputes in BC.

Here you will find an overview of common family law problems, the laws that deal with family law problems, the courts that deal with family law problems, and the other ways that family law problems are resolved. This section talks briefly about the law on caring for children after separation, child support, spousal support, sharing property and debts, separation and divorce, and family law agreements.

Introduction

When people in a romantic relationship break up, they may have to decide how a child will be cared for, how property should be divided, and whether someone needs extra money to help pay the bills. Family law, sometimes called *divorce law* or the *law on domestic relations*, is the area of the law that deals with problems like these. It is the area of law that talks about how family relationships with legal consequences are formed and what happens when they break up.

To understand how family law works in British Columbia, you need to have a basic understanding of the legal system, the law about family law problems, and how the courts apply the law when you can't agree about something. You don't always have go to court when there's a problem. Negotiation, mediation and arbitration are other ways that people can solve their problems without going to see a judge.

Family law problems are resolved in one of two ways:

- the adults involved bargain with each other and come up with a solution that they can both agree to, or
- they can't agree and they have to ask someone else to come up with a solution, usually by going to court or to an arbitrator.

Going to court means that one or both people have started or will start a court proceeding. (Court proceedings are also known as *lawsuits*, *claims* or *actions*.) Going to court is called *litigation*; trying to come up with an agreement without going to court is called *negotiation*. Mediation is a kind of negotiation, and arbitration is like going to a private court where you get to pick the judge.

There are two courts that handle almost all family law litigation in British Columbia: the Provincial (Family) Court and the Supreme Court. Each court has its own rules, its own forms, and its own processes.

There are two main laws that apply to family law problems. A law, in this sense of the word, means a collection of rules made by the government. (This kind of law is also called *legislation* or *statute law*. You've probably heard of legislation like the *Criminal Code*, the *Landlord and Tenant Act* and the *Motor Vehicle Act*.) The laws that apply to family law problems in British Columbia are the *Divorce Act*, a law made by the federal government, and the *Family Law Act*, a law made by the provincial government. Although these laws cover some of the same legal issues, each law also covers issues that the other doesn't. For some families, both laws will apply; for others, only one of these laws will apply, probably the *Family Law Act*.

It's important to know that you don't have to go to court, no matter how bad your problem is. The only times you *must* go to court are when:

- you need a divorce,
- someone is threatening to do something serious, like take the children away,
- there is a risk of violence, or
- someone is threatening to hide, sell, or give away property or money.

If you don't have to deal with one or more of these issues, you can always try to negotiate a resolution to the things you disagree about, and find a settlement that you both agree with. People who need help negotiating sometimes hire someone else to help, someone who has special training and experience helping people resolve problems and make deals, called a *mediator*. Mediators help to guide the negotiation process and encourage people to see different ways of solving the problem. If you can't reach a settlement no matter how hard you try, you might use an arbitrator. An arbitrator is someone who has special training and makes a judge-like decision, after listening carefully to each side, on the things you disagree about.

Lawyers who mediate family law problems are called *family law mediators*, and have training in mediation in addition to their training as lawyers. In the same way, lawyers who arbitrate family law problems are called *family law arbitrators*, and have additional training in arbitration. Because there are no rules about who can and who can't call themselves a mediator or an arbitrator, you should look carefully at the mediator's or arbitrator's credentials before you agree to use that person as your mediator or arbitrator.

Further reading

Chapters on:

- Understanding the Legal System for Family Law Matters
- Resolving Family Law Problems out of Court

Common family law problems

All sorts of people in all sorts of situations can have family law problems, including people who live together and people who don't, people who are married to each other and people who aren't, and people who intended to have a child together and people who didn't. In British Columbia, family law applies to people in same-sex relationships exactly the same way that it applies to people in opposite-sex relationships. Family law also applies to people when their family isn't a couple but includes more than two adults.

The sorts of problems adults can have when their relationship ends include deciding how the children will be cared for, whether support should be paid, and who will keep which property and be responsible for which debt.

Family law problems about children usually involve making decisions about:

- *parenting time*, which includes deciding whether the children will live with one parent for most of the time or share their time between their parents,
- *parental responsibilities* or *decision-making responsibility*, which includes deciding how parents or guardians will make choices about important things in children's lives, like healthcare and education, and
- *contact*, which is about deciding how much time other people will have with the children.

Support means money that one person pays another to help with that person's expenses. Family law problems about support usually involve making decisions about:

- *Child support*, which is money that is paid to help with the children's expenses, such as shelter, clothing, medical expenses, and food.
- *Spousal support*, which is money that is paid to help with a spouse's day-to-day living expenses, like rent, the phone bill and the electricity bill, and sometimes money that is paid to compensate a spouse for the financial impact of decisions about work and money that were made during the relationship.

When a family has property, sometimes including when only one person has property, they have to decide if and how that property will be shared between them. In family law, the property married spouses and unmarried spouses share is called *family property*, which generally means only the property that they accumulated during their relationship. Family property can include things like houses, bank accounts, businesses, and cars. It can also include RRSPs and pensions. Sometimes a family also has to decide who will take responsibility for debts. Generally, only the debts that accumulated during a relationship will be shared between spouses.

Married spouses also have to decide about whether they want to get divorced. A *divorce* is the legal ending of a marriage, and only a judge can make you divorced. Most married spouses whose relationship has ended want to get divorced, but it's usually a low priority when there are other things to worry about, like children and property. People who aren't married, including unmarried spouses, don't need to get divorced.

All of these family law problems will be talked about in more detail later on.

As you can see, the sorts of family law problems a family might have depends on the nature of their relationship. In British Columbia, family law deals with four types of relationship:

- **Unmarried couples.** Unmarried adults are dating and probably think of themselves as boyfriends and girlfriends. They may have lived together, but not for too long. Unmarried couples involved in a family law problem may have been together for only a very short time... perhaps just long enough to make a baby.
- **Unmarried spouses.** Unmarried spouses are not legally married. Unmarried spouses have lived together in a loving relationship for at least two years. If they have a child while living together, they are unmarried spouses even if they've lived together for less than two years.
- **Married spouses.** Married spouses have been legally married by a marriage commissioner or a religious official licensed to perform marriages.
- **Parents.** Parents are people who have had a child together, sometimes including people who helped have the child as a donor of sperm, a donor of eggs, or as a surrogate mother. Parents may include unmarried couples, unmarried spouses, married spouses, or complete strangers. What matters is that they have had a child together.

Family law doesn't have much to do with unmarried couples unless they have had a child together.

Further reading

Chapters on:

- Children and Parenting after Separation
- Child Support
- Spousal Support
- Property and Debt in Family Law Matters
- Family Relationships, in particular the sections on Married Spouses and the Law on Marriage and Unmarried Spouses

Resolving family law problems

If you have a family law problem now, or might have one in the future, you have two ways to deal with that problem: you can talk to the other person and try to make a decision about the problem together; or, you can ask someone else to make the decision for you. Really, there's also a third option. You could also walk away, refuse to deal with the problem, and wait to see what happens. This is usually a terrible way of dealing with family law problems.

If you want to try to make a decision about the problem together, you and the other adults involved in the problem will need to agree on a way of solving the problem, and your decision will usually be written down in a formal way. Reaching an agreement like this usually means that you have to negotiate — bargain — with each other. You can negotiate face to face, or do it through lawyers. *Mediation* is a kind of negotiation that uses a specially-trained person, a *mediator*, to help people talk to each other and find a settlement. *Collaborative negotiation* is a kind of negotiation that uses specially-trained lawyers, and sometimes also people who are experts about money or experts about children, who work together to help people find a settlement.

If you want to ask someone to make a decision about the problem, you can go to court or you can go to an arbitrator. If you decide to *litigate*, you will be starting a public court proceeding that will wrap up a few years later with a trial before a *judge*, if your family problem isn't resolved by a settlement before then. If you decide to *arbitrate*, you will be starting a private process that will wrap up a few months later with a hearing before an *arbitrator*.

Court proceedings usually end with the judge's final *order*. Arbitration proceedings end with the arbitrator's final *award*. Negotiation usually ends with a settlement that is written down as a *separation agreement* or a *parenting agreement*, but if you negotiate and reach a deal in the middle of a court proceeding, the settlement might be written down as a *consent order*. If you negotiate a deal in the middle of an arbitration proceeding, the settlement will be written down as a *consent award*.

Orders, awards, and separation agreements resolve the family law problems that you have now. However, agreements can also be used to address family law problems that you might have in the future. Agreements like these are usually called *marriage agreements* (also known as *prenuptial agreements* or *prenups*) or *cohabitation agreements* (also known as *living-together agreements*).

Further reading

Chapters on:

- Resolving Family Law Problems out of Court
- Resolving Family Law Problems in Court
- Family Law Agreements

Family law agreements

A family law agreement is a legal contract, like the contract you might have with your landlord or your employer, or the contract you might sign if you lease a car. Family law agreements are used to record people's settlement of the legal issues that they're dealing with when they make the agreement, or any legal issues that might come up in the future.

There are three kinds of agreement people can make about family law issues:

- **Cohabitation agreements** or **living-together agreements**. These agreements are made when people are living together in a romantic relationship or plan to live together in a romantic relationship.
- **Marriage agreements** or **prenuptial agreements**. These are agreements that a couple may make if they are married or are going to be getting married.
- **Separation agreements**. These agreements are made by married spouses, unmarried spouses and unmarried couples after their relationships have ended. Separation agreements that address only some issues might be called *parenting agreements*, *support agreements* or *property agreements*.

Cohabitation agreements and marriage agreements are for people who are just starting, or have just started, a relationship. These sorts of agreements can talk about how the relationship will be managed (who will pay the bills, will there be a joint bank account or a joint credit card, or who will do what parts of the housework), but usually talk about what will happen if the relationship ends. These agreements are usually meant to stop people from fighting after their relationship ends by saying who will get what, right from the start.

The law does not require that people make a cohabitation agreement or a marriage agreement when they start to live together or get married. You don't have to sign an agreement like this if you don't want to.

Cohabitation agreements and marriage agreements aren't for everyone. People who are bringing a lot of property, money, or children into a relationship may want a cohabitation agreement or a marriage agreement. People who don't have property or children, are young and just starting out, and expect to have a long-term relationship may not need or want an agreement at all.

Separation agreements are made after a relationship has ended. They talk about how people have agreed to deal with things like the care of children, child support and spousal support, and how the family property and debt will be shared. Separation agreements don't have to cover all the family law problems people have. They can deal with just some of those problems and leave the rest for the court or an arbitrator to decide.

Normally, people who are thinking about a separation agreement talk about their legal problems and try to negotiate a settlement that they are both happy with. It is unusual, and perhaps unfair, for just one person to write a separation agreement without talking to the other people involved.

The law does not require that people make a separation agreement when their relationship has ended.

No matter what kind of family law agreement you have signed, each of the people involved in the agreement expect that the others will follow the agreement, and that the court will enforce the agreement if someone doesn't follow it. The court will generally respect an agreement that people signed willingly, as long as the agreement was fair and no one misled anyone else about something important, like money or property.

Further reading

The chapter on:

- Family Law Agreements

The courts of British Columbia

There are three levels of court in British Columbia: the Provincial Court, the Supreme Court, and the Court of Appeal. The Court of Appeal is the highest court in the province, and the Provincial Court is the lowest. The Provincial Court and the Supreme Court are *trial courts*, which means that if the people involved in a court case (the *parties* or the *litigants*) can't solve a legal problem for themselves, the court will make a decision resolving the problems for them, after hearing from witnesses and considering the other evidence presented at a formal trial. The Court of Appeal is an *appeal court*, meaning that it doesn't hold trials, it just hears arguments about whether the decision of a trial court was correct or incorrect. Most family law litigation happens in the Provincial Court and the Supreme Court.

The branch of the Provincial Court that deals with family law is called the Provincial (Family) Court. Other branches of the Provincial Court include the Provincial (Youth) Court and the Provincial (Small Claims) Court. (When this resource talks about the Provincial (Family) Court, it will just say "Provincial Court.") The Provincial Court can only deal with:

- guardianship of children under the *Family Law Act*,
- parental responsibilities, parenting time, and contact under the *Family Law Act*,
- child support under the *Family Law Act*,
- spousal support under the *Family Law Act*,
- orders respecting companion animals, and

- orders protecting people.

The Supreme Court, on the other hand, can deal with all family law problems. As well as issues about parenting, child support, and spousal support under the *Family Law Act*, this court can also deal with:

- divorce,
- decision-making responsibilities, parenting time, and contact under the *Divorce Act*,
- child support under the *Divorce Act*,
- spousal support under the *Divorce Act*,
- dividing family property and family debt,
- orders respecting companion animals,
- caring for children's property,
- orders protecting people, and
- orders protecting property.

The Supreme Court also hears appeals of decisions made by the Provincial Court. The Court of Appeal only hears appeals of decisions made by the Supreme Court — including decisions made by the Supreme Court about appeals from the Provincial Court.

This chart shows which trial court can deal with which family law problem:

	Supreme Court	**Provincial Court**
Divorce	Yes	
Guardianship and parenting children	Yes	Yes
Time with children	Yes	Yes
Child support	Yes	Yes
Children's property	Yes	
Spousal support	Yes	Yes
Family property and family debt	Yes	Pets only
Orders protecting people	Yes	Yes
Orders protecting property	Yes	

To get to court, you must start a court proceeding and tell the court what you want. In the Provincial Court, proceedings are normally started with a court form called an Application About a Family Law Matter. In the Supreme Court, the court form is called a Notice of Family Claim. These forms ask you to state the basic facts of the case and the sort of orders you think the court should make. The orders you want the court to make are called *claims*. (In the Provincial Court, a person who starts a court proceeding is called the *applicant*; in the Supreme Court, this person is the *claimant*.)

Once a court proceeding has started, the people against whom the proceeding has been brought can reply to the claims being made and make new claims of their own. In the Provincial Court, this court form is called a Reply to an Application About a Family Law Matter, and the form includes parts for both replying to the claims being made and a part for *counter applications* to make new claims. In the Supreme Court, two court forms can be used: a Response to Family Claim, used to reply to the claims being made, and a Counterclaim, used to make new claims. (In the Provincial Court and in the Supreme Court, a person answering a court proceeding is called the *respondent*.)

Applicants and respondents (in the Provincial Court), and claimants and respondents (in the Supreme Court), are called the *parties* to a court proceeding.

After the respondent has filed a reply to the claims being made against them, any of the parties can ask the court to make an order about some or all of the issues raised in the court proceeding. An *order* is a decision of a judge that requires someone to do something or not do something. For example, a court can make an order that a child live mostly with one party, an order that one party not harass another party, or an order that one party be able to use the family car.

There are two types of order: an *interim order*, which is any order made before trial; and, a *final order*, which is the order made at the end of a trial. A *trial* is the final hearing before a judge, where the parties present their arguments and their evidence, and finishes the court proceeding. Interim orders and final orders can also be made based on the agreement of the parties. These orders are called *consent orders*.

If you don't like the order you get from the judge after a trial, you can sometimes challenge the order before a higher level of court in a court proceeding called an *appeal*. An order of the Provincial Court is appealed to the Supreme Court. An order of the Supreme Court is appealed to the Court of Appeal. You cannot appeal an order that you agreed to — a consent order — without proof that you were somehow tricked or forced into agreeing to the order.

Over time, the terms of an order may need to be changed. If there has been an important change in your circumstances or in the circumstances of the children since an order was made, you can go back to court and ask that the order be changed to better suit the new circumstances. This is called applying to *vary* an order.

Further reading

Chapters on:

- Understanding the Legal System for Family Law Matters, in particular the section on The Court System for Family Matters
- Resolving Family Law Problems in Court

Helpful Guides & Common Questions on:

- How Do I Start a Family Law Action in the Supreme Court?
- How Do I Respond to a Family Law Action in the Supreme Court?
- How Do I Start a Family Law Action in the Provincial Court?
- How Do I Respond to a Family Law Action in the Provincial Court?

The basic law

There are two kinds of law: laws made by the governments (called *legislation*, *statutes*, *acts*, and *regulations*); and, laws made by the court. Laws made by the court are known as the *common law*, *precedent decisions*, or *case law*. They come from the different proceedings that the courts have heard over hundreds of years, and the decisions the courts have made in those different proceedings. This section talks about the first kind of law, legislation.

Legislation is made by the federal government, the government of Canada, and the provincial government, the government of British Columbia. The two pieces of legislation that are the most important for family law in this province are the federal *Divorce Act* and the provincial *Family Law Act*. Each piece of legislation deals with and applies to different kinds of relationships.

The *Divorce Act* only applies to people who are married or who used to be married to each other, including married people of the same sex. It talks about:

- divorce,
- decision-making responsibility,
- parenting time and contact with a child,
- child support, and
- spousal support.

The *Family Law Act* applies to married spouses, unmarried spouses, and parents, and to unmarried couples who are neither married spouses nor unmarried spouses. This includes people in same-sex relationships and in families that

involve more than two adults. This law talks about:

- guardianship of children,
- parental responsibilities,
- parenting time and contact with children,
- child support,
- spousal support,
- dividing family property and family debt,
- caring for children's property,
- orders protecting people, and
- orders protecting property.

The Supreme Court can make orders under both the *Divorce Act* and the *Family Law Act*. The Provincial Court can only make orders under the parts of the *Family Law Act* that don't deal with property.

This chart shows which legislation deals with which issue:

	Provincial *Family Law Act*	**Federal *Divorce Act***
Divorce		Yes
Parenting children	Guardianship and parental responsibilities	Decision-making responsibility
Time with children	Yes	Yes
Child support	Yes	Yes
Children's property	Yes	
Spousal support	Yes	Yes
Family property and family debt	Yes	
Orders protecting people	Yes	
Orders protecting property	Yes	

There are other pieces of legislation that deal with family law problems, including the *Adoption Act* [1] (which talks about adoption), the *Name Act* [2] (which talks about changing your name and your children's names), the *Land Title Act* [3] (which has to do with land and houses), and the *Vital Statistics Act* [4] (which has to do with registering births, deaths, marriages, and divorces). The most important of these other laws are the Child Support Guidelines.

The Child Support Guidelines set out the rules about how much child support should be paid, according to both the income of the person paying child support and the number of children child support is being paid for. For most people, the amount that should be paid is set out in a table at the end of the Guidelines. The Guidelines also set out the rules about when child support can be paid in an amount different than what the tables say should be paid.

Further reading

Chapters on:

- Understanding the Legal System for Family Matters, in particular the section on The Law for Family Matters
- The Legislation on Family Law in Getting Started
- Child Support, in particular the section on Child Support Guidelines

Parenting children

There are three things that parents must decide when their relationship ends:

- where the children will live, including whether they will live mostly with one parent or split their time between their parents more evenly,
- how much time each parent will have with the children, and
- how the parents will make decisions about important things in the children's lives, like where they will go to school or how they will be treated if they get sick.

The *Divorce Act* talks about these issues in terms of *parenting time*, *contact*, and *decision-making responsibilities*. Parenting time is the time the child spends with each parent. Contact is the time someone other than a parent, like a grandparent or another relative, has with a child. Decision-making responsibility is how the parents share the responsibility of making decisions on behalf of their child; these responsibilities can be shared by both parents or divided between parents such that one parent has responsibility for decisions about one part of their child's life, like education, while the other parent has responsibility for another issue, like health care.

The *Family Law Act* talks about these issues in very similar ways. It talks about *parenting time* (which is very close to the same thing the *Divorce Act* means by parenting time), *contact* (which is exactly what the *Divorce Act* means by contact), and *guardianship* along with *parental responsibilities* (which is pretty much the same thing as decision-making responsibilities). People who are guardians, usually parents, have parental responsibilities and parenting time. Someone who isn't a guardian, which might include a parent who isn't a guardian, may have contact with a child.

Further reading

Chapter on:

- Children and Parenting after Separation, in particular the section on Basic Principles of Parenting after Separation

Child support

Child support is normally paid by the parent who has the children for the least amount of time to the parent who has the children for the most amount of time. Child support is paid to help with the children's day-to-day living expenses, and covers a lot of things, from new clothes to school supplies to the children's share of the rent or mortgage.

Child support is not a fee a parent pays to see the children.

Child support has nothing to do with decision-making responsibility, guardianship or parental responsibilities. It has nothing to do with parenting time or contact. It has nothing to do with whether a parent is a good parent or a bad parent, or whether a parent sees the child all the time or never. A parent has a duty to pay child support just because they are a parent.

Child support is almost always paid on a monthly basis, in the amount required by the Child Support Guidelines [5]. A parent's duty to pay child support does not end until the child turns 19, the age of majority of British Columbia. It can last longer than that if:

- the child has an illness or disability that prevents the child from earning a living and being independent of their parents,
- the child is going to university or college, or
- there is another very good reason why the child is unable to live independently from their parents.

Normally, a parent pays the exact amount of child support the Guidelines' tables say should be paid. A parent can pay a smaller amount in a limited number of circumstances, including if:

- the parent is a stepparent to the children,
- the children's time is shared almost equally between the parents,
- one or more children live with each parent,

- the child is over the age of majority, or
- paying the amount required by the Guidelines would cause serious financial hardship to a parent.

The basic amount of child support is intended to cover most of the children's expenses. Some expenses, called *special or extraordinary expenses*, are not covered in this basic amount. Typically, special or extraordinary expenses are expenses like daycare and orthodontics — the big, important expenses that most but not all children have. Where the children have special or extraordinary expenses, their parents usually contribute to the cost of those expenses in proportion to their incomes. For example, if one parent earns $30,000 per year and the other earns $20,000, for a total family income of $50,000, then $30,000 represents 60% of the total and so that parent pays 60% of an extraordinary expense while the other would have to pay 40%.

Further reading

Chapter on:

- Child Support, in particular the section on the Child Support Guidelines

Spousal support

Spousal support is money paid by one spouse to another spouse, for one of three reasons. Spousal support may be paid to help a spouse meet their day-to-day living expenses if they can't afford to pay those expenses on their own, or it may be paid to compensate a spouse for the economic consequences of decisions made during the relationship. Spousal support may also be paid because a spouse agreed to pay it, perhaps in a marriage agreement or a cohabitation agreement, but more commonly in a separation agreement.

Spousal support is not automatically paid just because people are married or unmarried spouses. The spouse who wants support must show that they are entitled to it.

The decisions made by people during their relationship can cause a spouse to be entitled to compensation if those decisions took the spouse out of the paid workforce, required the spouse to move to a place where there was less financial opportunity, prevented the spouse from taking a promotion, or have made it more difficult for the spouse to get a job after separation. Say, for example, the spouses decided that one of them should quit work and stay at home to raise the children and be a homemaker. While a decision like this can be very helpful for the family as a whole, the longer the spouse who stays at home remains out of the workforce, the more difficult it will be for them to return to work and get a job that pays as well as their old job. As well, by remaining out of the workforce, the spouse who stays at home loses all of the opportunities for raises and promotions the spouse would have had if they had stayed in their job. These are some of the economic consequences that might support a claim for spousal support.

The end of a relationship can also cause a spouse to need financial help. After people separate, the same amount of money they had during the relationship now has to pay for two rent bills, two electricity bills, and two grocery bills. When the family were together, however, their combined incomes only had to pay for one rent bill, one electricity bill, and one phone bill. If a spouse can't afford to pay their living expenses with the income available to them, they might be entitled to ask the other spouse to pay spousal support to help with those expenses.

Spousal support is usually paid every month in a set amount of money for a set amount of time, although support can be paid indefinitely or in one big lump-sum payment. The amount of spousal support that is paid usually works out to an amount that the person with more money can afford to pay, using the money left over after their basic living expenses have been paid.

The amount of spousal support that should be paid, and the length of time it should be paid for, is usually calculated using the The Spousal Support Advisory Guidelines. The Advisory Guidelines use two formulas — one for when a family has children and one for when they don't — that calculate how much support should be paid according to the length of the relationship and each party's annual income.

There are three very important things to know about the Advisory Guidelines:

- The Advisory Guidelines are not a law and there is no rule saying that the Advisory Guidelines formulas must be used. Despite this, lawyers and the courts use the Advisory Guidelines almost all the time when someone is entitled to receive spousal support.
- The Advisory Guidelines are only used when someone is proven to be entitled to receive support; if there is no entitlement, the Advisory Guidelines don't apply.
- The formulas the Advisory Guidelines describe are very complicated. In particular, the formulas that are used when a family has children cannot be done without using a computer program.

Only people who are married spouses or unmarried spouses can ask for spousal support. Married spouses must ask for spousal support within two years of their divorce. Unmarried spouses must ask for spousal support within two years of the date they separated.

Further reading

Chapter on:

- Spousal Support, in particular the section on The Spousal Support Advisory Guidelines

Dividing family property and family debt

If people are married or have lived together with each other in a romantic relationship for more than two years, each of them is usually entitled to share in the property that accumulated during the relationship, called *family property*, when their relationship ends. Some property, like the property a spouse had before the relationship, is excluded from the property the spouses share.

Family property is the property acquired by either or both spouses after they started living together or got married up to the date they separate. Family property includes:

- real estate and personal property, like cars and motorcycles,
- bank accounts, investments, RRSPs, and pensions,
- the interest a spouse has in a company, business, or partnership,
- debts owed to a spouse, and
- any increase in value of excluded property that happens during the relationship.

Each spouse is usually entitled to keep all of their *excluded property*. Excluded property includes:

- the property that was owned by a spouse on the date the spouses began to live together or the date they married, whichever is earlier,
- any gifts or inheritances received by a spouse during the relationship,
- certain kinds of court awards and insurance payments made to a spouse during the relationship, and
- new property bought using excluded property.

Each spouse is also usually responsible for half of the *family debt* when their relationship ends. Family debt includes:

- all debts incurred by either spouse during the relationship, and
- any debts incurred after separation as long as the debts were incurred to maintain family property.

Spouses have the right to a share of the family property and a duty to share in the family debt when they separate. However, it's important to know that separation doesn't only happen when someone moves out. Spouses can be separated while living together, as long as one of them has said that the relationship is over and then behaved as if the relationship is over, for example by not sleeping with their spouse, not eating meals with their spouse, or by not doing chores for their spouse.

Further reading

Chapter on:

- Property and Debt in Family Law Matters

Separation and divorce

Separation happens when one or more people in a relationship decide that the relationship is over and then acts like it's over. "Acting like it's over" might mean moving out, although this doesn't happen for every family. It does mean that the spouses stop sleeping together, stop sharing meals together, stop going out together and stop doing chores for each other.

You don't need the permission of your spouse to separate. You also don't need a legal document to separate, and you don't need to see a lawyer or a judge to separate; there is no such thing as a "legal separation" in British Columbia.

For unmarried spouses and other unmarried couples, their relationship is over the moment they separate. That's it, it's done! There is no such thing as a "common-law marriage," and unmarried spouses never need to get divorced.

For a marriage to legally end, however, the spouses must *divorce*. This means that one or both spouses have to start a court proceeding and ask a judge to make an order saying that they are divorced. A married couple can be separated for many, many years but they will still be legally married if they haven't gotten a divorce order.

Sometimes married people don't get around to getting a divorce for a long time. That's fine. The only thing a separated married person can't do that an unmarried person can do is marry again. Separated married people can date someone else, live with someone else, own property in their own name, have bank accounts and credit cards in their own name, and so on.

There is only one reason why a court will make a divorce order: it believes that the marriage has broken down. The breakdown of a marriage can be shown in one of three ways:

1. the spouses have separated and have stayed separated for more than one year,
2. a spouse has had sex with someone other than their spouse, called *adultery*, or
3. a spouse has been verbally, emotionally, or physically abusive to their spouse, which is what the *Divorce Act* means by *cruelty*.

To get a divorce order, you have to start a court proceeding. You don't have to ask the court for anything else except a divorce, if a divorce is all you need. When a married couple agrees to get a divorce, they can get a divorce using the do-it-yourself desk order process, and they won't have to go in front of a judge, ever.

Further reading

Chapter on:

- Separating and Getting Divorced

Information for people who are new to Canada

In Canada, men and women have exactly the same rights. There is no difference between the rights a man has and the rights that a woman has, whether they are married to each other or not. Men do not have the right to control women or tell them what they may and may not do, even if they are married to one another. As well, people in same-sex relationships have exactly the same rights as people in opposite-sex relationships.

Our courts are open to everybody who lives in Canada, not only to people who have Canadian citizenship. People who are new to Canada can make a claim in court, regardless of their citizenship status, including whether they do or do not have permanent residency in Canada.

There is no law that requires someone who is unhappy in a marriage to stay in their marriage. If someone wants to leave a relationship, they can, and they do not need the permission or agreement of their spouse, a family member, an elder or anyone else to leave their relationship.

In Canada, there is no requirement that either dowry or dower be paid when a couple marries or divorces. Even if a religion requires a payment like this, that religious duty is not legally binding in Canada.

If an arranged marriage is proposed, each of the parties to that proposed marriage must still agree to marry of their own free will. There is no law that allows someone to be forced to marry someone else. An agreement between

relatives or elders about a marriage is not legally binding on the people who are supposed to get married.

When one spouse sponsors another spouse to come to Canada, that person will usually sign a *sponsorship agreement* with the government. A sponsorship agreement is a contract that requires the sponsor to support the person who is coming to Canada, whether they stay married, separate, or divorce. This agreement is only between the sponsor and the government. If the person coming to Canada needs spousal support, for example, they can still ask the court for an order that their spouse pay support to them.

Separation does not automatically mean that someone new to Canada will have to leave the country. People who are permanent residents, for example, will usually be allowed to stay, regardless of what is happening in their relationship with their sponsors. You should, however, speak to an immigration lawyer just to be sure.

In Canada, you must have a court order to divorce and legally end a marriage. Religious divorces are not recognized in Canada as divorces that legally end a marriage. It is also important to know that the decisions of religious tribunals about how a separated couple will share their property or parent their children may not be recognized in British Columbia. You should, however, speak to a family law lawyer to find out whether you must follow the decision of a religious tribunal.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- Federal Child Support Guidelines [8]

Links

- Spousal Support Advisory Guidelines [9] from the Department of Justice
- Canada child benefits calculator [10] from the Canada Revenue Agency Child and Family Benefits Calculator] from the Government of Canada

Resources

- "Family Law Basics" video [11] from JP Boyd

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 23 November 2023.

References

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[2] http://canlii.ca/t/8481
[3] http://canlii.ca/t/8456
[4] http://canlii.ca/t/84fk
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[8] https://www.canlii.org/en/ca/laws/regu/sor-97-175/latest/sor-97-175.html
[9] https://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html
[10] https://www.canada.ca/en/revenue-agency/services/child-family-benefits/child-family-benefits-calculator.html
[11] https://www.clicklaw.bc.ca/resource/4762

The Legislation on Family Law

The most important pieces of legislation about family law in British Columbia are the provincial *Family Law Act* and the federal *Divorce Act*. There is also a very important federal regulation, known as the Child Support Guidelines, and an important academic paper, called the The Spousal Support Advisory Guidelines. You may also run into other provincial and federal laws, like the *Name Act* [2], the *Partition of Property Act* [1], or the *Canada Pension Plan* [2], which weren't written just for family law disputes but may still relate to your situation. There are also some international treaties that might apply, most commonly the Hague Convention on Child Abduction [3] and the UN Convention on the Rights of the Child [4].

This section describes the primary legislation on family law, and briefly reviews some of the more important secondary legislation and international treaties touching on family law issues.

Two important statutes, one important regulation and one influential paper

The federal *Divorce Act*, the provincial *Family Law Act,* and the federal Child Support Guidelines are central to family law in British Columbia. While some of the subjects covered by the *Divorce Act* and the *Family Law Act* are the same, there are significant differences between the two laws that you need to be aware of.

Only the *Divorce Act* deals with divorce, and the *Divorce Act* only applies to married spouses. Only the *Family Law Act* deals with the guardianship of children of property and debts, but the *Family Law Act* applies to everyone, regardless of the nature of their family relationship. Both statutes deal with parenting children, children's parenting schedules, child support, and spousal support. One of the most important distinctions between the two laws, as we'll talk about later, is how they define important terms like *spouse*, *parent*, and *child*. Depending on the particular law you're dealing with, you may fall ins or outside of them, and that can have an important impact on your family law problem and the options available to you.

Both the *Divorce Act* and the *Family Law Act* rely on the Child Support Guidelines to calculate child support and the payment of children's special or extraordinary expenses. The Guidelines are a regulation to the *Divorce Act* and are adopted by the *Family Law Act*.

Spousal support is usually calculated using the The Spousal Support Advisory Guidelines, whether your case is under the *Divorce Act* or the *Family Law Act*. The Advisory Guidelines aren't a statute or a regulation. They are an academic paper that proposes different formulas for calculating the amount of spousal support that should be paid and the length of time it should be paid for. Even though the Advisory Guidelines are a paper, all of Canada's courts have accepted their formulas as a good way to calculate spousal support.

This section provides an introduction to the *Divorce Act*, the *Family Law Act*, the Child Support Guidelines and the Spousal Support Advisory Guidelines. The next two pages go into the *Divorce Act* and the *Family Law Act* in a lot more detail.

Understanding legislation

Before moving on, let's talk about how to read laws made by the government, called *legislation*, *statutes*, and *acts*. (All of these terms mean the same thing.) We'll use British Columbia's *Family Law Act* as an example.

The name of a statute is written in italics. The names of another kind of law, called *regulations*, are written without italics in legal documents. For example:

- The *Family Law Act* is a statute, so it appears in italics.
- The Federal Child Support Guidelines is a regulation, so it is not written in italics.

In British Columbia, we talk about the provincial *Family Law Act* and the Family Law Act Regulation, and the federal *Divorce Act* and the Child Support Guidelines. The Child Support Guidelines are a regulation to the *Divorce Act*, and the Family Law Act Regulation is, like the name suggests, a regulation to the *Family Law Act*.

The proper legal title of the *Family Law Act* is:

> *Family Law Act*, SBC 2011, c. 25

Here's what those letters and numbers mean:

- **SBC** stands for "Statutes of British Columbia."
- **2011** means that the statute was passed by the provincial legislature in 2011.
- **c.** stands for "chapter."
- **25** means that the *Family Law Act* was the twenty-fifth statute passed by the legislature in 2011, or the twenty-fifth *chapter* of the statutes passed by the legislature in 2011.

Every now and then the government reorganizes all the laws it has made into one set of books, sorting the laws alphabetically. The federal government did this since 1985, and the last time British Columbia did this was in 1996. When this happens, SBC is replaced by *RSBC* (this stands for the "Revised Statutes of British Columbia") and the law gets a new chapter number. The old *Family Relations Act*, the law the *Family Law Act* replaced, first became law in 1978. However, the statutes of British Columbia were consolidated in 1996, and when that happened, the title of the *Family Relations Act* changed from the *Family Relations Act*, SBC 1978, c. 20 to become the *Family Relations Act*, RSBC 1996, c. 128.

Other provinces and the federal government follow the same pattern. The title of Alberta's *Family Law Act* is the *Family Law Act*, SA 2003, c. F-4.5 (Statutes of Alberta, 2003, chapter F-4.5), and the title of the *Divorce Act* is the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.) (Revised Statutes of Canada of 1985, chapter 3, second supplement).

The individual rules in a statute are broken down into numbered paragraphs, called **sections**. This helps people identify the specific rule they are talking about. This is section 23 of the *Family Law Act*:

> 23 (1) For all purposes of the law of British Columbia,
>
> (a) a person is the child of the person's parents,
>
> (b) a child's parent is the person determined under this Part to be the child's parent, and
>
> (c) the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.
>
> (2) For the purposes of an instrument or enactment that refers to a person, described in terms of the person's relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

You'll see that this rule is broken down into smaller bits. These are called **subsections**. If someone was talking about the last part of section 23, they would say "section 23, subsection 2" or "section 23 sub 2." In writing, you would put

"section 23(2)." (Just as *chapter* is abbreviated as **c.**, *section* is abbreviated as **s.** If we are talking about more than one section, *sections* is abbreviated as **ss.** *Subsection* is abbreviated as **s-s.** and the plural is written as **s-ss.**)

Long statutes like the *Family Law Act* sometimes have their subject matter broken into big chunks called **parts**. In the *Family Law Act*, Part 3 is titled "Parentage" and has all of the rules about deciding who the parents of a child are. Part 4 is titled "Care of and Time with Children" and has all the rules about parenting children. Long parts are sometimes broken into smaller chunks called **divisions**. Part 4 of the *Family Law Act* includes Division 2: Parenting Arrangements, and Division 3: Guardianship. Part 4, Division 2 has all of the rules about parental responsibilities, parenting time and contact, while Part 4, Division 3 has all the rules about appointing and removing people as the guardians of a child.

In this resource, we don't worry about using the full legal titles of legislation, and we mostly talk about sections rather than parts and divisions.

The *Divorce Act*

The *Divorce Act* is a federal law that you can find, along with other federal laws, on the website of the federal Department of Justice [5] or on CanLII [6], a free website for searching Canadian court decisions and legislation. The *Divorce Act* became law in 1985. A number of very important changes to the act became law on 1 March 2021 and changed how we talk about parenting children and the best interests of children. The current *Divorce Act* covers these main subjects:

- getting divorced,
- decision-making responsibility,
- parenting time and contact with children,
- moving away, with or without children
- child support, and
- spousal support.

The *Divorce Act* only applies to *married spouses*, people who are, or were, married to each other by a marriage commissioner or a religious official licensed to perform marriages. (If you're not legally married, the *Divorce Act* doesn't apply to you, and the *Family Law Act* is the only game in town.) The *Divorce Act* refers to children as *children of the marriage*. A "child of the marriage" is defined in section 2(1) as:

> A child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

In other words, a "child of the marriage" is someone who is less than 19 years old — the age of majority in British Columbia — or who is 19 or older if the child cannot support themselves for some reason, like going to college or university. The definition of "child of the marriage" is expanded in section 2(2) of the *Divorce Act* to include stepparents.

Not only do you have to be married to ask for an order under the *Divorce Act*, you also have to be *habitually resident* in your province for at least one year before you can ask the court of your province for the order. If you've lived in your province for less than 12 months, and your spouse has been habitually resident in their province for at least a year, you can ask the court there for an order under the *Divorce Act.*

Married spouses can ask the court for:

- an order for their divorce,
- an order about decision-making responsibilities for any children of the marriage,

- an order about parenting time,
- an order that they pay or receive child support, and
- an order that they pay or receive spousal support.

If there is a court proceeding between married spouses, someone who is not a spouse — like a grandparent, an aunt or uncle, or another person with a special connection to a child of the marriage — can ask for an order that they have contact with the child. However, people who are not spouses must get permission from the court before they can ask for a contact order.

JP Boyd on Family Law provides extensive coverage of the *Divorce Act*, including a chapter on *Divorce Act* Basics.

The *Family Law Act*

The *Family Law Act* is a British Columbia law that you can find, along with other provincial laws, at the official government website of the Queen's Printer [7] or on CanLII [8], a free website that lets you search Canadian laws and court decisions. The *Family Law Act* covers these basic subjects:

- determining who the parents of a child are,
- guardianship of children,
- parental responsibilities,
- parenting time and contact with children,
- moving away, with or without children,
- child support,
- managing children's property,
- spousal support,
- dividing property and debt,
- orders protecting people, and
- orders protecting property.

The *Family Law Act* applies to:

- *married spouses*, people who are, or were, married to each other by a marriage commissioner or a religious official licensed to perform marriages,
- *unmarried spouses*, people who live, or used to live, together in a romantic relationship,
- people who are the *parents* of a child together, and
- people who are the *guardians* of a child.

Unlike the *Divorce Act*, there are no rules requiring you to live in British Columbia for a certain amount of time before you can ask the court for an order under the *Family Law Act*.

Section 3 of the act says who is a "spouse:"

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

Part 3 of the act has the rules for deciding who is a "parent." Most of the time, the parents of a child are the child's *birth mother* and *biological father*. (Section 26(2) lists the circumstances in which a man is assumed to be the biological father of a child, such as being married to the birth mother, and section 33 says when the court can order

that a DNA test be conducted to determine whether a man is the biological father of a child.) When a child is conceived through assisted reproduction, a child's birth parents — depending on the arrangements people make — can include a donor of sperm, a donor of eggs, a surrogate mother and the spouse of a surrogate mother.

Section 1 of the act defines a *child* as "a person who is under 19 years of age." Section 146 expands that definition for the part of the act about child support, and says that "'child' includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians." ("Other reason" usually means that the adult child is going to college or university.)

The same section expands the definition of *parent* for the purposes of child support. Under this definition, "parent" can include someone who is a *stepparent*. A "stepparent" is "a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life."

Section 39 says who is assumed to be the *guardian* of a child:

> (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
>
> (3) A parent who has never resided with the parent's child is not the child's guardian unless one of the following applies:
>
> (a) section 30 [parentage if other arrangement] applies and the person is a parent under that section;
>
> (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
>
> (c) the parent regularly cares for the child.

It's important to notice that while the parents of a child are usually each a guardian of a child, this is not always the case. However, the court can make an order under section 51 of the *Family Law Act* to appoint a person, including a parent, as a guardian of a child.

Someone who is a *guardian* — whether or not they are a parent, a married spouse or an unmarried spouse — can ask the court for:

- an order about parental responsibilities for any children, and
- an order about parenting time and contact with a child.

Someone who is a *parent* or a *guardian* of a child — whether or not they are a married spouse or an unmarried spouse — can ask the court for an order that they pay or receive child support.

Someone who is a *married spouse* or an *unmarried spouse* can ask the court for:

- an order that they pay or receive spousal support, and
- an order for the division of property and debt, as long as a person who is an unmarried spouse has lived with their partner for at least two years.

Anyone can ask the court for:

- a declaration about who the parents of a child are,
- an order that they have contact with a child,
- an order appointing them as the guardian of a child, and
- an order about the management of a child's property.

JP Boyd on Family Law provides extensive coverage of the *Family Law Act*, including a chapter on *Family Law Act* Basics.

The Child Support Guidelines

The Child Support Guidelines, often referred to as just "the Guidelines," are a federal regulation that standardizes child support orders throughout Canada, except in Quebec. The Guidelines talk about how income is calculated and how children's special expenses are shared between parents, and provide a series of tables, one for each province and territory, which set out how much child support should be paid based on the payor's income and the number of children support is being paid for.

The Child Support Guidelines apply to anyone who is required to pay or entitled to receive child support, whether or not they are a married spouse, an unmarried spouse, a parent or a guardian.

The Child Support Guidelines apply to child support orders made under both the federal *Divorce Act* and the provincial *Family Law Act*. Because they are mandatory whenever child support is paid, the Guidelines also apply to agreements about child support.

The Child Support Guidelines include a series of tables, one for each province and territory, that specify how much child support should be paid according to:

- the income of the payor, the person paying child support,
- the number of children support is being paid for, and
- the province or territory in which the payor lives.

The Guidelines also talk about special circumstances in which the parties may agree, or the court may order, that child support be paid in an amount that is different from the amount specified in the tables:

- when the child is 19 — the age of majority in British Columbia — or older,
- the payor's income is more than $150,000 per year,
- the payor is a stepparent,
- the payor and the recipient, the person receiving child support, each have the primary home of one or more children,
- the payor and the recipient share the children's time equally or almost equally, and
- the payment of the table amount would cause "undue hardship" to either the payor or the recipient.

The Child Support Guidelines also talk about how the payor and recipient share the cost of the children's *special or extraordinary expenses*. ("Special expenses" include things like day care costs, medical insurance premiums, health care costs and the cost of college or university. "Extraordinary expenses" include primary and secondary school expenses and the cost of extracurricular activities, like sports teams or music lessons.) Most of the time, the payor and recipient share qualifying expenses according to their incomes.

The Child Support Guidelines, and the exceptions to the Guidelines' tables, are discussed in a lot more detail in the chapter Child Support.

The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines, often called "the Advisory Guidelines," are not a law. They are an academic paper that describes a number of mathematical formulas that can be used to calculate how much spousal support should be paid and how long spousal support should be paid for, once a spouse's entitlement to receive spousal support has been proven. Although the Advisory Guidelines are not a law, the courts of British Columbia and the rest of Canada routinely rely on the Advisory Guidelines' formulas when making decisions about spousal support. The Advisory Guidelines cannot be ignored if you have a problem involving the payment of spousal support.

The Spousal Support Advisory Guidelines apply to anyone who is required to pay or entitled to receive spousal support, whether or not they are a married spouse or an unmarried spouse.

The Spousal Support Advisory Guidelines will be considered when the court is making spousal support orders under both the federal *Divorce Act* and the provincial *Family Law Act*. Even though the Advisory Guidelines are not a law

and there is no rule saying that they must be used in agreements about spousal support, the Advisory Guidelines are often used to make agreements.

The Spousal Support Advisory Guidelines have two basic formulas that are used to calculate the amount of spousal support and the length of time it should be paid for: one when the spouses have children and one for when they do not. The formulas take into account a bunch of information, including:

- the income of the payor, the person paying spousal support, and the income of the recipient, the person receiving spousal support,
- the length of the spouses' relationship,
- the age of each spouse,
- how much child support is being paid,
- how much is being spent on the children's special or extraordinary expenses, and
- the age of each child and where they are in school.

The Advisory Guidelines also talk about special circumstances in which the parties may agree, or the court may order, that spousal support be paid differently than in the amount the results of the formulas specify, including:

- when the family has a lot of debts to pay,
- when a spouse has support obligations from a previous relationship,
- when a spouse is caring for children from a previous relationship,
- when a spouse is ill or disabled, and
- when a child has expensive special needs.

The Advisory Guidelines' formulas, and the way the courts have dealt with the Advisory Guidelines, are discussed in more detail in the chapter Spousal Support in the section The Spousal Support Advisory Guidelines.

Other legislation related to family law issues

This segment discusses some of the secondary legislation relating to marriage, children, child protection, the enforcement of orders and agreements relating to support payments, real property, wills and estates, and name changes.

Marriage

The federal *Marriage (Prohibited Degrees) Act* [9] sets out the degrees of *consanguinity* — relatedness by blood or adoption — a couple cannot have if they are going to marry each other. The federal *Civil Marriage Act* [10] defines marriage as the "union of two persons" rather than "the union of a man and a woman," allowing same-sex couples to marry, just as opposite-sex couples do, and makes related changes to other federal legislation, like the *Divorce Act*, allowing same-sex couples to divorce, just as opposite-sex couples do.

The provincial *Marriage Act* [11] deals with the formalities of marriage, and covers such things as who is entitled to marry people, issuing marriage licences, and the age at which a couple can legally marry.

More information about marrying and marriage, including void marriages and invalid marriages, is available in the Married Spouses and the Law on Marriage section in the Family Relationships chapter.

Children

The provincial *Age of Majority Act* [12] sets the age of majority at 19. The provincial *Infants Act* [13] describes the legal capacity of children, such as their ability to enter into legally binding contracts or marriage settlements.

The provincial *Adoption Act* [1] deals with such things as who can give a child up for adoption, who may adopt a child, and the general ins and outs of the adoption process. The process for adoption is described in more detail in the section on Adopting Children in the chapter Family Relationships.

The provincial *Parental Liability Act* [14] says that parents whose children have been convicted of causing damage to or loss of property may be held responsible for loss caused by their children's offences, up to a maximum of $10,000.

Child protection

On 1 October 2002, the Children's Commissioner, who investigated serious injuries or deaths suffered by children, and the Office of the Child, Youth and Family Advocate, which investigated issues involving children in the care of or involved with governmental and private agencies, were replaced by the Office for Children and Youth. On 18 May 2006, this was in turn replaced by the Representative for Children and Youth [15], operating under the *Representative for Children and Youth Act* [16]. The goals of the representative, who has significant oversight powers, are to:

- foster respect for the fundamental rights of all children and youth in British Columbia,
- support and promote the rights of children and youth in the care of the state,
- promote awareness and understanding of key principles in the United Nations Convention on the Rights of the Child,
- monitor the effectiveness and responsiveness of child-related s and programs in British Columbia,
- work collaboratively with public bodies, including the Chief Coroner and the Public Guardian and Trustee, to build an integrated, responsive process for the review and investigation of critical injuries and death, and
- draw on lessons learned to support and promote prevention initiatives and best practices with respect to intervention.

The provincial *Child, Family and Community Service Act* [17] gives the government, specifically the Ministry for Children and Family Development [18], the power to intervene when children are believed to be suffering from abuse or neglect or are at risk of suffering from abuse or neglect. The act regulates the conditions under which child protection workers may intervene, when children can be seized, the conditions in which children may be placed in the care of the government, and specifies the authority and powers of child protection workers.

Enforcement of support obligations

The provincial *Family Maintenance Enforcement Act* [19] establishes the Family Maintenance Enforcement Program [20], overseen by the BC Family Maintenance Agency which is the government agency with the authority to enforce support orders, and sets the extent of that authority. The provincial *Court Order Enforcement Act* [21] sets out the ways in which money awarded under a judgment can be collected, such as by liens against property, the garnishment of wages, and so forth.

The provincial *Interjurisdictional Support Orders Act* [22] allows support orders made outside of British Columbia to be registered in this province for enforcement. It also allows someone affected by a registered order to start a process here that may result in the variation of that order by the court that originally made the order. The act does not apply to all support orders, only to the orders of the countries, provinces, and states that have an agreement with British Columbia about support orders.

Real property

The provincial *Land (Spouse Protection) Act* [23] protects the rights of married spouses and unmarried spouses to their interest in their family home (called a "homestead" in the act) by allowing them to file an "entry" on the title of the property that can stop the property from being sold. A spouse seeking this protection must file an entry with the land title office while they are *still in the relationship*. The act stops applying when spouses separate.

The provincial *Land Title Act* [3] deals with all aspects of the ownership and transfer of real property in British Columbia, including the conditions of holding valid title to a piece of land, placing and removing encumbrances (like liens and mortgages) on the title of a property, and the conditions under which a Certificate of Pending Litigation can be placed on the title. The *Partition of Property Act* [1] gives someone who owns property jointly with someone else the right to force the sale of that property over the objections of the other owner.

Wills and estates

The provincial *Wills, Estates and Succession Act* [24] deals with wills, changing wills, how close relatives can challenge a will, and what happens when someone dies without a will.

Names and change of name

The provincial *Name Act* [2] is the law that deals with changes of name, both for a married spouse following divorce and for anyone who hankers to be called something different. (The process is fairly simple for a spouse following divorce.) The *Vital Statistics Act* [4] talks about the registration of new births and about the naming of infants, and should be read if you're thinking of calling your child something different like Moon Unit or Blue Ivy.

There's more information about naming and changing names in the guide on How Do I Change My Name after Marriage or Divorce?.

International treaties

Canada is a signatory to many international agreements, from agreements about the treatment of prisoners in wartime to agreements about money laundering. In family law, the two most important treaties concern the wrongful removal of children from a country and the human rights of children.

The Hague Convention on the abduction of children

The Hague Convention on the Civil Aspects of International Child Abduction [3] says what steps a signatory country must take when someone has wrongfully taken a child into that country. The convention explains how someone from the departure country can make an application for an order in the destination country for the return of the child. It outlines the defences that can be made to applications like these, the different orders the court in the destination country can make, and the factors that court must consider in deciding whether to make those orders.

More information about the Hague Convention, including a list of signatory countries, can be found in the chapter Resolving Family Law Problems in Court.

The UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child [4] is an international treaty and law in Canada. The convention says that children have the basic human rights that adults do, as well as other rights such as the right to be protected from abuse and exploitation, the right to education and health care, and the right to an adequate standard of living. The convention also says, at article 12, that the views of children must be heard in any legal proceeding that affects their interests:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all

> matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

You can find more information about how the views of children are heard in family law disputes in the chapter Children and Parenting after Separation.

Domestic legislation

Canada and British Columbia have made a number of important agreements with other countries for the mutual enforcement of court orders.

The *Interjurisdictional Support Orders Act* [25] talks about getting and changing orders for child support and spousal support where the parties are living in different provinces, territories, or countries. The Interjurisdictional Support Orders Regulation [26] has a table showing which countries have signed up.

The *Court Order Enforcement Act* [27] is about enforcing court orders for the payment of money or transfer of goods or property. The countries that have signed up can be found in the Notice of Reciprocating Jurisdictions [28].

You can find more information about the *Interjurisdictional Support Orders Act* in the chapter Child Support, in the section Making Changes to Child Support. You can find more information about enforcement of orders in the chapter Resolving Family Law Problems in Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 16 November 2023.

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Divorce Act Basics

The *Divorce Act* is the law that deals with marriage breakdown in Canada. It only applies to people who are married to each other or who used to be married to each other. It talks about how married spouses get divorced and when divorce orders from another country are recognized here. It also talks about the care and parenting of children after separation, child support, and spousal support.

This section provides a top to bottom overview of the *Divorce Act* in an easy-to-read question and answer format. It is written primarily for justice system workers and legal advocates, but anyone can use it. All of the information provided in this section is discussed in more detail elsewhere in *JP Boyd on Family Law*.

Introduction

The very first Canadian *Divorce Act* didn't become law until 1968. It was overhauled and replaced with a new *Divorce Act* 17 years later, in 1985. The 1985 version of the act was updated in 1997 when the *Child Support Guidelines* were introduced, but it took another 24 years for the next major changes to the act to become law on 1 March 2021. These most recent changes to the *Divorce Act* were very important because they changed the way we talk about parenting children from terms like *custody* and *access*, which were about the rights of parents and tended to encourage conflict between separated parents, to terms like *decision-making responsibility* and *parenting time*, which are about the rights of children and encourage separated parents to cooperate.

Other important changes to the 1985 *Divorce Act* include:

- expanding the factors parents and the court must consider when deciding what is, and isn't, in the best interest of children,
- requiring parents to try to resolve family law problems other than by going to court,
- adding measures to help the court deal with family violence,
- creating a new way of dealing with parents who want to move away, with or without the children, after separation, and
- implementing a number of international treaties.

The full list of changes can be found in the legislation that changed the *Divorce Act,* the *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* [1]. (What a long name!) All of these changes are reflected in this resource.

Who does the *Divorce Act* apply to?

The federal *Divorce Act* is the main Canadian law on marriage breakdown and divorce. It only applies to couples who are or were legally married to each other, regardless of where they were married. If people in other kinds of relationships can't make an agreement and need to ask the court for orders about parenting children, child support, or spousal support, they must apply under provincial legislation. In British Columbia, that law is the *Family Law Act*.

If married spouses have started a court proceeding under the *Divorce Act*, other people — including grandparents, other family members, and children's other caregivers — can use the *Divorce Act* to ask for orders for contact with the spouses' children, but they must get the court's permission first.

What issues does the *Divorce Act* cover?

The *Divorce Act* talks about:

- divorce and foreign divorce orders,
- decision-making responsibility for children,
- parenting time or contact with children,
- moving away after separation, with or without children,
- paying and receiving child support,
- paying and receiving spousal support, and
- changing orders about decision-making responsibility, parenting time, contact with children, child support, or spousal support.

Orders about decision-making responsibility and parenting time are called "parenting orders."

What is corollary relief?

You may have heard the term "corollary relief" used about court proceedings under the *Divorce Act*. *Corollary* means something that is related to or a consequence of something else. The primary subject matter of the *Divorce Act* is divorce. The other orders available under the act, about parenting children, child support, and spousal support, all stem from the court's ability to make a divorce order. The court's power to make these orders is "corollary" to the court's power over divorce, and orders about parenting children, child support, and spousal support are sometimes called *corollary relief* or *corollary orders*.

What about annulment?

When a marriage is *annulled*, the marriage is cancelled as if the couple had never been married at all. A marriage can sometimes be annulled if there is a problem with the legal requirements of the marriage ceremony or the legal capacity of the parties to marry.

The *Divorce Act* doesn't deal with the annulment of marriages, only divorce. Annulment is governed by the common law and is nowhere near as easy to get as a divorce. The section on Married Spouses and the Law on Marriage in the Family Relationships chapter talks about when and how marriages can be annulled.

When can a court proceeding under the *Divorce Act* start?

A court proceeding for a divorce order can only start when one of the spouses has lived in the province where the proceeding is started for at least one year. As long as this requirement is met, a court proceeding can be started as soon as the spouses have separated. There's no waiting period.

If you have recently moved to a new province, you have three choices. You can wait until you have lived in your new province to start a court proceeding under the *Divorce Act* in the court of your new province. You can start a court proceeding in the province where your spouse lives, as long as they have lived in that province for at least one year. Or, you can start a court proceeding under the family law legislation in your new province and wait until you've lived there one year to add a claim under the *Divorce Act* to the court proceeding.

Which court can hear a proceeding under the *Divorce Act*?

If you are married and want to get divorced, you must start your court proceeding in the Supreme Court. Both the Provincial Court and the Supreme Court can hear court proceedings under the provincial *Family Law Act*. However, only the Supreme Court has the jurisdiction to hear proceedings under the *Divorce Act*.

What happens if we each start a court proceeding for divorce?

If each spouse has started a court proceeding under the *Divorce Act*, the court in which the first court proceeding was started can continue to deal with that proceeding, and the court proceeding that was started second is considered to be cancelled. This can be very important where spouses live in different provinces.

If the two court proceedings were started on the same day and you can't agree on which court proceeding should be cancelled, you or your spouse will have to apply to the Federal Court [2] for a decision about which court proceeding should continue and which should end. The Federal Court will use these rules:

- if one of the proceedings asks for an order about parenting, the court proceeding that will continue is the proceeding in the province where the child normally lives,
- if neither proceeding asks for an order about parenting, the court proceeding that will continue is the proceeding in the province where you last lived together, and
- if neither proceeding asks for an order about parenting and neither province is the province where you last lived together, the court proceeding that will continue is the proceeding which the Federal Court considers to be "most appropriate."

The "most appropriate" court will usually be the court in the province in which most of the witnesses and evidence that are needed for the court proceeding are located.

What about claims under the *Family Law Act*?

Both the *Divorce Act* and the *Family Law Act* talk about parenting children, child support, and spousal support. As long as a person is married, they can start a court proceeding about these issues under either law or under both laws at the same time. However, it's important to know that only the *Family Law Act* talks about orders dividing property and debt, personal protection orders and financial protection orders, declarations about the parentage of a child, or orders about the use of the family home. If orders like these are required, the court proceeding must include claims under the *Family Law Act*.

See the section *Family Law Act* Basics for more information about the *Family Law Act*.

Child support

The rules about child support are almost the same between the *Divorce Act* and the *Family Law Act*, except that it can be a bit easier to ask a stepparent to pay child support under the *Family Law Act*. The Child Support chapter talks about child support and when stepparents can be required to pay child support.

Spousal support

The rules about spousal support are very similar between the two laws, except that under the *Family Law Act* spousal support is also available to adults who aren't married to each other as long as they meet that act's definition of "spouse."

There's no limit to when claims for spousal support can be brought under the *Divorce Act*. Under the *Family Law Act*, however, spouses who are entitled to ask for spousal support must begin a court proceeding for spousal support within two years of the divorce order if the couple were married, or within two years of separation if the couple wasn't married, or they will be out of time and can't make the claim at all.

Parenting children

The *Divorce Act* talks about *spouses* who have *decision-making responsibility* and *parenting time*, and people who aren't spouses who have *contact*. The *Family Law Act* talks about *guardians* who have *parental responsibilities* and *parenting time*, and people who aren't guardians who have *contact*. Both laws also talk about what happens when a parent wants to move away with a child and how family violence impacts the court's decisions about parenting. The two laws are very similar to each other, although there are some small differences.

The law about divorce

Why will the court make a divorce order?

Under section 8(1) of the *Divorce Act*, the court can make a divorce order only if the spouses' marriage has *broken down*. Under section 8(2), there are three reasons why a marriage may have broken down:

- because the spouses have been *separated for at least one year*;
- because one spouse has committed *adultery*, and the adultery hasn't been forgiven, or
- because one spouse has treated the other with such *cruelty* that the spouses cannot continue to live together, and the cruelty hasn't been forgiven.

In Canada, most divorce claims are made on the basis of separation, even if there has been adultery or cruelty. It's important to know that you can't ask for a divorce because of your own adultery or cruelty, only the adultery or cruelty of your spouse.

Separation

To get a divorce based on separation, you and your spouse must have "lived separate and apart" for one year.

The period of living "separate and apart" can include time when you were both living in the same home. However, the "conjugal" quality of your relationship — the *marriage-like* quality of your relationship — must have ended. In general, this means that you must have stopped sleeping together, eating meals together, doing chores for each other, and going out together as a couple.

Under section 8(3) of the *Divorce Act*, spouses can live together in an attempt to reconcile and resume married life for up to 90 days during the one-year period. However, if the couple wind up living together for a total period of more than 90 days, the clock resets and the spouses must wait for a new one-year period to end before asking for a divorce order.

Adultery

To get a divorce based on adultery, you have to be able to prove that:

- your spouse had sex with someone else without your consent, and
- you haven't forgiven your spouse for their adultery.

The evidence the court will require isn't *indirect*, or "circumstantial" evidence, like a hotel receipt or a used condom, but *direct* evidence, like a photograph of the adultery while it is occurring or your spouse's admission to having committed adultery.

You can't ask for a divorce because of your own adultery. You can only ask because of the adultery of your spouse.

Cruelty

To get a divorce based on cruelty, you have to be able to prove that:

- you were treated with such mental or physical cruelty that it was impossible to continue living with your spouse, and
- you haven't forgiven your spouse for their cruelty.

The evidence of cruelty that the court will require must come from someone else, like a doctor or a psychologist. Your own evidence won't do.

You can't ask for a divorce because of your own cruelty. You can only ask because of the cruelty of your spouse.

The effect of forgiveness

The court will not grant a divorce based on adultery or cruelty if the adultery or cruelty has been *forgiven*, or "condoned." If the bad behaviour has been condoned, the marital relationship is considered not to have broken down, and the court won't make a divorce order.

When can the court make the divorce order?

If the claim for the divorce is based on separation, neither spouse can apply for the divorce order until one year has passed from the date of separation. The one-year period doesn't run from the date the court proceeding is started; it runs from the date of separation.

The nice thing about divorce claims based on adultery or cruelty is that the application for the divorce order can be made right away, without having to wait for one year. However, the adultery or cruelty must be proven, and most of the time it is difficult to get the other person to explicitly agree that these grounds exist. Also, if more than a year has passed from the date of separation at the time the court is asked to make the divorce order, the court may very well refuse to make the divorce order for any reason other than because the spouses have been separated for over a year.

Lawyers rarely advise their clients to make claims for divorce based on adultery and cruelty, especially because a claim based on separation for one year is much less contentious, requires very little evidence to prove, and is much more straightforward.

The process for getting a divorce order is described in detail in the Getting Divorced section of the chapter Separating and Getting Divorced.

What about child support?

The court may not make a divorce order unless it is satisfied that adequate arrangements have been made for child support. Section 11(1)(b) of the *Divorce Act* says that the court has the duty to:

> satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made

What this means is that the court will usually refuse to make a divorce order unless child support is being paid under a court order or a separation agreement in the amount that would normally be required by the Child Support Guidelines. However, the court may be prepared to consider other terms of an order or agreement that provide an important benefit to the children in deciding whether the amount of support being paid is reasonable. This can sometimes be hard to prove.

Information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Guidelines.

When is a divorce order effective?

Under section 12(1), a divorce order takes effect on the 31st day after the divorce order is made. That's because the deadline to make an appeal of a *Divorce Act* order is the 30th day after the order is made and the deadline for an appeal needs to pass, without an appeal being brought, before the spouses will be considered divorced.

What's the legal effect of a divorce order?

A divorce order ends a marriage. When a marriage is terminated by divorce, the parties stop being spouses and lose all of the obligations and benefits that come from being a spouse. A divorced person is free to marry again.

What if we wait to get a divorce order?

Getting a divorce is often a low priority for married people and some spouses wait for many years before starting a court proceeding for divorce. This isn't unreasonable, and usually happens for one of three reasons:

- the cost of getting a divorce can be expensive,
- other issues, like the parenting of children or the division of property and debt, take priority, or
- a spouse's religion discourages or prohibits divorce.

However, delaying your divorce for too long can cause some complications...

No divorce without a divorce order

Firstly, no matter how long spouses wait to get divorced, they will remain married to each other until one of them dies or they finally get a divorce order. There's no such thing as an automatic divorce; the passage of time alone won't do it. You actually have to get that order.

New relationships

Secondly, separated spouses often move on with their lives, meet new people and get into new romantic relationships without having been divorced. There's nothing wrong with this and the new relationship won't stop the married person from getting a divorce when the time is finally ripe.

However, if it takes too long and a separated spouse moves in to live with someone new, it's entirely possible that the spouse can find themselves in a spousal relationship with their new partner without being divorced from their spouse. (Remember that under the *Family Law Act* people can become spouses without getting married.) If that relationship also doesn't work out, the spouse may wind up being obliged to pay spousal support to more than one

other spouse!

Are foreign divorce orders valid in Canada?

Under section 22 of the *Divorce Act*, a divorce order made outside of Canada will be recognized in Canada, and be effective to determine a person's marital status in this country, as long as at least one of the spouses was "habitually resident" — normally lived — in the country that made the divorce order for at least one year before the court proceeding was started in that country.

The law about children

Who is a "child of the marriage"?

The *Divorce Act* talks about "children of the marriage" rather than just saying "children." A child must qualify as a "child of the marriage" before the court can make orders about parenting that child or paying child support for that child.

A *child of the marriage* is a child of one or both spouses who:

- is under the provincial age of majority and has not "withdrawn from their charge," or
- is older than the age of majority but is unable to withdraw from the spouses' care "by reason of illness, disability or other cause."

In British Columbia, the age of majority is 19. In other provinces, like Alberta and Manitoba, the age of majority is 18.

The bit about "other cause" where the act talks about adult children usually means that the child is going to college or university. There are a few court decisions where "other cause" has been interpreted to include circumstances in which the child is unemployed after reaching the age of majority and is "unable to withdraw" from their parents' charge because they can't find a job.

How are decisions about children made?

Section 16 of the *Divorce Act* says that:

> (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (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.

Section 16(3) provides a list of specific factors that the court should take into account when deciding what order is in the "best interests of the child." That list includes things like the child's wishes, needs, age, relationships with brothers and sisters, history of care, and cultural upbringing. The list also includes the presence of family violence in the child's life. When family violence is a concern, section 16(4) provides a list of additional factors to help the court decide how the violence has affected the child and the ability of the spouses to provide proper care for the child.

Section 16(6) provides further guidance to the court. It says 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.

(In legislation, "shall" means *must*.)

Although a court can make orders about the parenting of any children who are under the age of majority, in practice the court usually won't make orders involving older children who are close to the age of majority. Children who are that old are usually mature enough to make decisions for themselves about where they'd like to live, and the court will usually respect their decisions.

Who can ask for parenting orders and contact orders?

Under section 16.1(1)(a) of the *Divorce Act*, the people who can ask for orders about decision-making responsibility and parenting time are *spouses* as well as:

> (b) 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.

Although parents and stepparents — people who "stand in the place of a parent" — can apply for orders about decision-making responsibility and parenting time in a court proceeding between spouses, section 16.3 says that they must get the court's permission first.

Under section 16.5(1), anyone other than a spouse can apply for an order that they have contact with a child. Like parents and stepparents who want parenting orders, the court must give permission for someone to apply for contact.

What entitlements does decision-making responsibility give?

Under section 2(1) of the *Divorce Act*, someone with decision-making responsibility has the responsibility for making "significant decisions" about "a child's wellbeing," including about healthcare, education, culture, language, religion, and "significant extracurricular activities." The court can order that spouses share all decision-making responsibilities or that just one spouse have decision-making responsibility with respect to specific aspects of a child's life. (A court, for example, might order that one spouse have responsibility for healthcare decisions, while the other spouse has responsibility for the child's education.)

Someone with decision-making responsibility also has the right to get information about the child's wellbeing from another person with decision-making responsibility and from any person who might have that information, like doctors or teachers.

What entitlements does parenting time give?

Parenting time means the time a child of the marriage spends with a spouse, and normally refers to the schedule of the child's time with each spouse.

Someone with parenting time is entitled to make day-to-day decisions affecting the child during their time with the child, and has the right to get information about the child's wellbeing from another person with decision-making responsibility and from any person who might have that information.

What entitlements does contact give?

Contact is the time a child of the marriage has with someone other than a spouse.

Someone with contact with a child *does not* have the right to make day-to-day decisions about the child. Someone with contact *does not* have the right to get information about the child's wellbeing from persons with decision-making responsibility or from anyone else who might have that information.

How are parenting orders and contact orders enforced?

Divorce Act parenting orders and contact orders have effect throughout Canada, and are enforced under the laws of each province. In British Columbia, *Divorce Act* orders can be enforced by a spouse under the rules of court that tall about enforcing orders and under the provincial *Court Order Enforcement Act* [27]. For more information, read the section Enforcing Orders in Family Matters.

How are parenting orders and contact orders changed?

Under section 17(1)(b) of the *Divorce Act*, a spouse or another person can apply to change, or *vary*, a parenting order, but someone who isn't a spouse has to get permission from the court first. Under section 17(1)(c), applications to change a contact order can be made by "a person to whom the order relates," usually themselves or a spouse.

The legal test that must be met before the court changes a parenting order or contact order is at section 17(5) and 17(5.1):

> (5) Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order, or of an order made under subsection 16.5(9).
>
> (5.1) For the purposes of subsection (5), a former spouse's terminal illness or critical condition shall be considered a change in the circumstances of the child, and the court shall make a variation order in respect of a parenting order with regard to the allocation of parenting time.

Someone who wants to change an order must first show that there has been a change in circumstances, normally an *important* change in circumstances. When the court is deciding what new parenting order or contact order it should make, the court must apply the best interests of the child considerations and factors described in section 16.

What happens if a spouse wants to move?

If a spouse wants to move, with or without a child, and the move will have a "significant impact" on the child's relationship with someone with decision-making responsibility, parenting time or contact, the spouse must give 60 days' notice of the move to anyone else who has decision-making responsibility, parenting time or contact. The notice must in the form required by the rules of court and say where the spouse plans on moving to, when the spouse plans on moving, and how decision-making responsibility, parenting time and contact can be exercised after the move. See the discussion on relocation under the heading "Relocating with or without a child", in the section on Changing Family Law Orders and Agreements Involving Children in the Children and Parenting after Separation chapter.

If a person receiving this notice objects to the proposed move, they have 30 days to file an objection to the move. The objection must in the form required by the rules of court and say why the person objects and they must respond to the spouse's proposal on how decision-making responsibility, parenting time and contact can be exercised after the move. If no one objects after receiving the notice, then the spouse will usually be able to move.

When a spouse objects, how the spouses share the child's time becomes really important.

- When the spouses have *substantially equal* parenting time with the child, it is the job of the spouse who wants to move to show that the move *is* in the best interests of the child.
- When the child is with the spouse who wants to move for the *vast majority* of their time, it is the job of the objecting spouse to show that the move *is not* in the best interests of the child.
- In those in-between cases where the child's time isn't shared *substantially equally* and the child isn't in the care of a spouse for the *vast majority* of their time, *both* spouses have the job of showing whether the proposed move is or is not in the child's best interests.

Section 16.92 of the *Divorce Act* has a list of factors that the court should think about when deciding whether to allow a move or not. These include:

- the reasons for the move,
- the impact of the move on the child,
- whether there is an order, an arbitrator's award or an agreement that a spouse will not move, and
- the reasonableness of the moving spouse's proposal on how decision-making responsibility, parenting time and contact can be exercised after the move.

The law about child support

Who is a "child of the marriage"?

The *Divorce Act* talks about "children of the marriage." Only children of the marriage are entitled to benefit from the payment of child support.

A *child of the marriage* is a child of two spouses who is under the age of 19, the age of majority in British Columbia, or 19 and older but unable to withdraw from the spouses' care. Normally, adult children who are "unable to withdraw" are children who are ill or disabled, or are going to college or university, and are unable to support themselves as a result.

Who is a spouse?

In the context of child support, *spouse* includes a spouse who is a parent of a child and a spouse who "stands in the place of a parent" for a child. In other words, "spouse" includes people who are *stepparents*.

Who is required to pay child support?

Section 15.1(1) of the *Divorce Act* says that a court may "make an order requiring a spouse to pay for the support of any or all children of the marriage." The act doesn't say that it's *parents* who have to pay; it's *spouses* who have to pay, and "spouse" includes stepparents.

Who can ask for child support?

Under section 15.1(1), only spouses can use the *Divorce Act* to ask for child support orders. If the child lives with someone other than a spouse and that person needs child support, that person will need to apply for child support under the provincial *Family Law Act*.

How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines, which you read about in the Child Support chapter of this resource. Most of the time, child support is easy to figure out: you just look up the amount payable in the tables attached to the *Guidelines* based on the income of the *payor*, the person paying child support, and the number of children support is being paid for. Calculating child support can get more complicated when:

- a child is 19 or older,
- the payor has an income of more than $150,000 per year,
- the payor is a stepparent,
- the payor is self-employed or has other sources of income that can be complicated to figure out,
- one or more children live mostly with each spouse,
- the spouses share the children's time equally or almost equally, or
- the payment of the table amount would cause "undue hardship" to either the payor or the spouse receiving child support, the *recipient*.

More information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Guidelines.

How is child support paid?

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very, very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

However child support gets paid, it's important for the payor to keep a record of how much was paid and when it was paid, perhaps from receipts provided by the recipient, from cancelled cheques, from bank statements or from e-transfer acknowledgements. This can help prevent arguments about whether a payment was late or missed altogether.

Are there tax consequences?

There are no tax consequences when child support is paid. The payor isn't allowed to deduct child support payments from the payor's taxable income, and the recipient isn't required to report child support payments as taxable income.

What are special or extraordinary expenses?

Section 7 of the Child Support Guidelines says that child support can include an extra amount to pay for children's "special or extraordinary expenses," on top of the table amount. *Special expenses* are the costs incurred on behalf of a child for things like daycare, medical insurance premiums, health expenses and the costs of going to college or university. *Extraordinary expenses* include public school costs and the cost of extracurricular activities, like sports teams, art classes or music lessons.

When a child has expenses that qualify as special or extraordinary expenses, both spouses contribute to paying the *net cost* of those expenses, once things like bursaries, subsidies and tax deductions are taken out of the cost. The spouses' contributions are calculated in proportion to their incomes. Here's an example of how that works:

> Say that Spouse A has an income of $30,000 per year and Spouse B has an income of $20,000. Together, their total income is $50,000. Spouse A's income makes up 60% of their total income while Spouse B's income makes up the remaining 40%. Spouse A would then pay for 60% of the net cost of the child's qualifying special or extraordinary expenses — whether Spouse A is the payor or recipient of child support — while Spouse B would pay the other 40% of those expenses.

Special or extraordinary expenses are usually paid on a monthly basis, often around the same time as the payor's payment of the table amount of child support is made.

How are orders for child support changed?

Under section 17(4) of the *Divorce Act*, the court can change an order for child support if there has been a change in circumstances that would result in a different amount of support being paid. Typical changes are increases or decreases in the payor's income, or changes in how the children's time is divided between the spouses. Section 17(6.1) requires that the amount of child support payable under a *variation order* — an order changing another order — also be determined under the Child Support Guidelines.

People can sometimes agree that the court will make a certain order. Orders that are made with the agreement of the parties are called *consent orders.* Under section 17(6.4), a consent order varying child support must calculate child support under the Child Support Guidelines. However, the court may be prepared to consider other terms of an order or agreement that provide an important benefit to the children in deciding whether the amount of support being paid is reasonable. This can sometimes be hard to prove.

When both spouses live in British Columbia

To change a British Columbia *Divorce Act* child support order when both spouses live here, the *applicant* — the person making the application — must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules [3] have special rules about applications to change final orders.

When a spouse lives outside of British Columbia

To change a British Columbia *Divorce Act* child support order when the *respondent* — the person against whom the application is made — lives in another province, the applicant sends an application to the British Columbia Interjurisdictional Support Services Program [4]. The program will send the application to the court or child support recalculation program in the respondent's province. The court or recalculation program will take care of letting the respondent know about the application, and the application will be handled in the respondent's province.

The court may decide to:

- ask the applicant for more information,
- delay the hearing if more information is needed,
- dismiss the application, or
- make a variation order.

More information about how child support orders are changed when one of the spouses lives outside British Columbia is available in the Child Support chapter.

The law about spousal support

Who can ask for spousal support?

Only spouses can ask for spousal support. Under section 2(1) of the *Divorce Act*, "spouse" includes *former spouses*, people who have been divorced from each other. There is no time limit on when a spouse or former spouse can ask for spousal support.

A spouse's entitlement to spousal support is determined based on factors set out at section 15.2(4):

> In making an order [for spousal support], the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from the payment of child support. Anyone who is a spouse can *ask* for spousal support, but being able to ask doesn't mean you'll get it. You must also show that you are *entitled* to get spousal support.

How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount to be paid and the length of time support should be paid for is determined based on objectives set out at section 15.2(6):

> An order [for spousal support] should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) 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;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The amount of spousal support to be paid and the duration that it should be paid for is often determined using the The Spousal Support Advisory Guidelines. The Advisory Guidelines are not a law like the Child Support Guidelines and are not mandatory. In fact, the *Divorce Act* doesn't even mention the Advisory Guidelines. However, the courts of British Columbia and the rest of Canada routinely rely on the Advisory Guidelines when making decisions about spousal support. The Advisory Guidelines cannot be ignored if you are asking for, or being asked to pay, spousal support.

The Spousal Support Advisory Guidelines have two basic formulas that are used to calculate the amount of spousal support and the length of time it should be paid for: one when the spouses have children and one for when they do not. The formulas take into account a bunch of information, including:

- the income of the payor, the person paying spousal support, and the income of the recipient, the person receiving spousal support,
- the length of the spouses' relationship,
- the age of each spouse,
- how much child support is being paid,
- how much is being spent on the children's special or extraordinary expenses, and
- the age of each child and what grade they are at in school.

More information about spousal support is available in the Spousal Support chapter and the section on the Advisory Guidelines.

Is a spouse's conduct taken into account?

Under section 15.2(5) of the *Divorce Act*, the court is not allowed to consider a spouse's behaviour during the marriage when making an order about spousal support.

How is spousal support paid?

Most of the time, spousal support is paid every month, usually on the first day of the month. If child support is also being paid, child support and spousal support payments can be staggered if that's fair to both parties. It is also possible for spousal support to be paid in a single lump sum. Payors, the people paying spousal support, can be required to pay by giving the recipient, the person receiving spousal support, a series of post-dated cheques.

Where the payor cannot pay both spousal support and child support, under section 15.3 of the *Divorce Act* the court must give priority to the payment of child support.

Are there tax consequences?

There are tax consequences when spousal support is paid on a regular, repeating basis.

The recipient of spousal support must declare the support received in their income tax return and pay tax on it, just as if the support payments were employment income. The payor, on the other hand, can deduct the spousal support paid from their taxable income in the same way that RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax on the spousal support they received at the end of the year while the payor might get a tax refund.

There are no tax consequences when spousal support is paid as a single lump sum. When a lump sum is paid, the payor cannot deduct the spousal support payment from their taxable income, and the recipient does not have to add it to their own. However, the tax status of lump sum payments compared to regular, repeating payments is usually taken into account when calculating the amount of lump sum payments.

Remember that taxes need to be taken into account when figuring out spousal support. If you are a recipient of spousal support, don't forget to put some money aside to pay the taxes you may owe on the spousal support you receive!

How are orders for spousal support changed?

Under section 17(4.1) of the *Divorce Act*, the court can change an order for spousal support if:

> a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order

When the court varies an order for spousal support, it must take the change of circumstances into account under section 17(4.1) and, under section 17(7), consider the same objectives for the amount and duration of spousal support orders that it considered in making the original order.

When both spouses live in British Columbia

To change a British Columbia *Divorce Act* spousal support order when both spouses live here, the applicant must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules [3] have special provisions for applications to change final orders.

When a spouse lives outside of British Columbia

To change a British Columbia *Divorce Act* spousal support order when the *respondent* — the person against whom the application is made — lives in another province, the applicant sends an application to the British Columbia Interjurisdictional Support Services Program [4]. The program will send the application to the court in the respondent's province. The court will take care of letting the respondent know about the application, and the application will be handled in the respondent's province.

The court may decide to:

- ask the applicant for more information,
- delay the hearing if more information is needed,
- dismiss the application, or
- make a variation order.

More information about how spousal support orders are changed when one of the spouses lives outside British Columbia is available in the Spousal Support chapter.

Resources and links

Legislation

- *Divorce Act* [6]
- *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* [1], the legislation that changed the *Divorce Act* on 1 March 2021
- Supreme Court Family Rules [5]
- *Family Law Act* [6]
- Federal Child Support Guidelines [6]
- *Court Order Enforcement Act* [7]

Links

- "Divorce and Separation" [8] from the Department of Justice
- *What happens next? Information for kids about separation and divorce* [9] from the Department of Justice
- Fact Sheet "Divorce" [10] from the Department of Justice
- *Because Life Goes On… Helping children and youth live with separation and divorce* [11] report from Public Health Agency of Canada
- "Getting a Divorce" [12] from Legal Aid BC
- "Separation & Divorce" [13] from Legal Aid BC
- "Parent Guide to Separation and Divorce" [14] from the Justice Education Society
- "Changes to the Divorce Act" [15] from Dial-a-Law by the People's Law School
- "Divorce Act Changes Explained" [16] from the Department of Justice

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 17 February 2023.

References

[1] http://canlii.ca/t/53rg6
[2] https://www.fct-cf.gc.ca/en/home
[3] http://canlii.ca/t/8mcr
[4] https://www.isoforms.bc.ca
[5] https://canlii.ca/t/55289
[6] https://canlii.ca/t/531vd
[7] https://canlii.ca/t/54b9k
[8] https://www.justice.gc.ca/eng/fl-df/divorce/index.html
[9] https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/book-livre/title-titre.html
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[13] https://www.clicklaw.bc.ca/resource/4639
[14] https://www.clicklaw.bc.ca/resource/4139
[15] https://www.clicklaw.bc.ca/resource/4869
[16] https://www.clicklaw.bc.ca/resource/4865

Family Law Act Basics

The provincial *Family Law Act* is the primary legislation on family law issues in British Columbia. It applies to married spouses, unmarried spouses, parents, guardians and people in other relationships. It also applies to people who have an interest in caring for someone else's children, like a family member or friend. The *Family Law Act* talks about parenting children after separation and about how guardians are appointed. It also deals with financial issues like child support, spousal support, and the division of property and debt, as well as with family violence, court processes, and ways of resolving family law problems without going to court.

This section provides a top to bottom overview of the *Family Law Act* in an easy-to-read question and answer format. It is written primarily for justice system workers and legal advocates, but anyone can use it. All of the information provided in this section is discussed in more detail elsewhere in *JP Boyd on Family Law*. Use the search tool at the top of the page to find more information about specific topics.

Introduction

The *Family Law Act* became law in 2013. It replaced the *Family Relations Act* which had been the law in British Columbia, in one form or another, since 1972. The *Family Law Act* made a lot of important changes to family law in the province. We stopped talking about parenting children in terms like *custody* and *access*, which were about the rights of parents and tended to encourage conflict between separated parents, and started talking about a bigger idea of what *guardianship* means and new ideas about *parental responsibilities* and *parenting time*, which focus on the rights of children and encourage separated parents to cooperate.

Other important changes introduced in the *Family Law Act* include:

- a new emphasis on resolving family law problems other than by litigation in court,
- provisions for appointing parenting coordinators,
- new measures for people having children with assisted reproduction and allowing those people to decide, on their own, without a court order, who the parents of their child will be,
- a different way of dividing property and new provisions for dividing debt,
- new ways of addressing family violence, including in assessing children's best interests,
- provisions for managing children's property; and,
- a whole bunch of new rules about how the court can manage its process and the people before it.

British Columbia's *Family Law Act* is not only the most modern, most progressive family law legislation in Canada, it also provided the inspiration for a lot of the changes to the federal *Divorce Act* that became law on 1 March 2021.

Who does the *Family Law Act* apply to?

The *Family Law Act* is the main law on family breakdown in British Columbia. Although there is also the federal *Divorce Act*, the *Divorce Act* only applies to married spouses. The *Family Law Act* applies to everyone in a family relationship in British Columbia, including people who:

- are married spouses,
- are unmarried spouses,
- are parents of a child together,
- want to be the guardian of a child,
- want contact with someone else's child,
- are at risk of family violence,
- are having a child with assisted reproduction; and,
- want to manage a child's property.

The only kind of relationship that the *Family Law Act* doesn't really talk about is dating relationships, where the people involved probably think of themselves as boyfriends and girlfriends, and don't have a child together.

What issues does the *Family Law Act* cover?

The *Family Law Act* talks about:

- family violence, and protecting adults and children from violence,
- determining who is a child's parent,
- having children through assisted reproduction,
- determining who is the guardian of a child, and how guardians are appointed and removed,
- how guardians share responsibility for parenting children,
- the time someone has with a child who isn't the child's guardian,
- what happens when a guardian wants to move, including with a child,
- enforcing time with a child provided under an order or an agreement,
- paying child support and how child support is calculated,
- paying spousal support,
- dividing property and dividing responsibility for debt, including dividing property located outside the province; and,
- managing children's property.

The act, in other words, covers every issue in family law except names, adoption, child protection, and wills and estates problems!

How are family law problems resolved under the *Family Law Act*?

The *Family Law Act* tries to change how people solve family law problems. The act:

- encourages people to find solutions to family law problems outside of court,
- makes financial disclosure mandatory, even when people are dealing with a family law problem outside of court,
- makes family law agreements more difficult to change, as long as they were fairly negotiated; and,
- promotes the use of parenting coordinators, when there is a final agreement or order about the care of children.

Family law problems can be resolved out of court through negotiation, mediation, collaborative negotiation and arbitration. When people have to go to court, however, the *Family Law Act* gives the court important tools to:

- protect people who are at risk of family violence,
- protect property,
- enforce court orders and agreements; and,
- manage court processes and manage the behaviour of people in court.

More information about settling legal problems out of court is available in the chapter Resolving Family Law Problems out of Court. More information about resolving problems in court, through litigation, is found in the chapter Resolving Family Law Problems in Court.

When can a court proceeding under the *Family Law Act* start?

There are no requirements under the *Family Law Act* that you must have lived in the province where you start a court proceeding for a certain amount of time like there are under the *Divorce Act*. However, some claims are tied to the date of separation. Claims for:

- an order about parental responsibilities or parenting time, when made by a parent,
- an order for the division of property and debt; and,
- an order for the payment of child support, when the proposed payor is a stepparent,

cannot be made until the parties are separated. Other claims are *not* tied to the date of separation and can, at least theoretically, be brought at any time, including claims for:

- a declaration about who the parents of a child are,
- the appointment &mdash, or removal &mdash, of a person as a guardian of a child,
- an order for contact with a child,
- an order for the payment of child support, when the proposed payor is a parent or guardian,
- an order about the management of children's property; and,
- an order for the payment of spousal support.

Which court can hear a proceeding under the *Family Law Act*?

Both the Provincial Court and the Supreme Court can hear claims under the *Family Law Act*. However, while the Supreme Court can deal with every claim under the act, the Provincial Court can only deal with claims for:

- declarations about who the parents of a child are, when a declaration is necessary to resolve another claim under the act,
- the appointment or removal of someone as the guardian of a child,
- parental responsibilities,
- parenting time and contact with a child,
- child support,
- spousal support,
- orders about ownership of companion animals (pets), and
- orders for the protection of people.

What about claims under the *Divorce Act*?

Both the *Divorce Act* and the *Family Law Act* talk about parenting children, child support, and spousal support. As long as a person is married, they can start a court proceeding about these issues under either law or under both laws at the same time. However, it's important to know that the *Divorce Act* only applies to married spouses, and that only the *Family Law Act* talks about orders dividing property and debt, personal protection orders and financial protection orders, declarations about the parentage of a child, or orders about the use of the family home. If orders like these are required, the court proceeding must include claims under the *Family Law Act*.

See the section *Divorce Act* Basics for more information about the *Divorce Act*.

Child support

The rules about child support are almost the same between the *Divorce Act* and the *Family Law Act*, except that it can be a bit easier to ask a stepparent to pay child support under the *Family Law Act*. The Child Support chapter talks about child support and when stepparents can be required to pay child support.

Spousal support

The rules about spousal support are very similar between the two laws, except that under the *Family Law Act* spousal support is also available to adults who aren't married to each other as long as they meet that act's definition of "spouse."

There's no limit to when claims for spousal support can be brought under the *Divorce Act*. Under the *Family Law Act*, however, spouses who are entitled to ask for spousal support must begin a court proceeding for spousal support within two years of the divorce order if the couple were married, or within two years of separation if the couple wasn't married, or they will be out of time and can't make the claim at all.

Parenting children

The *Divorce Act* talks about spouses who have decision-making responsibility and parenting time, and people who aren't spouses who have contact. The *Family Law Act* talks about guardians who have parental responsibilities and parenting time, and people who aren't guardians who have contact. Both laws also talk about what happens when a parent wants to move away with a child and how family violence impacts on the court's decisions about parenting. The two laws are very similar to each other, although there are some small differences.

The law about children

How are decisions about children made?

The *Family Law Act* says that parents, judges, and other decision-makers, including arbitrators, must make decisions about children considering only the children's best interests and nothing else.

Determining the best interests of children

To decide what is in a child's best interest, parents and judges must consider all of the needs and circumstances of the child, as well as a number of factors that are listed in section 37 of the act. These factors include:

- the child's health and emotional well-being,
- the views of the child, unless it wouldn't be appropriate to consider them,
- the history of the child's care and the child's need for stability,
- the child's relationships with other important people,
- any court proceedings that are relevant to the child's safety and well-being; and,
- the impact of any family violence.

The best interests of children and family violence

When family violence is an issue, parents and judges must consider the best-interests factors at section 37 of the *Family Law Act*, as well as a list of additional consideraions set out at section 38, to help assess the impact of the family violence on the child and on a person's capacity to care for the child. These considerations include:

- the severity of the family violence,
- the frequency of the family violence,
- whether the violence was directed toward the child; and,
- the "harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence."

The *Family Law Act* also says that an agreement or order is presumed *not* to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

The best interests of children and hearing children's views

Under section 211 of the *Family Law Act*, the court can order that a family justice counsellor, a social worker, or another person like a clinical counsellor or a psychologist, assess one or more of:

- the needs of a child,
- the views of a child; and,
- the ability of a person to meet the child's needs.

These assessments are *evaluative* because they are conducted by an expert who makes recommendations to the court.

Views of the child reports can also be ordered under sections 37(2)(b) and 202 of the act. These reports usually just describe the child's views without analyzing the child's statements or making any recommendations, and are often much cheaper and faster to get than a full parenting assessment under section 211. These reports are *non-evaluative* because they do not make recommendations to the court.

Who is a parent?

Under the *Family Law Act*, a child's parents are presumed to be the child's birth mother and biological father. If the court is not sure who the child's father is, the court can order medical tests — usually DNA tests — to determine who the father is under section 33.

When people have a child through assisted reproduction, a person who donates eggs or sperm is not presumed to be a legal parent. However, a woman who is a surrogate mother *is* presumed to be a parent, and her spouse may also be a legal parent. The *Family Law Act* lets people make agreements when they have a child through assisted reproduction. These agreements can say who is a parent and who isn't. The people who can be a parent under an assisted reproduction agreement are:

- up to two people who want to have the child,
- a donor of sperm,
- a donor of eggs,
- a surrogate mother; and,
- the spouse of the surrogate mother.

As a result, a child can have more than two parents under the *Family Law Act*. The courts have yet to figure out how child support will work in situations like this.

Who is a guardian?

Under the *Family Law Act*, the people who are responsible for caring for a child are *guardians*. A child can have one guardian, two guardians, or more than two guardians. Most of the time, a child's parents will be the child's guardians, as long as the parents have lived with the child. A parent who never lived with a child isn't a guardian unless:

- the court makes an order that the parent is a guardian,
- the parent and the child's other guardians make an agreement that the parent is a guardian,
- the parent *regularly cares* for the child; or,
- the parent is a parent because of an assisted reproduction agreement.

The court can make an order appointing someone who isn't a parent as the guardian of a child under section 51. The same section also lets the court make an order removing a person, including a parent, as the guardian of a child. Both the Provincial Court and the Supreme Court can make orders about guardianship.

It's important to know that a guardian's new spouse or partner doesn't become a guardian to a child just because of their relationship with the guardian. The only way for a new spouse or partner to become a guardian is for them to be appointed as a guardian by the court.

What are parental responsibilities?

The different ways that guardians care for a child and the decisions guardians have to make are called *parental responsibilities.* Parental responsibilities are listed at section 41 of the *Family Law Act* and include:

- making decisions about the day-to-day care of the child,
- deciding where the child will live,
- making decisions about the child's schooling and extracurricular activities,
- making decisions about the child's healthcare; and,
- deciding how the child will be raised, including making decisions about things like religion, language, and culture.

When a child has more than one guardian, the guardians must usually make these decisions together. However, the guardians can agree or the court can order that only one guardian should have a particular parental responsibility. One guardian, for example, might have the exclusive responsibility for making decisions about education while another guardian might have the exclusive responsibility for making decisions about healthcare.

If the child's guardians can't agree on a particular decision, they can go to see a family justice counsellor, a mental health professional, or a mediator to help them make the decision, or they can go to court or see an arbitrator. Both the Provincial Court and the Supreme Court can make orders about parental responsibilities.

Remember that only guardians have parental responsibilities and the right to make decisions for a child.

What happens if a guardian can't exercise parental responsibilities?

If a guardian is temporarily unable to exercise their parental responsibilities, perhaps because they're sick or leaving the country for an extended period of time, the guardian can authorize someone else to manage certain responsibilities. This person doesn't become a guardian but can be given the power to:

- make decisions about the day-to-day care of the child,
- make decisions about the child's schooling and extracurricular activities,
- make decisions about the child's healthcare; and,
- give or withhold permission on behalf of a child, like about going on a school field trip or having a medical treatment.

This is useful whenever a guardian needs someone else to care for a child, or if a child from outside British Columbia will be going to school here and an adult living in British Columbia needs to care for the child and manage the child's affairs.

What happens if a guardian has a terminal illness or dies?

Under the *Family Law Act*, a guardian can appoint someone to take over and act as the child's guardian if:

- the guardian has a terminal illness,
- the guardian is going to be permanently unable to care for the child because of a mental illness; or,
- the guardian dies.

The new person takes over as guardian when the first guardian dies or becomes unable to exercise their parental responsibilities.

It's important to know that a parent who is not a guardian does not automatically become the child's guardian when a guardian dies. If that parent wants to become the child's guardian, they have to apply to court to be appointed as a guardian of their child.

What's the difference between parenting time and contact?

The time a guardian has with a child is called *parenting time*. During a guardian's parenting time, the guardian is responsible for the care of the child and has the right to make day-to-day decisions for the child.

The time that someone who isn't a guardian has with a child is called *contact*. Parents who aren't guardians, grandparents, other relatives of a child, and people who aren't a child's relative can have contact with the child. Someone with contact *does not* have the right to make day-to-day decisions for the child.

How do agreements and orders about parenting time and contact work?

Agreements about parenting time and contact can be made by the child's guardians. Both the Provincial Court and the Supreme Court can make orders about parenting time and contact.

Agreements and orders about parenting time and contact can set a fixed schedule of each guardian's time with a child or they can say that the parenting time or contact will happen when everyone agrees, as the child prefers, or on some other term. Parenting time and contact can also be on "conditions"; for example, that the person will not smoke or drink during their time with the child, or that their time with the child will be supervised by a third party.

Remember that only guardians have parenting time. Everyone else has contact with a child.

How are parenting time and contact enforced?

The *Family Law Act* gives the court the power to enforce parenting time and contact when:

- parenting time or contact has been "wrongfully" withheld from a person entitled to parenting time or contact; or,
- a person with parenting time or contact fails to use their parenting time or contact.

In certain situations, it isn't wrongful to withhold a child from a person entitled to parenting time or contact. Under section 62, it isn't wrongful to withhold a child if:

- the guardian with the child believes there is a risk of family violence,
- the guardian with the child believes that the other person is impaired by alcohol or drugs,
- the child is sick, and the guardian with the child has a doctor's note,
- the other person has frequently failed to use their parenting time or contact in the past; or,
- the other person told the guardian ahead of time that they weren't going to use their parenting time or contact.

The court can make a number of orders to enforce parenting time and contact, including requiring:

- make-up time with the child, when parenting time or contact was wrongfully withheld,
- a person or a child to attend counselling,
- the parties to try to resolve their dispute outside of court,
- payment of a party's expenses; or,
- payment of a penalty of up to $5,000 to a person or as a fine.

Applications about the wrongful withholding of parenting time or contact must be brought within a year of when the parenting time or contact was withheld. Remember that disagreements about the exercise or withholding of time with a child can also be addressed through a mediator or an arbitrator, and that arbitrators can exercise the power of a judge when making decisions.

What happens if a guardian wants to move?

If a guardian wants to move, with or without a child, and the move will have an impact on the child's relationship with another guardian or someone who has contact with the child, the guardian must usually give 60 days' notice of the move, in writing. The notice must say where the guardian plans on moving to and when the guardian plans on moving. See the discussion on relocation under the heading "Relocating with or without a child", in the section on Changing Family Law Orders and Agreements Involving Children in the Children and Parenting after Separation chapter.

Only other guardians can object when a guardian plans on moving. If a guardian does object, they have 30 days to go to court to get an order preventing the move. (Remember that only a guardian can object to a proposed move!) Someone who has contact can't prevent a guardian from moving.

When a guardian objects, how the guardians share the child's time becomes really important. When the guardians *do not* have substantially equal parenting time, the guardian with the greater parenting time who wants to move must show the court that

- they want to move in good faith; and,
- they have proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child, and with others who have an important role in the child's life,

and the objecting guardian must then show that the move is not in the best interests of the child or the move will be allowed.

When the guardians *do* have substantially equal parenting time, the guardian who wants to move must show the court that:

- they want to move in good faith,
- they have proposed reasonable plans to preserve the child's relationship with the child's other guardians, with people who have contact with the child, and with others who have an important role in the child's life; and,
- the move is in the child's best interests.

Good faith means that the guardian who wants to move isn't planning on moving just to take the child away from another guardian, but because they are moving, at least in part, because they believe the move will improve the child's or guardian's quality of life.

The law about child support

Who is entitled to get child support?

Child support is usually paid to support children who are under the age of 19, or who are 19 or older but are unable to support themselves for some reason, usually because they are ill or disabled, or are going to college or university. Under section 147(1) of the *Family Law Act*, children who are younger than age 19 can stop being entitled to child support if:

- they become a spouse; or,
- they withdraw from the care of their parents or guardians, providing they didn't withdraw because of family violence or because of poor living conditions.

Child support is usually paid to the person whom the child mostly lives with. Child support can sometimes be paid directly to the child, usually if the child is 19 or older and living away from home and going to college or university.

Who is required to pay child support?

All of a child's parents and guardians are required to support the child. The person with whom the child lives most often is presumed to meet their support obligation through their care of the child living in their home. Everyone else pays child support, usually on a monthly basis, and more than one person can be required to pay child support at the same time for the same child.

In certain circumstances, stepparents can also be required to pay child support. A *stepparent* is the married or unmarried spouse of a parent, as long as:

- the spouse has contributed to the child's expenses and other needs for at least one year; and,
- the claim for child support is made within one year of the stepparent's last contribution to the child's expenses and other needs.

Under the *Divorce Act*, a stepparent is someone who is married to a parent and "stands in the place of a parent" to the child. This is a much different legal test. The test under the *Family Law Act* looks at the fact of a stepparent's contributions and the date of their last contribution. The *Divorce Act* looks at the nature of the relationship between the stepparent and the child.

How is the amount of child support calculated?

Child support is determined by the Child Support Guidelines, which you read about in the Child Support chapter of this resource. Most of the time, child support is easy to figure out: you just look up the amount payable in the tables attached to the Guidelines based on the income of the *payor*, the person paying child support, and the number of children support is being paid for. Calculating child support can get more complicated when:

- a child is 19 or older,
- the payor has an income of more than $150,000 per year,
- the payor is a stepparent,
- the payor is self-employed or has other sources of income that can be complicated to figure out,
- one or more children live mostly with each spouse,
- the spouses share the children's time equally or almost equally; or,
- the payment of the table amount would cause "undue hardship" to either the payor or the spouse receiving child support, the *recipient*.

More information about how child support is calculated is available in the Child Support chapter, particularly in the sections on the Guidelines and the Exceptions to the Child Support Guidelines.

How is child support paid?

Most of the time, child support is paid every month, usually on the first day of the month. It is possible for child support to be paid in a single lump sum, but this is very, very rare. Payors can be required to pay by giving the recipient a series of post-dated cheques.

However child support gets paid, it's important for the payor to keep a record of how much was paid and when it was paid, perhaps from receipts provided by the recipient, from cancelled cheques, from bank statements or from e-transfer acknowledgements. This can help prevent arguments about whether a payment was late or missed altogether.

Both the Provincial Court and the Supreme Court can make orders about the payment of child support.

Are there tax consequences?

There are no tax consequences when child support is paid. The payor isn't allowed to deduct child support payments from the payor's taxable income, and the recipient isn't required to report child support payments as taxable income.

How are orders for child support changed?

Under section 152 of the *Family Law Act*, the court can change an order for child support if:

- there has been a change in circumstances that would result in a different amount of support being paid,
- new evidence, usually about the payor's income, has been discovered since the last hearing about child support; or,
- proof of a lack of financial disclosure has been discovered since the last child support order.

When both parties live in British Columbia

To change a *Family Law Act* child support order when both parties live here, the *applicant* — the person making the application — must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules [3] have special rules about applications to change final orders.

When a party lives outside of British Columbia

To change a *Family Law Act* child support order when the *respondent* — the person against whom the application is made — lives in another province, the applicant must make an application under the provincial *Interjurisdictional Support Orders Act* [25].

The applicant must complete an application form provided by the British Columbia Interjurisdictional Support Services Program [4]. The program will send the application to the court or child support recalculation program in the respondent's province. The court or recalculation program will take care of letting the respondent know about the application, and the application will be handled in the respondent's province.

If the application is heard by a court, the court may decide to:

- ask the applicant for more information,
- delay the hearing if more information is needed,
- dismiss the application; or,
- make a variation order.

More information about how child support orders are changed when one of the spouses lives outside British Columbia is available in the Child Support chapter.

What about when the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as a beneficiary of the policy. This way, the child will still be supported if the payor dies.

The parties can agree and the court can order that the payor’s obligation to pay child support will continue after the payor’s death and be paid from the payor's estate. Court orders about this can be made at the time the child support order is made or after the payor’s death.

The law about spousal support

Who is entitled to ask for spousal support?

Only spouses can ask for spousal support. Under the *Family Law Act*, for the purposes of spousal support, "spouse" includes people who:

- are married to each other, or used to be married to each other,
- have lived together in a marriage-like relationship for at least two years; and,
- have lived together in a marriage-like relationship for less than two years and have had a child together.

A spouse's entitlement to spousal support is determined based on objectives taken from section 15.2(6) of the *Divorce Act*, set out at section 161 of the *Family Law Act*:

> In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
>
> (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
>
> (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
>
> (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
>
> (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

(This is actually backwards from how the *Divorce Act* does things. In section 15.2 of the *Divorce Act*, the "factors" at section 15.2(4) help the court determine entitlement to support while the "objectives" at section 15.2(6) help the court determine amount when entitlement is proven. Under the *Family Law Act*, the objectives of the *Divorce Act* help determine entitlement while the factors of the *Divorce Act* determine amount. Go figure.)

Remember that no one is automatically entitled to get spousal support the way a child is automatically entitled to benefit from child support. Anyone who is a spouse can *ask* for spousal support, but being able to ask doesn't mean you'll get it. Someone asking for spousal support also must show that they are *entitled* to spousal support.

When do claims for spousal support have to be made?

Under the *Family Law Act*:

- married spouses have to start a court proceeding asking for spousal support within two years from the date *they were divorced* or their *marriage was annulled*, and
- unmarried spouses have to start a proceeding for spousal support within two years from the date *they separated*.

Remember that these limits are for the *Family Law Act* — there are no limits about when married spouses can ask for spousal support under the *Divorce Act*.

It's important to know that under section 198(5), the two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer, or an arbitrator.

How are the amount and duration of spousal support calculated?

When a spouse is entitled to receive spousal support, the amount to be paid and the length of time support should be paid for, called *duration*, is determined based on factors taken from section 15.2(4) of the *Divorce Act*, set out at section 162 of the *Family Law Act*:

> 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.

The amount of spousal support to be paid and the duration that it should be paid for is often determined using the The Spousal Support Advisory Guidelines. The Advisory Guidelines are not a law like the Child Support Guidelines and are not mandatory. In fact, the *Divorce Act* doesn't even mention the Advisory Guidelines. However, the courts of British Columbia and the rest of Canada routinely rely on the Advisory Guidelines when making decisions about spousal support. The Advisory Guidelines cannot be ignored if you are asking for, or are being asked to pay, spousal support.

The Spousal Support Advisory Guidelines have two basic formulas that are used to calculate the amount of spousal support and the length of time it should be paid for: one when the spouses have children and one for when they do not. The formulas take into account a bunch of information, including:

- the income of the payor, the person paying spousal support, and the income of the recipient, the person receiving spousal support,
- the length of the spouses' relationship,
- the age of each spouse,
- how much child support is being paid,
- how much is being spent on the children's special or extraordinary expenses; and,
- the age of each child and what grade they are at in school.

More information about spousal support is available in the Spousal Support chapter and the section on the The Spousal Support Advisory Guidelines.

Is a spouse's conduct taken into account?

Under the *Divorce Act*, the court is not allowed to consider a spouse's behaviour during the marriage when making an order about spousal support. The same thing is generally true under the *Family Law Act*, except that under this act the court can take into account misconduct that:

- unreasonably prolongs a spouse's need for support; or,
- unreasonably undermines a spouse's ability to pay support.

In other words, the court can look at whether a spouse is being unreasonable in not becoming financially self-sufficient and whether a spouse has reduced work hours, quit a job, or refused to take a job in order to avoid paying support.

How is spousal support paid?

Most of the time, spousal support is paid every month, usually on the first day of the month. If child support is also being paid, child support and spousal support payments can be staggered if that's fair to both parties. It is also possible for spousal support to be paid in a single lump sum. Payors, the people paying spousal support, can be required to pay by giving the recipient, the person receiving spousal support, a series of post-dated cheques.

If a payor cannot pay both spousal support and child support, section 173 of the *Family Law Act* requires the court to give priority to child support.

Are there tax consequences?

There are tax consequences when spousal support is paid on a regular, repeating basis.

The recipient of spousal support must declare the support received in their income tax return and pay tax on it, just as if the support payments were employment income. The payor, on the other hand, can deduct the spousal support paid from their taxable income in the same way that RRSP contributions can be deducted from taxable income. This usually means that the recipient has to pay tax on the spousal support they received at the end of the year while the payor might get a tax refund.

There are no tax consequences when spousal support is paid as a single lump sum. When a lump sum is paid, the payor cannot deduct the spousal support payment from their taxable income, and the recipient does not have to add it to their own. However, the tax status of lump sum payments compared to regular, repeating payments is usually taken into account when calculating the amount of lump sum payments.

Remember that taxes need to be taken into account when figuring out spousal support. If you are a recipient of spousal support, don't forget to put some money aside to pay the taxes you may owe on the spousal support you receive!

Reviews of spousal support

It can sometimes be very difficult to figure out when spousal support should end, despite the help provided by The Spousal Support Advisory Guidelines. The person getting support usually wants support to continue for as long as possible. The person paying support wants support to end as soon as possible. It is hard to settle on an end date if, for example, it’s not known when a spouse will finish job training, become self-sufficient, or recover from an illness.

People often try to avoid this problem by agreeing that spousal support will be paid for now, but that support will be reconsidered in a *review*, after a certain amount of time has passed or when a certain event has happened. The *Family Law Act* says that agreements and orders for spousal support can be *reviewable*. Agreements and orders for reviewable spousal support can specify:

- what will trigger the review,
- the dispute resolution process that will be used at the review; and,
- the factors that will be considered at the review.

The *Family Law Act* says that a review can also be triggered when someone begins to receive a pension, even if the agreement or order for spousal support doesn’t call for the review.

How are orders for spousal support changed?

Under section 167 of the *Family Law Act*, the court can change an order for spousal support if:

- there has been a change in circumstances that would result in a different amount of support being paid,
- new evidence has been discovered since the last hearing about spousal support; or,
- proof of a lack of financial disclosure has been discovered since the last spousal support order.

When both spouses live in British Columbia

To change a *Family Law Act* spousal support order when both spouses live here, the applicant must file a Notice of Application in the original court proceeding. The Supreme Court Family Rules [3] have special provisions for applications to change final orders.

When a spouse lives outside of British Columbia

To change a *Family Law Act* spousal support order when the *respondent* — the person against whom the application is made — lives in another province, the applicant must make an application under the provincial *Interjurisdictional Support Orders Act* [25].

The applicant must complete an application form provided by the British Columbia Interjurisdictional Support Services Program [4]. The program will send the application to the court or child support recalculation program in the respondent's province. The court or recalculation program will take care of letting the respondent know about the application, and the application will be handled in the respondent's province.

If the application is heard by a court, the court may decide to:

- ask the applicant for more information,
- delay the hearing if more information is needed,
- dismiss the application; or,
- make a variation order.

More information about how spousal support orders are changed when one of the spouses lives outside British Columbia is available in the Spousal Support chapter.

What about when the payor dies?

If the payor has a life insurance policy, the parties can agree and the court can order that the payor keep the policy up to date and name a person, usually the recipient, as a beneficiary of the policy. This way, the spouse will still be supported if the payor dies.

The parties can agree and the court can order that the payor's obligation to pay spousal support will continue after the payor's death and be paid from their estate. Court orders about this can be made at the time the spousal support order is made or after the payor's death.

The law about dividing property and debt

Who is entitled to ask to divide property and debt?

Only *spouses* can ask to divide property and debt. Under the *Family Law Act*, for the purposes of dividing property and debt, "spouse" includes people who:

- are married to each other or who used to be married to each other; and,
- have lived together in a "marriage-like relationship" for at least two years.

Note that the people who qualify as "spouses" for the division of property and debt are different than the people who are "spouses" for child support and spousal support.

When do claims for the division of property and debt have to be made?

Under the *Family Law Act*:

- married spouses have to start a court proceeding asking to divide property and debt within two years from the date *they were divorced* or their *marriage was annulled*, and
- unmarried spouses have to start a proceeding asking to divide property and debt within two years from the date *they separated*.

It's important to know that under section 198(5), the two-year countdown from the date of divorce or separation stops while the spouses are trying to resolve their dispute outside of court with the help of a family justice counsellor, a mediator, a lawyer, or an arbitrator.

What is excluded property?

Excluded property is all of the property each spouse owned on the date they began to live together or got married, whichever was first. The *Family Law Act* called this "excluded property" for the sensible reason that this property is usually excluded from division with the other spouse.

Excluded property also includes certain property received by each spouse during their relationship, such as:

- gifts and inheritances,
- court awards for injury or loss, except for awards relating to both spouses or for lost income,
- insurance payments, except for payments relating to both spouses or for lost income,
- certain kinds of trust interests; and,
- property bought with excluded property.

If you buy new property using excluded property to pay for all or some of the new property, it's important to keep track of how much of your excluded property you spent on the new property! If you can't trace your excluded property into the new property, you may wind up having to share all of the new property with your spouse.

What is family property?

Family property is the property either or both spouses got after the date they began to live together or got married, whichever was first. "Family property" includes:

- real estate,
- bank accounts,
- interests in companies, businesses and partnerships,
- debts owed to a spouse,
- pensions, RRSPs and other kinds of pensionable savings; and,
- other personal property.

Most importantly, family property also includes the increase in value of excluded property during the spouses' relationship, beginning either at the date the spouses began to live together or the date of their marriage, whichever is first. Say, for example, that a house had equity of $100,000 when a relationship started, and equity of $150,000 when it ended. The spouse who owns the house would keep the $100,000 the house was worth at the beginning of the relationship as excluded property, and each of them would share the $50,000 in growth as family property.

What about pets?

The *Family Law Act* introduced special laws around pets, defined as *companion animals*, in January 2024. Prior to this, pets were not treated differently by legislation.

A judge of either the Supreme Court or the Provincial Court can decide which party will own the pet in question. Interestingly, the court does not have discretion to order shared ownership of a pet. People can make their own family law agreements to accommodate shared ownership of a pet, but if the court is to make a decision, it must be for one or the other party to be the owner. Section 97 sets out the factors which determine who should be the owner of a family pet, and it is not just about who owned the pet before the relationship. See the section on Dividing Property and Debt in Family Law Matters under the Property and Debt chapter for more.

What is family debt?

Family debt is all debt incurred by either spouse after the date the spouses began to live together or got married, whichever was first, up to the date of separation. Family debt also includes debt incurred after the date of separation if the debt was incurred to maintain family property, like repairing the family home or paying the mortgage.

How are property and debt divided?

Spouses can make agreements and the court can make orders about how property and debt should be divided. Only the Supreme Court can make orders about the division of property and debt, with the exception of pets which are called *companion animals*.

Note that agreements and orders about debt made under the *Family Law Act* are only binding between spouses. They don't affect the rights of creditors or the steps creditors can take to collect on a debt.

Family property and family debt

Under section 81(a) of the *Family Law Act*, spouses are presumed to:

- each be entitled to one-half of family property, regardless of how they contributed to or used the property; and,
- each be responsible for one-half of family debt.

When spouses separate, under section 81(b) of the act, they each become one-half owners of all family property as tenants in common and one-half responsible for all family debt. (Owning something as tenants in common means that each spouse owns an independent share of the property, and if they die, their share goes to their estate. Owning something as joint tenants, the other way more than one person can own property in British Columbia, means that each spouse owns the whole property, and if they die their ownership interest just disappears and the surviving joint tenants continue to own the whole property.)

Despite the strong presumption in the act that family property should be divided, the court can divide family property *unequally* under section 95, if an equal division would be "significantly unfair." The court can take into account a number of reasons why an equal division could be significantly unfair including:

- length of the spouses' relationship,
- a spouse's contribution to the other spouse's career,
- whether the amount of family debt is more than the value of family property,

- whether a spouse reduced the value of family property or got rid of family property to avoid sharing either the property, or the full value of the property, with the other spouse; and,
- any taxes owing from dividing the property.

Excluded property

Each spouse's excluded property is presumed to remain their separate property and not be shared with the other spouse.

Despite the strong presumption in the act that excluded property should *not* be divided, the court can divide a spouse's excluded property if:

- it can't divide family property or family debt that is located outside British Columbia; or,
- it would be "significantly unfair" not to share the excluded property because of the length of the spouses' relationship or because of the contributions made by the spouse who doesn't own the property.

Valuing property

The value of a property is what a reasonable person — someone objective and independent of the spouses — would pay to buy the property in its current state. This is called the property's *fair market value*. The process of assessing this value is called *valuation*, and because property changes value over time, the date when the property's value is to be determined, the *valuation date*, is critically important.

For a signed agreement dealing with property division between spouses, the valuation date is the date of the agreement. For a court order dividing property, the valuation date is the date of the court hearing.

How are pensions divided?

Spouses can make agreements and the court can make orders about how pensions and assets that are like pensions are divided. Only the Supreme Court can make orders about the division of pensions.

RRSP accounts

The value of RRSPs accumulating during the spouses' relationship is family property. If RRSPs are divided, the federal *Income Tax Act* [1] allows them to be equalized between spouses without any taxes being paid.

Workplace pensions

In general, the part of the pension that accumulated between the date the spouses began living together or got married and the date of separation is family property and is divided equally between the spouses. This is true whether the pension is being paid out or not.

Agreements and orders about dividing pensions are carried out by the people who administer the pension plans, not by the spouse who owns the pension. Note that the division of pensions can be very, very complicated. It is always best to speak to a lawyer about issues with pensions.

Canada Pension Plan credits

Spouses are entitled to equalize the CPP credits they each accumulated between the date they began living together or got married and the date of their separation or divorce. Agreements and orders about the equalization of CPP credits are carried out by the people who administer the Canada Pension Plan in Ottawa.

British Columbia is one of a handful of provinces that let people decide *not* to divide their CPP credits. To do this, very specific language must be used and it's best to consult a lawyer to make sure you get it exactly right.

How is foreign property divided?

Under the *Family Law Act*, the court can make orders about family property that is located outside of British Columbia, including orders about the:

- safekeeping of the property,
- right to use the property; and,
- right to own the property.

The court can decide to divide property or debt inside British Columbia to compensate for each spouse's interest in property outside of British Columbia, instead of trying to divide that property. The court can also divide excluded property between spouses if it can't divide property outside of British Columbia.

What about children's property?

Children sometimes get large amounts of money or property from inheritances, insurance policies, or court awards. Under the *Family Law Act*, a child's guardians are *not* automatically the trustees of the child's property, except for property with a value of less than $10,000.

A guardian may apply to court to be appointed as the trustee of the child's property. Someone appointed as a trustee never owns the child's property, that remains the property of the child, and the trustee can be required to provide an accounting of how they have managed the child's property. Only the Supreme Court can make orders about children's property.

Family violence and protection orders

What is family violence?

Family violence is defined in very broad terms in section 1 of the *Family Law Act*, and includes obvious things like physical abuse as well as:

- sexual abuse,
- attempts to physically or sexually abuse someone,
- psychological and emotional abuse, including by harassing, stalking, or intimidating someone, or by restricting their liberty; and,
- in the case of children, being exposed to family violence.

Family violence does not include a person's use of force to protect themselves, or someone else, from family violence.

What are the duties of professionals?

Under section 8, family justice counsellors, mediators, lawyers, arbitrators, and parenting coordinators are required to "assess" for family violence and the extent to which it affects someone's safety or ability to negotiate. These professionals have to discuss with their clients how different family dispute resolution processes may or may not be appropriate for their situation, and consider what additional assistance may be necessary, including a safety plan. If there is an imminent risk of serious physical harm, they may have to share confidential information or report a child who needs protection. The Legal Services Society [2] has published a guide to relationship violence for lawyers that covers some of these considerations.

How do you determine what is in children's best interests?

To decide what is in a child's best interests, parents and judges must consider all of the needs and circumstances of the child and a number of factors that are listed in section 37 of the *Family Law Act*. The best interests factors include the impact of any family violence on the child. When family violence is an issue, parents and judges must consider an additional list of factors to assess the impact of the family violence on the child and on a person's capacity to care for the child. The family violence factors are set out in section 38 and include:

- the nature and severity of the family violence,
- the recency and frequency of the family violence,
- whether the family violence is situational or part of a pattern of controlling behaviour,
- whether the family violence was directed to the child and the extent to which the child was exposed to the family violence; and,
- the harm caused to the child's safety and well-being.

The *Family Law Act* also says that an agreement or order is presumed *not* to be in the best interests of a child unless it protects the child's safety and well-being to the greatest extent possible.

What are protection orders?

The court can make an order against one family member to protect another family member. Protection orders can include orders:

- restricting contact and communications,
- requiring a person to stay away from someone else's home, school, place of employment, or place of business,
- prohibiting stalking,
- prohibiting a person from possessing weapons; and,
- requiring the police to remove a person from the family home.

Protection orders remain in force for one year, unless the protection order says otherwise. Protection orders can be renewed.

Applying for protection orders

A person at risk of family violence, or someone on that person's behalf, can ask the court for a protection order as long as the at-risk person and the person from whom the protection order is sought are *family members* as defined by section 1. In general, a family member is someone who lives with the other person, someone who is a spouse of the other person, or someone who is a parent with the other person. People who don't live together and are just dating will not qualify as family members.

Applications for protection orders can be made without notice to anyone else, and may be made whether there is an existing court proceeding or not.

Protection orders that conflict with other orders

If a protection order conflicts with another order made under the *Family Law Act*, like an order for parenting time or contact with a child, the parts of the earlier order that are in conflict with the protection order are suspended until either the earlier order is changed to remove the conflict, or the protection order expires.

This rule also applies to orders that are like *Family Law Act* protection orders but are made under the *Criminal Code* [3] or under the laws of another jurisdiction.

Enforcing protection orders

Protection orders cannot be enforced under the *Family Law Act* or the provincial *Offence Act* [4]. They can only be enforced under section 127 of the *Criminal Code* [3], which makes breach of a court order a criminal offence.

The *Family Law Act* directs police officers to take action to enforce a protection order, and to use reasonable force if necessary.

Out-of-court dispute resolution processes

What are the alternatives to going to court?

Under the *Family Law Act*, processes that help people resolve family law problems outside of court are called *family dispute resolution* processes. Family dispute resolution processes include:

- assistance from family justice counsellors,
- mediation, collaborative processes, and arbitration; and,
- parenting coordination.

People can make an agreement that they will resolve a family law problem, or a family law problem that might arise in the future, using a family dispute resolution process rather than going to court.

How are family dispute resolution processes supported?

Duties of professionals

Family justice counsellors, mediators, lawyers, and arbitrators are required to tell people about the different ways that family law disputes can be resolved outside of court.

Lawyers are also required to certify that they have told their client about family dispute resolution processes when they start a court proceeding under both the *Family Law Act* and the *Divorce Act*.

Duties of parties making agreements

People who are trying to resolve family law problems outside of court are required to provide each other with "full and true information." Agreements about support and the division of property and debt can be set aside for a number of reasons, including if:

- a person did not make full disclosure of their financial information; or
- a person took advantage of the other person's lack of knowledge or emotional state.

However, when full disclosure is made, agreements about spousal support and the division of property and debt that were fairly negotiated are harder to set aside under the *Family Law Act* than they were under the old *Family Relations Act*.

Suspended time limits

Court proceedings about spousal support or the division of property and debt must normally be started within two years of the date of divorce, for married spouses, or within two years of the date of separation, for unmarried spouses. Under section 198 of the *Family Law Act*, the countdown for the two-year limit stops while the spouses are involved in a family dispute resolution process with a family justice counsellor, mediator, lawyer, or arbitrator.

What is mediation?

Family justice counsellors, mediators, and lawyers who have special training can help people resolve a family law dispute through mediation. In mediation, a neutral person, a *mediator*, helps people reach their own settlement of a legal dispute. Although some mediators also provide information about the law and may offer an opinion about a person's position, mediators do not make decisions for people and do not have the power to impose a settlement.

When mediation is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

More information about mediation is available in the Resolving Family Law Problems out of Court chapter in the section on Family Law Mediation.

What is collaborative negotiation?

Lawyers who have special additional training can help people resolve a family law dispute through collaborative negotiation. When people agree to use collaborative negotiation, they and their lawyers sign an agreement which says that they will use their best efforts to resolve the dispute outside of court, and that if the parties do decide to go to court they will hire new lawyers.

Collaborative negotiation works like ordinary negotiation but can involve other professionals when their participation will help the parties to reach a settlement:

- clinical counsellors or psychologists can be involved as *coaches*, helping the parties work through their emotions and other stumbling blocks in the negotiation process,
- clinical counsellors or psychologists can be involved as *child specialists*, giving the parties advice about parenting schedules and information about how the children are experiencing the separation; and,
- accountants, appraisers, and tax experts and other *financial specialists* can be involved to help the parties figure out complicated problems about money.

When collaborative negotiation is successful, the parties will usually sign a separation agreement to document their settlement. Separation agreements can be filed in court and be enforced like court orders.

More information about collaborative negotiation is available in the Resolving Family Law Problems out of Court chapter in the section on Collaborative Processes.

What is arbitration?

In arbitration, a neutral person with special training, an *arbitrator*, resolves a family law dispute by making a decision, called an *award,* after hearing each party's evidence and witnesses. Arbitral awards are binding on the parties just like a court order. Although arbitration can be a lot like going to court, it has a lot of advantages over litigation:

- the parties can pick the person they want to arbitrate their dispute,
- the arbitration hearing can be scheduled whenever everybody is available without having to wait on trial scheduling,
- arbitration hearings happen in private, often in the arbitrator's office boardroom,
- the parties can choose the rules of the arbitration process; and,

- the parties can decide to have the arbitrator resolve a dispute in many different ways, from an oral hearing over the telephone without witnesses to a full hearing that looks just like a trial.

The result of an arbitration process is the arbitrator's award. The arbitrator's award is private, but can be filed in court and be enforced like a court order.

The arbitration of family law disputes in British Columbia is governed by rules set out in Part 2, Division 4 of the *Family Law Act*, and is no longer covered by the provincial *Arbitration Act*.

More information about arbitration is available in the Resolving Family Law Problems out of Court chapter in the section on Family Law Arbitration.

What is parenting coordination?

Social workers, counsellors, psychologists, mediators, and lawyers who have special training can help people resolve disputes about the care of children through parenting coordination. Parenting coordination is only used where parents have an agreement or a final court order about parental responsibilities, parenting time, and contact, and is meant to help with:

- implementing the parts of the agreement or order about children,
- helping parents deal with conflict about their children,
- improving how parents communicate with each other; and,
- making sure the parents put the needs and interests of the children first.

Parenting coordinators cannot help with child support, spousal support, or the division of property and debt.

Parenting coordinators try to resolve disputes about children by helping the parents find a settlement, like a mediator. However, when a settlement cannot be reached or the dispute is urgent, the parenting coordinator may make a decision resolving the dispute, like an arbitrator. A parenting coordinator's decision is called a *determination.* Determinations can be filed in court and be enforced like court orders.

Parenting coordinators can be appointed by parents' agreement or by a court order made under the *Family Law Act*, and are appointed for terms ranging from six months to two years. A parenting coordinator's appointment can be renewed, if the parenting coordinator agrees.

More information about parenting coordination is available in the Resolving Family Law Problems out of Court chapter in the section on Parenting Coordination.

In-court dispute resolution

Which court deals with which family law problem?

The powers of the Provincial Court are pretty much the same under the *Family Law Act* as they were under the old *Family Relations Act* [5]. The Supreme Court can deal with all family law problems, but the Provincial Court can only deal with problems about parenting children, child support, and spousal support. As a result, the Provincial Court can make declarations about the parentage of a child, but only if the declaration is necessary to handle a claim about a problem within its jurisdiction. The Provincial Court can also enforce agreements and orders, but only the parts of agreements or orders that are within its jurisdiction.

What happens when there's a proceeding in each court?

Starting a court proceeding in one court doesn't stop a proceeding being started in the other court, unless the claims made in the second proceeding have already been dealt with by the first court. Section 194 of the *Family Law Act* talks about what happens when there is a proceeding in each court:

- The making of an order by one court doesn't stop an application in the other court, unless the application is about the same thing as the order made by the first court.
- A court can refuse to deal with a claim until the claim has been dealt with by the other court.
- The Supreme Court can "consolidate" a Provincial Court proceeding with its own proceeding so that both are handled as a single proceeding in the Supreme Court.

The Supreme Court can change a Provincial Court order to accommodate an order it is making. The Supreme Court cannot otherwise change Provincial Court orders except as the result of an appeal.

How does the court manage court processes and people in court?

Guiding principles

The *Family Law Act* says that court proceedings should be managed with as little delay and formality as possible, and in a way that promotes cooperation between parties and protects adults and children from family violence. The court is also required to encourage parties to focus on the best interests of their children and minimize the effect of their conflict on their children.

Preventing misuse of court processes

If a party is frustrating or misusing the court process, the court can make an order prohibiting the party from making further applications without permission under section 221 of the *Family Law Act*. When making orders like this, the court can also:

- make the order last for a specific period of time, or until the party has complied with another order,
- require the party to pay another person's expenses; and,
- make the party pay a penalty of up to $5,000 to a person or as a fine.

Conduct orders

Under section 222 of the *Family Law Act*, the court may make a *conduct order* to:

- encourage settlement of the family law dispute,
- manage aspects of a party's behaviour that are preventing a family law dispute from settling; and,
- prevent misuse of the court process.

Conduct orders include orders:

- that the parties participate in a family dispute resolution process,
- that one or more of the parties, or a child, attend counselling,
- restricting communication between the parties; and,
- that a party continue to pay for debts and services related to the family home, like paying the mortgage or paying the gas bill.

In serious cases, conduct orders restricting communication can also be made as protection orders.

Case management orders

Conduct orders include *case management orders*. Case management orders include orders:

- cancelling all or part of a claim or an application,
- delaying a court proceeding while the parties participate in a family dispute resolution process; and,
- requiring that all other applications be heard by the same judge.

A judge might make an order that they deal with all applications in a court proceeding in circumstances where there is a lot of conflict between the parties, and one or both of the parties are coming back to court over and over again.

How are orders enforced?

Some orders, like orders about parenting time and contact, have their own enforcement procedures. Where an order under the *Family Law Act* doesn't have a specific enforcement procedure, the general enforcement provisions of the act are used. Under section 230, the court may enforce an order by requiring a party to:

- post "security" — deposit money — in court to guarantee their future good behaviour,
- cover the expenses of the other party resulting from their conduct; or,
- pay up to $5,000 to another person.

When nothing else will get a party to obey a court order, the court may order that the party be imprisoned for up to 30 days. This is a last resort only. Orders that someone go to jail are very, very unusual in family law cases.

Both the Provincial Court and the Supreme Court can enforce orders.

Resources and links

Legislation

- *Family Law Act* [6]
- Provincial Court (Family) Rules [6]
- *Divorce Act* [7]
- Supreme Court Family Rules [5]
- Federal Child Support Guidelines [6]
- *Income Tax Act* [7]
- *Criminal Code* [8]
- *Offence Act* [9]

Resources

- A Very Brief Introduction to the *Family Law Act* (PDF): A plain-language overview of the *Family Law Act* written for justice system workers and advocates.
- An Overview of the Family Law Act (PDF): A more complicated overview of the *Family Law Act*, prepared before the act came into effect, written for lawyers and judges.

Links

- "Spousal Support Advisory Guidelines" [9] from the Department of Justice
- "The Family Law Act Explained" [10] from the Ministry of Attorney General
- "The Family Law Act Regulations Explained" [11] from the Ministry of Attorney General
- "Amendments to Court Rules" [12] from the Ministry of Attorney General
- "Living Together or Living Apart" [13] from the Legal Services Society
- "Provincial Court Family Rules Explained" [14] from the Ministry of Attorney General

- "What you need to know about the new Provincial Court Family Rules" [15] from the Provincial Court of British Columbia

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 17 November 2023.

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Understanding the Legal System

Understanding the Legal System for Family Law Matters

In its broadest sense, *the legal system* refers to how laws and policies are made, how we decide which problems are legal problems, all of the ways that legal problems are addressed, all of the people involved in resolving legal problems — including politicians, government staff, judges, prosecutors, lawyers, court administrators, mediators, arbitrators, and mental health professionals — and all of the people experiencing legal problems. This chapter takes a narrow view of the legal system, but it's the view that we see in movies and on television, where all legal problems are resolved in court by a judge after listening to lawyers arguing about the law.

The chapter begins with a brief overview of the basic elements of our legal system and how they work together. The sections that follow discuss the legal system in more detail, covering the court system, the law, and the lawyer-client relationship, in the context of family law disputes. It finishes by talking about the barriers and obstacles people often experience in resolving their legal problems, in the Access to Family Justice section.

Introduction

When some families separate, the adults just separate and it's over and done with. For other families, separation raises a bunch of practical and legal problems. If a family includes children, the parents have to decide where the children will mostly live, how they will make parenting decisions, how much time the children will spend with each parent, and how much child support should be paid. If one spouse is financially dependent on the other, they may have to decide whether spousal support should be paid. If the family has property and debt, they'll have to decide who should keep what.

When a family has problems like these, they also have to decide how they'll resolve them. In other words, they need to pick the process they'll use to figure everything out and get to a resolution. Some couples just talk it out. Others go to a trusted friend, family member, elder, or community leader for help. Others use a mediator to help them find a solution. Others go to court or hire an arbitrator.

In that narrow view, *the legal system* refers to the litigation process. It includes the people who have legal problems, the lawyers who represent them in court, the judge who makes a decision about those legal problems, and of course the laws and rules that guide the court process. It's important to remember, despite what you see on television, that there are other, often better, ways of resolving family law problems than litigation. You can read about negotiation, mediation, collaborative negotiation, and arbitration in the chapter Resolving Family Law Problems out of Court. This chapter, however, mostly talks about the litigation process.

Choosing the right process

Many people see *litigation* — going to court — as their first and only choice. That might be true if your business partner has broken a deal, if you've had a car accident and ICBC won't pay, or if you're suing some huge corporation. It is certainly not true for family law problems.

Deciding not to litigate

Instead of going to court, you could, for example, sit down over a cup of coffee and *talk* about the problem. You could hire a family law mediator to help you talk to each other, help identify opportunities for compromise, and help come up with a solution that you're both as happy with as possible. You could hire a lawyer to talk to the other side on your behalf and negotiate a solution for you. There's also collaborative negotiation, a cooperative process in which you and your ex each have your own lawyer and your own coach, and you agree to work through your problems without ever going to court. Then there's arbitration, in which you hire a family law arbitrator who serves as your own personal judge and manages the dispute resolution process that you have designed.

In almost all cases, negotiation and mediation, and even arbitration, are better choices than litigation. They cost a lot less than litigation, they offer you the best chance of getting to a solution that you're both happy with, and they give you the best chance of maintaining a decent relationship with your ex after the dust has settled. A national study [1] of family law lawyers done by the Canadian Research Institute for Law and the Family in 2017 showed that lawyers see mediation, collaborative negotiation and arbitration as cheaper than litigation, faster than litigation, and more likely to produce results that are in the interests of their clients and in the interests of their clients' children.

Despite the obvious benefits of avoiding litigation, a lot of people still go to court when they have a family law problem. Why? Usually because they're angry, sometimes because they want revenge. Sometimes they go to court because they see a bigger threat to their personal and financial well-being than really exists; sometimes it's because they can't trust their ex anymore and simply don't know what to do next. Sometimes it's because going to court costs less than hiring a lawyer, a mediator, or an arbitrator. Sometimes it's because the only way we see legal problems being resolved on television is through litigation.

The legal system isn't just about judges and courts, lawyers, and litigation. It also includes negotiation, collaborative negotiation, mediation, and arbitration. If you have a family law problem, litigation isn't your only choice. You have options. (Whatever you decide to do, however, it's very important that you get legal advice from a lawyer in your area since most laws change from province to province. It is important to know about the law, your options, and the range of likely outcomes if you took your legal problem to court.)

Knowing when you need to litigate

Despite its many downsides, there are some situations in which litigation may be your best choice.

Your ex won't talk to you

The thing about negotiation, collaborative negotiation, mediation, and arbitration is that they are all *voluntary*. You and your ex have to agree to negotiate, mediate or arbitrate. Litigation is not voluntary. When someone starts a court process, the people on the other side *have* to participate in that process or they risk the court making a decision without hearing from them, called a *default judgment*.

If you can't get your ex to sit down and talk to you, or if your ex will talk to you but won't commit to a settlement, litigation may be your only choice.

You can't get a deal done

You may need to start a court proceeding if you've tried to resolve things in other ways but can't reach a final settlement no matter how hard you try. For some people, prolonging disagreement and conflict is a way of continuing a relationship beyond the end of a romantic relationship; others are afraid to commit to a final settlement because they're afraid of what the future might hold. Still other people refuse to accept anything less than their best-case outcome and don't see the financial and emotional benefits of settlement.

If you just can't get to a settlement, arbitration and litigation are great ways of breaking the logjam. You will, without a doubt, get a resolution to your legal problem. There's a risk to each of you, of course, because you're giving up your ability to control the final resolution of your legal problem. Maybe the arbitrator or judge will make the decision you want, but you never know.

The good news, however, is that you are not doomed to a trial just because you have started a court proceeding. The vast majority of family law proceedings started in the British Columbia Supreme Court settle without a trial; many Provincial Court proceedings settle short of trial as well. Settlement is still possible even though a court proceeding has started.

You can't get the information you need

There once was a game show called *Let's Make a Deal* which aired for a number of years beginning in the 1960s. The idea with the show was that people would be selected from the studio audience, and then be given something of value. They were then given the choice of keeping what they'd been given or trading that initial prize for something else hidden behind a curtain or in a box. If the contestant guessed right, they might win a pile of cash, a new car or a vacation trip, but if they guessed wrong they might have to trade their initial prize for a case of beans, a Christmas sweater or a llama.

You can negotiate the settlement of a family law dispute like you're playing *Let's Make a Deal*, but that's a bad idea. If you can't get the information you need to know from your ex about whether you are making a good deal or a bad deal, the odds are that you're making a bad deal. In family law disputes, people usually need to know each other's incomes, the value of savings and pensions, and the value of property, as well as the amount owing on credit cards, loans and mortgages. If you cannot get this financial information from your ex, you may have no choice but to start a court proceeding.

You're concerned about family violence and threats

You may also have no choice but to start a court proceeding if:

- there's a history of family violence or other abuse in your relationship,
- you or your children need to be protected from your ex, or
- your ex is threatening to do something drastic like take the children, hide or damage property, or rack up debt that you'll be responsible for.

While many mediators and some arbitrators have special training in handling cases involving a history of family violence, there may be times when only the court can guarantee your safety and the safety of your children, and only a court order will adequately protect people or property. Even though you may have no choice but to start a court proceeding, remember that settlement is still possible.

The law

When lawyers talk about "the law", they're talking about two kinds of law: laws made by the government and the common law.

Laws made by the government are called *legislation*. Important legislation in family law disputes includes the *Divorce Act*, a law made by the federal government, and the *Family Law Act*, a law made by the provincial government. The government can also make regulations for a particular piece of legislation which might contain important additional rules or say how the legislation is to be interpreted. One of the most important regulations in family law is the Child Support Guidelines, a regulation to the *Divorce Act*.

The *common law* is all of the legal rules and principles that haven't been created by a government. The common law consists of the legal principles in judges' decisions, and has been developing since the modern court system was established several hundreds of years ago.

Legislation

Legislation, also known as *statutes* and *acts*, are the rules that govern our day-to-day lives. The federal and provincial governments both have the authority to make legislation, like the provincial *Motor Vehicle Act*, which says how fast you can go on a highway and that you need to have a licence and insurance to drive a car, or the federal *Criminal Code*, which says that it's an offence to stalk someone, to steal, or to shout "fire" in a crowded theatre.

Because of the *Constitution of Canada* [2], each level of government can only make legislation on certain subjects, and normally the things one level of government can make rules about can't be regulated by the other level of government. For example, only the federal government can make laws about divorce, and only the provincial governments can make laws about property.

The common law

The basic job of the courts is to hear and decide legal disputes. In making those decisions, the courts wind up doing a lot of different things. They:

- interpret, and develop rules for interpreting, the legislation that may apply to a dispute,
- interpret, and develop rules for interpreting, the words in a contract that may be the subject of a dispute,
- interpret the legal principles that may apply to a dispute, and
- interpret, and develop rules for interpreting, the past decisions of other judges.

Interpreting and applying legislation is one of the court's more important jobs. For example, section 16(6) of the *Divorce Act* says this about orders for parenting time:

> 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 court has had to decide what "as is consistent with the best interests of the child" means when applying this section, and there are lots of decisions that talk about this phrase. In *Young v Young* [3], a 1993 decision of the Supreme Court of Canada, the country's top court, said this:

> "By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase 'as is consistent with the best interests of the child' means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But *only* to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access."

Unlike the laws made by governments, which are written down and organized, the common law is more of a series of legal concepts and principles that guide the courts in their process and in their consideration of each case. These ideas are not organized in a law, a code or a regulation. They are found in the case law: judges' written explanations of why they have decided a particular case a particular way. (A really good resource for finding case law is the website of the Canadian Legal Information Institute [4].)

The common law provides direction and guidance on a wide variety of issues, such as how to understand legislation, the test to be applied to determine whether someone has been negligent, and what kinds of information can be admitted as evidence at trial. However, unlike legislated laws, the common law doesn't usually apply to our day-to-day lives in the sense of imposing rules that say how fast we can drive in a school zone or whether punching someone in the nose is a criminal offence. It usually applies only when we have to go to court.

The courts

The fundamental purpose of the courts is to resolve legal disputes in a fair and impartial manner. The courts deal with all manner of legal disputes, from the government's claim that someone has committed a crime, to a property owner's claim that someone has trespassed on their property, to a shareholder's grievance against a company, to an employee's claim of wrongful dismissal.

No matter what the nature of the dispute is, the judge who hears the dispute must give each party the chance to tell their story and give a complete answer to the claims made against them. The judge must listen to each party without bias and make a fair decision resolving the dispute based on the facts and the law, including both the common law and any legislation that applies to the dispute.

The courts of British Columbia

There are three levels of court in this province: the Provincial Court of British Columbia, the Supreme Court of British Columbia, and the Court of Appeal for British Columbia. Each level of court is superior to the one below it. A decision of the Provincial Court can be challenged before the Supreme Court, and a decision of the Supreme Court can be challenged before the Court of Appeal.

The Provincial Court

There are four divisions of the Provincial Court: Criminal and Youth Court, which mostly deals with charges under the *Criminal Code* and the *Youth Criminal Justice Act*; Small Claims Court, which deals with claims about contracts, services, property, and debt; Traffic and Bylaw Court, which deals with traffic tickets and provincial and municipal offences; and, Family Court, which deals with certain claims under the *Family Law Act*, the *Child, Family and Community Service Act* and the *Family Maintenance Enforcement Act.*

The jurisdiction of the Provincial Court is narrower than the Supreme Court. The Provincial Court only deals with the subjects assigned to it by the provincial government. Unless the government has expressly authorized the Provincial Court to deal with an issue, the Provincial Court cannot hear the case. For example, Small Claims Court can only handle claims with a value of between $5,001 to $35,000, and Family Court cannot deal with claims involving family property or family debt (with the exception of declaration of pet ownership between spouses), or hear claims under the *Divorce Act*. Each branch of the Provincial Court has its own set of procedural rules and its own court forms.

The Supreme Court

The Supreme Court can deal with any legal claim and there is no limit to the court's authority, except for the limits set out in the court's procedural rules and in the Constitution. There are three kinds of judicial official in the Supreme Court: justices, masters, and registrars. Justices and masters deal with most family law problems, and only justices hear trials.

There are two sets of rules in the Supreme Court: the Supreme Court Family Rules [3], which apply just to family law disputes, and the Supreme Court Civil Rules [5], which apply to all other non-criminal disputes. Each set of rules has its own court forms.

The Supreme Court is a trial court, like the Provincial Court, and an appeal court. The Supreme Court hears appeals from Provincial Court decisions, and justices of the Supreme Court hear appeals from masters' decisions.

The Court of Appeal

The Court of Appeal is the highest court in British Columbia and hears appeals from Supreme Court decisions. The Court of Appeal does not hear trials. The Court of Appeal has its own set of procedural rules and its own court forms.

The Federal Courts

The Federal Court of Canada is a second court system that is parallel to the courts of British Columbia and those of the other provinces and territories. The Federal Court and Federal Court of Appeal only hear certain kinds of disputes, including immigration matters and tax problems. The Federal Court is a trial court, and the Federal Court of Appeal hears appeals from the Federal Court.

The federal courts also deal with *Divorce Act* claims in those rare cases when each spouse has started a separate court proceeding for divorce on the same day but in different provinces. In a situation like that, the Federal Court decides which province's court will have jurisdiction to hear the court proceeding.

The Supreme Court of Canada

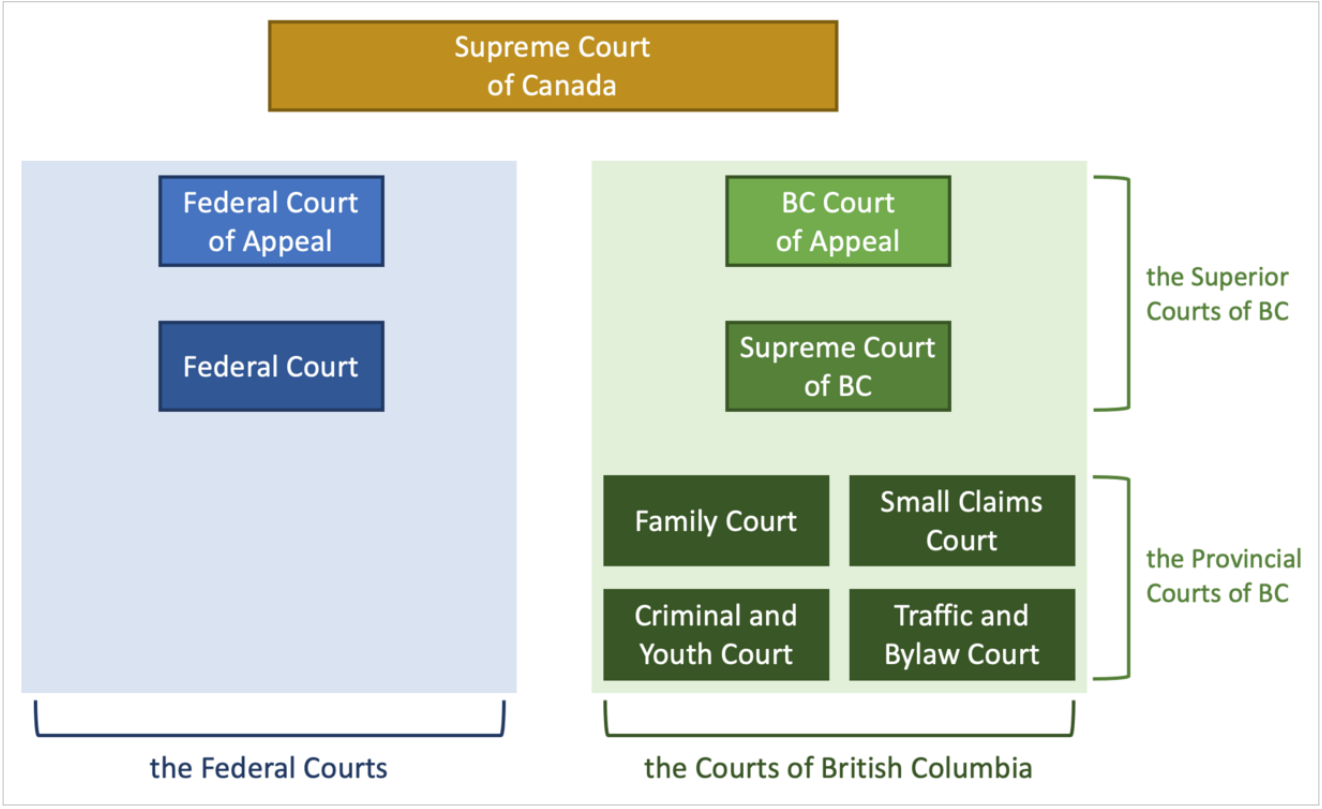
The highest level of court in the country is the Supreme Court of Canada. This court has three main functions: to hear appeals from decisions of the provinces' courts of appeal; to hear appeals from decisions of the Federal Court of Appeal; and, to decide questions about the law for the federal government. Almost all of the court's time is occupied with hearing appeals.

Some criminal cases can be appealed to the Supreme Court of Canada automatically. Appeals in almost all other kinds of cases, including family law cases, need the court's permission, called *leave*, to proceed. The Supreme Court of Canada chooses which appeals it will hear and which it won't. In general, the legal issue in a proposed appeal must have a broad public importance — the legal issue is shared by a lot of people and the case law on that issue has become confused — before the court will agree to hear the case. The Supreme Court of Canada does not hear a lot of family law cases.

Decisions of the Supreme Court of Canada are final and absolute. There is no higher court or other authority to appeal to.

A handy chart

This chart shows the structure of our courts. The lowest level of court in British Columbia are the provincial courts, the highest is the Court of Appeal for British Columbia; these courts are shown on the right. The highest court in the land, common to all provinces and territories, is the Supreme Court of Canada, at the top.



Court processes

All court processes start and end more or less the same way. You must file a particular form in court and serve the filed document on the other party. After being served, the other party has a certain number of days to file a reply. If the other party replies, there is a hearing. If the other party doesn't reply and you can prove that they were served, you can ask for a judgment in default. That's about it in a nutshell. The chapter on Resolving Family Law Problems in Court, especially the sections that are continuously updated in the online version of *JP Boyd on Family Law*, address these processes.

In the Provincial Court, you generally start a court proceeding by filing an *Application About a Family Law Matter* in Form 3. The other party has 30 days after being served to file a *Reply to an Application About a Family Law Matter* in Form 6. Read [How Do I Start a Family Law Action in the Provincial Court?] in the Helpful Guides & Common Questions part of this resource for more information.

In the Supreme Court, court proceedings are usually started by filing a *Notice of Family Claim*, and sometimes by filing a *Petition*. A person served with a Notice of Family Claim has 30 days to file a *Response to Family Claim* and possibly a *Counterclaim*, a claim against the person who started the court proceeding. A person served with a Petition has 21 days to file a *Response to Petition*, if served in Canada, 35 days if served in the United States of America, and 49 days if served anywhere else. [How Do I Start a Family Law Action in the Supreme Court?] in the Helpful Guides & Common Questions part of this resource also contains more information.

Eventually, there will be a hearing, a trial, or an application for default judgment if a responding document isn't filed, in the Provincial Court or the Supreme Court. The trial will result in a final order that puts an end to the legal dispute, unless, that is, someone decides to appeal the final order.

In family law disputes, things rarely go from starting the proceeding straight to trial. Along the way you will likely have to:

1. attend a *judicial case conference*, if you're in the Supreme Court, or a *family management conference*, if you're in the Provincial Court,
2. make or reply to one or more *interim applications*,
3. *produce financial documents and other documents* that are relevant to the claims in the dispute, and
4. attend an *examination for discovery*, if you're in the Supreme Court.

If either party is unhappy with the result of a trial and can show that the judge made a mistake, that person can appeal the final order to another court. Orders of the Provincial Court are appealed to the Supreme Court, and orders of a Supreme Court judge are appealed to the Court of Appeal. Consult the various appeals-related guides under the Helpful Guides & Common Questions part of this wikibook.

You start an appeal by filing a *Notice of Appeal*, and serving the filed document on the other party, usually within 30 days of the date of the final order. The other party has a certain amount of time to file a *Notice of Appearance* in the Court of Appeal, or a *Notice of Interest* for appeals from the Provincial Court to the Supreme Court.

Eventually, there will be a hearing that will result in another final order that puts an end to the appeal. Appeals heard by the Supreme Court can be appealed to the Court of Appeal, and appeals heard by the Court of Appeal can be heard by the Supreme Court of Canada, but only if that court gives permission.

Trial basics

A trial is the conclusion of a court proceeding. It is the moment when each side presents their claims, the evidence they have gathered in support of those claims, and the arguments and law that support their claims to a judge. A trial ends when each side has finished presenting their evidence and arguments. In some cases the judge will give their decision right away, but it is far more common for a judge to take time to think about the evidence and the law, and decide what the right outcome is.

The usual order of a trial appears below. (Remember that in the Provincial Court, the person who starts a court proceeding is the *applicant*. In the Supreme Court, this person is the *claimant*. In both courts, the person against whom a court proceeding has started is the *respondent*.)

- The applicant (or claimant) presents their *opening statement* or *opening argument* to tell the judge about their case and about what their witnesses will say.
- The applicant presents their witnesses. For each witness:
    1. The applicant will ask the witness a series of questions, called a *direct examination* or an *examination-in-chief*.
    2. The respondent will ask the witness more questions, called a *cross-examination*.
    3. The applicant will ask the witness a small number of further questions, called a *redirect examination*.
- When the applicant has finished presenting their witnesses, the respondent will present their opening statement.
- The respondent presents their witnesses. For each witness:
    1. The respondent will conduct their direct examination.
    2. The applicant will conduct their cross-examination.
    3. The respondent will conduct their redirect examination.
- The applicant will present their *closing argument* to tell the judge why the evidence of the witnesses support the decision they want the judge to make.
- The respondent will present their closing argument.
- Sometimes, but not always, the applicant will be able to provide a short reply to the respondent's closing argument, called a *surrebuttal*.
- The judge makes their decision.

(Evidence at trial is almost always given by witnesses and through documents like bank records, income tax returns, and photographs that the witnesses identify. In rare cases, the evidence of a witness can be given by an affidavit or through some other statement, like a transcript of the examination for discovery of the witness, but this hardly every happens.)

In every case that goes to trial — and, to be clear, very few cases do — the judge who hears the case must first make a decision about what the *facts* of the case are after they have listened to the evidence, since people hardly ever agree on the facts of a case. This is called a "finding of fact." The judge then reviews the law and the rules and legal principles that might apply, and decides what *law* applies to the legal issues. This is called making a "finding of law." The judge makes a decision about the legal claim by applying the law to the facts.

The judge's written decision, summarizing their conclusions about the facts and the law, is called the judge's *reasons for judgment*. When the judge needs to think about the evidence and the law before they make a decision, the judge has *reserved judgment* on the case.

Appeal basics

The decision of a trial judge can be challenged to a higher court. A decision of the Provincial Court is appealed to the Supreme Court, and a decision of the Supreme Court is appealed to the Court of Appeal. Decisions of the Court of Appeal can be appealed to the Supreme Court of Canada, but only if the court agrees to hear the appeal.

An appeal is not a chance to have a new trial, introduce evidence that you forgot about, or call additional witnesses. You don't get to appeal a decision just because you're unhappy with how things turned out. Appeals generally only concern whether the judge used the right law and correctly applied the law to the facts. This is what the Court of Appeal said about the nature of appeals in the 2011 case of *Basic v. Strata Plan LMS 0304* [6]:

> "Consideration of this appeal must start, as all appeals do, recalling that the role of this court is not that of a trial court. Rather, our task is to determine whether the judge made an error of law, found facts based on a misapprehension of the evidence, or found facts that are not supported by evidence. Even where there is such an error of fact, we will only interfere with the order if the error of fact is material to the outcome."

An appeal court very rarely hears new evidence or makes decisions about the facts of a case. Most often, the appeal court will accept the trial judge's findings of fact. If the appeal court is satisfied that the trial judge made a mistake about the law, however, the appeal may succeed.

Appeals at the Supreme Court are heard by one judge; appeals at the Court of Appeal are heard by a panel of three judges. (Really important appeals are sometimes heard by a panel of five judges.) At the appeal hearing, the person who started the appeal, the *appellant*, will go first and try to explain why the trial judge made a mistake about the law. The other party, the *respondent*, will go next and explain why the trial judge appropriately considered the applicable legal principles and why the judge was right. The appellant will then be able to provide a short reply to the respondent's arguments. Sometimes the court is able to make a decision after hearing from each party but, like at trial, the court usually reserves its decision to think about the arguments that each side made.

The Helpful Guides and Common Questions part of this resource has details about the procedures for making an appeal. You may want to look at these topics:

- How Do I Appeal a Provincial Court Decision?
- How Do I Appeal an Interim Supreme Court Decision?
- How Do I Appeal a Final Supreme Court Decision?
- How Do I Appeal a Court of Appeal Decision?

Representing yourself

There is no rule that says that you must have a lawyer represent you in court. Although a court proceeding can be complicated to manage and the rules of court can be confusing, you have the right to represent yourself.

If you do decide to represent yourself in a court proceeding, you have a responsibility to the other parties and to the court to learn about the law that applies to your proceeding and the procedural rules that govern common court processes, like document disclosure, and common court processes, like making and replying to interim applications.

A good start would be to read through the other sections in this chapter on The Law for Family Matters, and You and Your Lawyer, as well as the section on The Court System for Family Matters within the Resolving Family Law Problems in Court chapter. You might also want to read a short note I've written for people who are representing themselves in a court proceeding, "The Rights and Responsibilities of the Self-Represented Litigant" (PDF).

To find out what to expect in the courtroom, read How Do I Conduct Myself in Court at an Application?. It's located in the Helpful Guides & Common Questions part of this resource, in the section Courtroom Protocol.

Sometimes people begin a court action with a lawyer, and then start to represent themselves. If you do this, you need to notify the other parties and the court of the change. See How Do I Tell Everyone That I'm Representing Myself?. It's located in the Helpful Guides & Common Questions part of this resource.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Constitution Acts, 1867 to 1982* [7]
- Child Support Guidelines [6]
- Supreme Court Civil Rules [8]
- Supreme Court Family Rules [9]

Resources

- The Rights and Responsibilities of the Self-Represented Litigant (PDF)
- Family Law Handbook [10] from the Canadian Judicial Council
- Guide to Preparing for a Family Court Trial in Provincial Court [11] from the Provincial Court of BC
- The National Self-Represented Litigants Project resources [12]
- Legal Aid BC's Family Law in BC [13] website

Links

- Courts of British Columbia website [14]
- Supreme Court of Canada website [15]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 18 November 2023.

References

[1] http://dx.doi.org/10.11575/PRISM/32768
[2] http://laws.justice.gc.ca/eng/Const/Const_index.html
[3] http://canlii.ca/t/1frwv
[4] https://www.canlii.org/en/
[5] http://canlii.ca/t/8lld
[6] http://canlii.ca/t/flgwf
[7] http://laws-lois.justice.gc.ca/eng/Const/index.html
[8] https://canlii.ca/t/8lld
[9] https://canlii.ca/t/8mcr
[10] https://www.clicklaw.bc.ca/resource/4900
[11] https://www.clicklaw.bc.ca/resource/4039
[12] https://www.clicklaw.bc.ca/organization/solveproblems/1199
[13] https://family.legalaid.bc.ca/
[14] http://www.bccourts.ca/
[15] https://www.scc-csc.ca/

The Court System for Family Matters

There are three levels of court in British Columbia: the Provincial Court, the Supreme Court, and the Court of Appeal. Above all of these courts is the Supreme Court of Canada, the highest court in Canada. The Provincial Court and the Supreme Court are trial courts. They listen to witnesses and hear arguments and make decisions about the legal claims people bring before them. The Court of Appeal only hears appeals. It listens to arguments about why a trial judge may have made the wrong decision about a claim, and may confirm, change or cancel a trial judge's decision.

The Provincial Court deals with a limited variety of issues and claims. The Supreme Court and the Court of Appeal are our province's superior courts and can deal with all issues and all claims; their jurisdiction is limited only by their rules and by the Constitution.

This section provides an introduction to the Provincial Court, the Supreme Court, and the Court of Appeal.

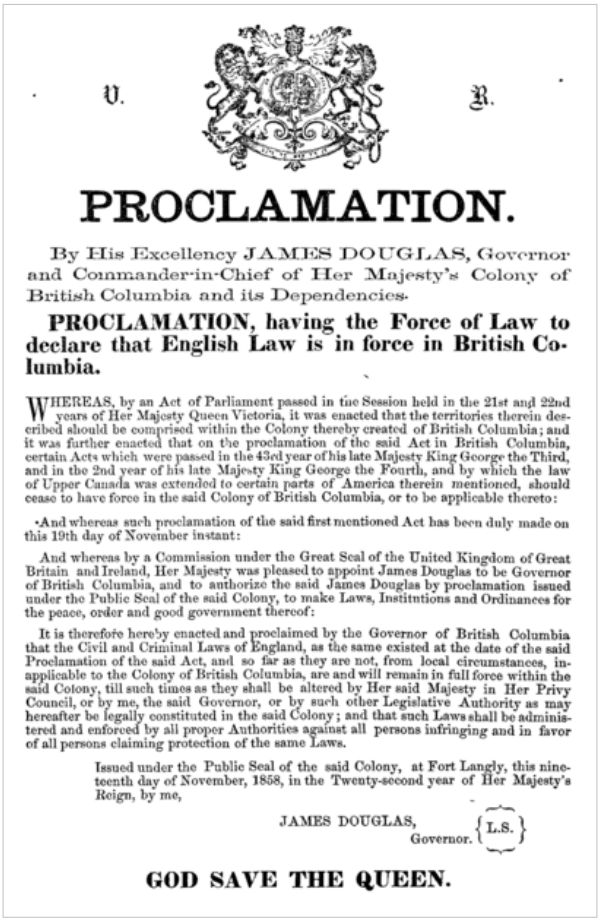
Introduction

Our court system has its origins hundreds of years ago in England, when the Court of Common Pleas was established by Henry II in the late 12th Century. Before this, people would come to the king or queen on special days set aside for the hearing of "petitions," legal complaints made by someone, the *petitioner*, against someone else, the *respondent*. If the petition was heard, and not all were, the king or queen would make a decision that the parties were obliged to accept, whether they liked it or not, putting an end to the complaint.

As the rule of law became more and more important in maintaining a civil society and the law itself became more and more complicated, kings and queens began to farm out the job of hearing petitions to people specially appointed to hear them. This was the origin of the Court of Common Pleas, and it marked the start of the English common law as the specially-appointed people, *judges*, were sent out to tour the country and resolve legal problems on behalf of the king or queen. Eventually, the monarchy got out of the business altogether and left the hearing of petitions entirely to the judges. The English court system became more complex as time went on, and different types of courts, like the Court of Equity, the Court of the Exchequer and the Court of Wards and Liveries, were eventually set up to deal with different kinds of problems.

The English court system was brought to British Columbia when the colonies of Vancouver Island and British Columbia were founded in the middle of the nineteenth century. The laws of England were adopted by British Columbia after the two colonies were joined by the proclamation of Governor Sir James Douglas on 19 November 1858, shown below. Our local court system was brought into the Canadian system when British Columbia entered

Confederation in 1871.



V. R.

PROCLAMATION.

By His Excellency JAMES DOUGLAS, Governor and Commander-in-Chief of Her Majesty's Colony of British Columbia and its Dependencies.

PROCLAMATION, having the Force of Law to declare that English Law is in force in British Columbia.

WHEREAS, by an Act of Parliament passed in the Session held in the 21st and 22nd years of Her Majesty Queen Victoria, it was enacted that the territories therein described should be comprised within the Colony thereby created of British Columbia; and it was further enacted that on the proclamation of the said Act in British Columbia, certain Acts which were passed in the 43rd year of his late Majesty King George the Third, and in the 2nd year of his late Majesty King George the Fourth, and by which the law of Upper Canada was extended to certain parts of America therein mentioned, should cease to have force in the said Colony of British Columbia, or to be applicable thereto:

And whereas such proclamation of the said first mentioned Act has been duly made on this 19th day of November instant:

And whereas by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, Her Majesty was pleased to appoint James Douglas to be Governor of British Columbia, and to authorize the said James Douglas by proclamation issued under the Public Seal of the said Colony, to make Laws, Institutions and Ordinances for the peace, order and good government thereof:

It is therefore hereby enacted and proclaimed by the Governor of British Columbia that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony, till such times as they shall be altered by Her said Majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper Authorities against all persons infringing and in favor of all persons claiming protection of the same Laws.

Issued under the Public Seal of the said Colony, at Fort Langly, this nineteenth day of November, 1858, in the Twenty-second year of Her Majesty's Reign, by me,

JAMES DOUGLAS, Governor. { L.S. }

GOD SAVE THE QUEEN.

The fundamental purpose of the courts today is the same as it was then: to resolve people's legal disputes. We still use a lot of the same terms that were used hundreds of years ago — there's even a court form called a Petition — although we have merged the different types of courts into a single system with the authority to decide every sort of legal problem.

Our courts deal with all manner of disputes, from the government's complaint that someone has committed a crime, to a property owner's complaint that someone has trespassed on their property, to an employee's complaint that they have been wrongfully dismissed, to a driver's complaint that someone else was responsible for an accident and should pay for the damage it caused. The job of the judge is to hear each case and decide what an appropriate and fair solution should be, in an impartial and unbiased manner, free from any interference by the government or influence by the parties.

The courts of British Columbia

Today we have three levels of court in British Columbia:

1. the Provincial Court of British Columbia,
2. the Supreme Court of British Columbia, and
3. the Court of Appeal for British Columbia.

Each successive level of court is "superior" to the other, with the Provincial Court being at the bottom of the pile and the Court of Appeal being at the top. Above our Court of Appeal is the Supreme Court of Canada, which deals with cases from all of the courts of appeal across Canada.

The Provincial Court and the Supreme Court of British Columbia are where the bulk of family law court proceedings are resolved; they are our *trial courts*. The Court of Appeal and the Supreme Court of Canada only hear appeals of

decisions made by the lower courts; they are our *appellate courts*.

Only a few family law cases are brought to the Court of Appeal. Fewer still are brought to the Supreme Court of Canada, partly because that court must give permission, called *leave*, to hear appeals in non-criminal cases and partly because it can cost a great deal of money to take a case that far. Appeals generally tend to be complicated and fairly expensive. This often discourages people from arguing about their legal disputes after they've gone through a trial.

Making the choice of forum

There are important differences between the Provincial Court and the Supreme Court. Deciding in which trial court to start a proceeding is called making the *choice of forum*.

The Provincial Court deals with issues relating to parenting children, child support, spousal support, companion animals, and orders protecting people under the provincial *Family Law Act*. The Supreme Court has the authority to deal with all of those issues, but can also deal with issues about parentage, dividing property and debt, and orders protecting property under the provincial act. Only the Supreme Court has the authority to make orders under the federal *Divorce Act*, including orders for divorce. There's a chart showing which court can deal with which issue in the Family Law in British Columbia chapter of the Getting Started part of this resource.

The rules of the Supreme Court can be very complicated and fees are charged for many steps in the court process, including filing the paperwork that starts a court proceeding, making an application, or going to trial. The rules of the Provincial Court are shorter and more straightforward, and the court doesn't charge any fees.

It is possible to start a proceeding in the Provincial Court to deal with things like child support, and then start a proceeding in the Supreme Court to get a divorce and deal with things like property. It can be complicated to split your family law issues between two courts. A lot of people find it easier just to deal with everything in one court. Because of the limits of the authority of the Provincial Court, that court is usually the Supreme Court.

The Provincial Court

The Provincial Court can be the most accessible court for people who aren't represented by a lawyer. The Provincial Court Family Rules [1] which govern the Provincial Court's process are written in easy-to-understand language, the court doesn't charge any filing fees, and most people who use the Provincial Court don't have a lawyer. There are also many more courthouses across the province for the Provincial Court than there are for the Supreme Court.

There are four divisions of the Provincial Court. Provincial Family Court is the one that deals with family law problems.

Jurisdiction

The Provincial Court can only deal with claims for orders under the *Family Law Act* and the *Interjurisdictional Support Orders Act* [25]. The Provincial Court does not have the jurisdiction to make orders for the division of family property (with the exception of companion animals) or family debt, the management of children's property, or orders protecting property. It cannot make any orders under the *Divorce Act*. The Provincial Court is unable to make declarations about who the parents of a child are, unless it's necessary in order to deal with another issue, like a claim about child support or guardianship.

The Provincial Court can hear claims about these issues:

- guardianship of children,
- parental responsibilities and parenting time,
- contact with a child,
- child support,
- spousal support,
- companion animals (the one form of family property that it can deal with)

- changing and cancelling Provincial Court orders,
- enforcing Provincial Court orders,
- enforcing Supreme Court orders about guardianship, parental responsibilities, parenting time, and contact, and
- moving away, with or without a child.

Court proceedings

The Provincial Court has special rules just for family law proceedings, the Provincial Court Family Rules [2]. Within these rules, there are also different procedures to follow depending on the type of registry, and this means the rules can vary significantly depending where you are. It's important to know which type of registry your family law matter is filed at. The types and locations are:

- *Early Resolution Registries* (currently Victoria and Surrey), which follow a much different process (including what forms to use) from the other registries — luckily this is well explained on the BC Ministry of Attorney General's website [3], and discussed generally in the Resolving Family Law Problems in Court chapter.
- *Family Justice Registries* (Kelowna, Nanaimo, and Vancouver (Robson Square)), which require parties to go through a family needs assessment at the very beginning.
- *Parenting Education Program Registries*, are the default type of registry found in the remaining registry locations of the Provincial Court. Unless you're in Kelowna, Nanaimo, Surrey, Vancouver, or Victoria, this will be the registry type you'll deal with. (If your matter is in Kamloops, and it looks like it's going to trial, you might need to learn about that registry's new *Informal Family Court Trials* pilot, which is explained on the Provincial Court's website [4], and on Legal Aid BC's Family Law website [5].

Regardless of which type of Provincial Court registry is handling your family law matter, it's important that you read and understand the Provincial Court Family Rules. The rules say how every aspect of a Provincial Court case is run, from starting a court proceeding to scheduling a trial. They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directions [6] issued by the Chief Judge, which clarify certain aspects of the rules of court and describe additional processes and procedures.

Provincial Court procedure based on location of registry

Provincial Court Family Rules changed considerably in 2021. Provincial Court procedure now depends a lot on where the parties live and in which registry the claim is filed. At the time of writing, there are effectively three types of Provincial Court registries, and three of these have some unique procedural processes:

Early Resolution Registries Surrey and Victoria's Provincial Court registries now follow a new procedure designed to resolve cases without the need for going to court. The early resolution process in these registries is quite a different procedure compared to traditional Provincial Court procedure. The good news is that many people will find the process more straight forward, less complex, and less adversarial.

Family Justice Registries Kelowna, Nanaimo, and Vancouver's Provincial Court registries have a special process for court applications that involve children. Before the Court hears any applications, the parties have to take a parenting course and meet with a family justice counsellor to do a *family needs assessment*.

Parenting Education Program Registries All of the other Provincial Court registries require that parties who are parents of children under 19 take a parenting after separation course in most cases. A certificate of completion of the parenting after separation course is filed with the registry, and this lets you proceed to make court applications.

Procedure

The person who starts a proceeding in the Provincial Court is the *applicant*. The person against whom the court proceeding is brought is the *respondent*.

An applicant starts by filing a form, although a different form is needed for *Early Resolution Registries* than in other Provincial Court registry locations. To read more about the Early Resolution process in Victoria and Surrey see the BC Ministry of Attorney General's website [3], which also makes available a brochure with a simplified process map. The procedures explained below do not apply to the Early Resolution Registries.

In most Provincial Court registries you start by filing an Application About a Family Law Matter in Form 3 and then serving it on each person named as a respondent. The form must be *personally served* on the respondent by an adult other than the applicant — you can't do it yourself. The respondent has 30 days to answer the claim by filing a Reply to an Application About a Family Law Matter in Form 6 at the court registry. The court clerk will send a copy of the Reply to the applicant. The Reply can also be used to make a *counter application*, the respondent's own claim against the applicant. A respondent who does not file a Reply to an Application About a Family Law Matter is not entitled to notice of further hearings in the case!

After the proceeding has been started, registry locations usually require the parties (if there is a matter involving children) to attend a *parenting after separation course*, and the Family Justice Registries further require the parties to meet with a *family justice counsellor* for a family needs assessment before they can go to see a judge. Family justice counsellors are government employees trained in mediation who can help with issues about the care of children, child support, and spousal support.

The parties' first appearance before a judge is normally at a *family management conference*, where the judge (or a family justice manager, but we'll just refer to the judge for simplicity's sake) will see if the parties can resolve their issues early on. A family management conference is a private meeting between the parties, their lawyers — if they have lawyers — and the judge. In general, a judge will not make orders at a family management conference except with the parties' agreement, but the judge can direct the parties to hold another family management conference, or to go to a family settlement conference, if the first meeting ends before a resolution is agreed to. All of these early conferences can be very helpful as they provide a great opportunity to talk about the legal issues and explore potential areas of compromise.

After the family management conference, *interim applications* — applications for temporary orders — can be made formally, triggering another hearing.

If the legal issues in the court proceeding aren't settled, there will be a *trial*. At the trial, each side will present their evidence and their arguments, and the judge will make a decision about the legal issues, called a *judgment.* The judgment will describe not only the judge's *final orders* on the legal issues, but the judge's decisions about the facts of the case and the law that applies to the case.

Court procedures are covered in the Resolving Family Law Problems in Court chapter.

Addressing the court

Judges of the Provincial Court are addressed as "Your Honour."

Appeals

Final orders of the Provincial Court may be appealed to the Supreme Court. The appeal must be started within 40 days of the date the final order was made. The timelines for appeals are strictly applied.

According to s. 233(1) [7] of the *Family Law Act*, only final orders may be appealed. In a 2011 case called *Dima v Dima* [8], the Court of Appeal confirmed that the only way to challenge an interim order of the Provincial Court is through judicial review under the *Judicial Review Procedure Act* [9].

It's important to know that an order that is appealed remains in effect unless the judge who made the order says otherwise. Starting an appeal doesn't mean that you can ignore the order you are appealing.

The Supreme Court

Unlike the Provincial Court, the Supreme Court has the authority to deal with all family law issues. If the Provincial Court cannot deal with a particular issue, the Supreme Court is where you will have to go. As well, the Supreme Court is the only court that can grant an order for divorce.

There are fewer registries of the Supreme Court than there are for the Provincial Court. Court fees — fees for services like filing documents, photocopying, starting a court proceeding, or having a trial — are also payable in the Supreme Court. No fees are charged by the Provincial Court.

The Supreme Court is also a lot more formal than the Provincial Court. While it is possible to represent yourself in the Supreme Court, the rules of court used for family law matters, the Supreme Court Family Rules [3], are complicated and are applied strictly. The assistance of a lawyer is highly recommended.

Court jurisdiction

The Supreme Court has the authority to deal with all of the same issues as the Provincial Court and more. The Supreme Court:

- has *inherent jurisdiction*, which means it can deal with every kind of legal issue,
- can deal with claims under the *Divorce Act*, including making divorce orders, as well as claims under the *Family Law Act*,
- can divide family property and family debt, and make orders respecting companion animals, under the *Family Law Act*,
- may divide assets between people who aren't spouses under either the common law, like the law of trusts, or under legislation, like the *Land Title Act* [3] or the *Partition of Property Act* [1],
- may make orders for the protection of property, and
- hears appeals from decisions of the Provincial Court.

Court proceedings

The Supreme Court has special rules just for family law proceedings, the Supreme Court Family Rules [3]. If you are involved in a proceeding before the Supreme Court, you should try to read and understand these rules, or at least the rules that talk about the specific procedure you are dealing with. The rules of court govern every aspect of a Supreme Court case, from starting a court proceeding to scheduling a trial. They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directions [10] and Administrative Notices [11] issued by the Chief Justice, which clarify aspects of the rules of court and describe additional processes and procedures.

Procedure

Most Supreme Court family law proceedings are started by filing a *Notice of Family Claim* (Form F3 of the Supreme Court Family Forms) in court. The person who starts a proceeding by a Notice of Family Claim is the *claimant*, and the person against whom the claim is brought is the *respondent*. In certain unusual cases, a proceeding can also be started by filing a *Petition* (Form F73). Someone starting a proceeding with a Petition is the *petitioner*, and the other party is the *petition respondent*.

Notices of Family Claim and Petitions must be *personally served* on the other party by an adult other than the claimant or petitioner. You cannot serve the other side yourself.

A respondent may reply to a Notice of Family Claim by filing a *Response to Family Claim* (Form F4). A respondent who does not file a Response to Family Claim is not entitled to notice of further hearings in the case! The respondent may also file a *Counterclaim* (Form F5). A counterclaim is used to describe the respondent's own claim against the applicant.

In general, before anyone can do anything else, the parties must attend a *judicial case conference*. A judicial case conference is a private meeting between the parties, their lawyers, and an associate judge or judge to talk about the legal issues and see whether any of them can be settled. The associate judge or judge who hears a judicial case conference cannot make orders, except for procedural orders, without the parties' agreement. Judicial case conferences can be very helpful. Cases, even difficult ones, sometimes settle at judicial case conferences! *Interim applications*, applications for temporary orders, can be made by filing a *Notice of Application* (Form F31) and an *Affidavit* (Form F30) in court. An affidavit is a person's written evidence, which the person swears or affirms is true before a lawyer, notary public, or court staff member able to take oaths. The person making an application is the *applicant*; the person against whom an application is brought is the *application respondent*. An application respondent may reply to a Notice of Application by filing an *Application Response* (Form F32) and an *Affidavit* within five business days after service of the Notice of Application.

If the legal issues in the court proceeding aren't settled, there will be a *trial*. At the trial, each side will present their evidence and their arguments, and the judge will make a decision about the legal issues, called a *judgment*. The judgment will describe not only the judge's *final orders* on the legal issues, but the judge's decisions about the facts of the case and the law that applies to the case.

Applications to *change final orders* are made by filing a Notice of Application (Form F31) and an *Affidavit* (Form F30) in court and serving them on the other parties. The process works just like the process for interim applications, except that the application respondent has 14 business days from the date of service of the application materials to reply to the application.

Addressing the court

There are two kinds of judicial officials at the Supreme Court that hear applications and trials, *associate judges* and *justices*, both of whom we'll refer to as "judges" for convenience.

Associate judges (called *masters* until January 2024 when their title was changed) deal with a wide variety of applications in Supreme Court Chambers, but they do not have the full range of judicial authority that a *justice* has, and they do not have the authority to make final orders. Associate judges deal mainly with interim applications and hear judicial cases conferences. Associate judges of the Supreme Court are addressed as "Your Honour."

Justices can also hear interim applications and judicial cases conferences, but are mostly assigned to hear trials and applications to change final orders. Until a couple years ago, justices were addressed by the ancient-sounding terms "My Lord" or "My Lady," or, if you wanted, as "Your Lordship" or "Your Ladyship." As of the end of 2021, a justice of the BC Supreme Court is to be addressed as "Chief Justice", "Associate Chief Justice", "Justice", "Madam Justice", or "Mr. Justice" as the context requires. The old terms "My Lord", "My Lady", "Your Lordship", and "Your Ladyship" are to be avoided.

Appeals

Interim orders of associate judges may be *appealed* to a justice of the Supreme Court. A party appealing the order of an associate judge must file a *Notice of Appeal* (Form F98) in the Supreme Court within 14 days of the date the order was made.

Interim and final orders of justices of the Supreme Court are *appealed* to the Court of Appeal. This is a more rigorous process. An appeal of a justice's order to the Court of appeal must be brought within 30 days of the date of the order. Appeals of interim orders are generally *limited appeal orders* and require the permission of the Court of Appeal before they will be heard. This permission is called *leave*. Appeals of final orders don't need leave to proceed. Appeals to the Court of Appeal proceed under the *[Court of Appeal Act* [12]*]* and the Court of Appeal's rules of court [13] and court forms.

It's important to know that an order that is appealed remains in effect unless the associate judges or justice who made the order says otherwise. Starting an appeal doesn't mean that you can ignore the order you are appealing.

See How Do I Appeal an Interim Supreme Court Decision? and How Do I Appeal an Interim Supreme Court Decision? under the Helpful Guides & Common Questions section for more information on appealing Supreme Court orders.

The Court of Appeal

The Court of Appeal has the same sort of jurisdiction as the Supreme Court. It can deal with every kind of legal problem. However, this court does not hear trials, it only hears appeals from decisions of the Supreme Court and certain legal questions referred to it by the government of British Columbia. Although the Court of Appeal's central registry is in Vancouver, the court occasionally hears cases in Victoria, Kelowna, and Kamloops.

Appeals are a fairly expensive process. You should only bring an appeal after you've given a lot of thought to the cost of the appeal and your chances of success; don't leap to appeal a decision just because you don't like it or are angry with the result. Consider asking a lawyer to review your case and the reasons for judgment from trial. Simply put, the cost of the appeal may outweigh the benefits you will get even if you are completely successful.

Court proceedings

If you are involved in a proceeding before the Court of Appeal, you must read the *Court of Appeal Act* [12] and the Court of Appeal Rules [13]. The act and the rules govern every aspect of an appeal, from starting an appeal to the size and colour of paper you have to use for court documents. (I'm not kidding. The rules even say what kind of font and type size you have to use!) They set out important deadlines and limitations, and say what court forms must be used for which purpose. You also need to have a look at the Practice Directives [14] issued by the Chief Justice, which clarify aspects of the rules of court and describe additional processes and procedures.

While it is possible to represent yourself in the Court of Appeal, and lots of people do, the court requires very strict compliance with its rules and forms. The assistance of a lawyer is highly recommended.

Procedure

Appeals of final Supreme Court orders are discussed in the Helpful Guides & Common Questions section under How Do I Appeal a Final Supreme Court Decision?. They must be started within 30 days of the date the order was made. The person who starts an appeal is the *appellant*, the other parties are *respondents*. The appellant must serve the Notice of Appeal on all respondents. After being served, a respondent has to file a *Notice of Appearance*, and may serve their own *Notice of Cross Appeal*, which is only necessary if the respondent also wants to appeal the Supreme Court's order and is asking for different orders than the appellant.

Interim applications, applications for temporary orders, can be made in the Court of Appeal subject to the rules on them being *limited appeal orders*. Appeals of interim Supreme Court orders are discussed in the Helpful Guides &

Common Questions section under How Do I Appeal a Interim Supreme Court Decision?.

Applications are rarely brought to the Court of Appeal, but when they are, the rules say the hearing of the application must be completed within 30 minutes.

All appeals are based on the evidence before the judge who made the original decision. The Court of Appeal does not hear evidence from witnesses and rarely considers evidence that was not presented to the trial judge. Before an appeal can be heard, the appellant must:

1. get transcripts of all of the oral evidence at trial, and transcripts can be hideously expensive to obtain,
2. prepare an *appeal record* with the Notice of Appeal, and all of the pleadings filed in the Supreme Court proceeding plus the order at issue and reasons for judgment, and
3. prepare an *appeal book with* all of the documents used as evidence at trial.

(By "book" I mean that the paper is securely bound in some way. Lawyers often use *cerlox* or *comb binding*, and businesses that provide photocopying services will usually be able to bind paper like this.)

Each side must also prepare a written argument, called a *factum*, as well as books containing all the statute law and case law they will be relying on in arguing the appeal. The court registry is very particular about how these materials are prepared; read the Court of Appeal Rules [13] very carefully!

Applications for leave to appeal, when they are required, are heard by one judge.

Appeals are heard by a *panel* of three judges, but when a legal issue is particularly important, the appeal may be heard by a panel of five judges. The panel reaches its decision after reading the parties' factums, hearing the parties' oral arguments, and considering the law that applies to the issues. The decision of the panel, and the result of the appeal, is the decision of a majority of the judges on the panel; the judge or judges who disagree with the majority decision are said to *dissent* and may write a separate decision, called a *dissenting judgment*.

Addressing the court

Not too long ago, justices of the Court of Appeal were addressed as "My Lord" or "My Lady". This outdated convention has now changed, as it had throughout most of Canada before BC. Justices are to be referred to as "Chief Justice", "Justice", "Madam Justice", "Mr. Justice" or, collectively, as "Justices", according to the context.

The old terms "My Lady", "My Lord", "Your Ladyship" or "Your Lordship" are now to be avoided. The BC Court of Appeal has over 15 judges, and it also has a registrar, who is another court official that hears select court matters. In a registrar's hearing, the registrar is addressed as "Your Honour".

Appeals

Decisions of the Court of Appeal can be appealed to the Supreme Court of Canada. However, the Supreme Court of Canada must first grant leave for the appeal to be brought. There is no automatic right to appeal a judgment of the Court of Appeal in a family law dispute. Read the Helpful Guides & Common Questions section under How Do I Appeal a Court of Appeal Decision?.

Resources and links

Legislation

- *Provincial Court Act* [15]
- *Supreme Court Act* [16]
- *Court of Appeal Act* [17]
- *Court Rules Act* [18]
- *Family Law Act* [6]
- *Divorce Act* [7]

- *Interjurisdictional Support Orders Act* [25]
- *Judicial Review Procedure Act* [19]
- *Constitution Acts, 1867 to 1982* [7]
- Provincial Court Family Rules [1]
- Supreme Court Family Rules [3]
- Court of Appeal Rules [20]

Resources

- Provincial Court Family Forms [21]
- Supreme Court Family Forms [22]
- BC Court of Appeal Civil Rules Forms [23]
- Provincial Court Practice Directions [24]
- Supreme Court Family Practice Directions [10]
- Supreme Court Administrative Notices [11]
- Court of Appeal Practice Directives [14]
- "Family Law in BC: Quick Reference Tool" [25] from Legal Aid BC
- "Preparing for a Family Court Trial in Provincial Court" [11] from the Provincial Court of British Columbia
- *The CanLII Manual to British Columbia Civil Litigation* [26]
- Legal Aid BC's Family Law website's information page "BC Legal System" [27]

Links

- Courts of British Columbia website [14]
- Provincial Court website [28]
- Supreme Court website [29]
- Court of Appeal website [30]
- CanLII [31]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Nate Russell, 19 November 2023.

References

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[3] https://www.clicklaw.bc.ca/resource/4843
[4] https://www.provincialcourt.bc.ca/enews/enews-16-05-2022
[5] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/informal-trials-kamloops-court-registry
[6] https://www.provincialcourt.bc.ca/types-of-cases/family-matters/chief-judge-practice-directions
[7] https://canlii.ca/t/8q3k#section233
[8] https://canlii.ca/t/fkmwm
[9] https://canlii.ca/t/844v
[10] https://www.bccourts.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx
[11] https://www.bccourts.ca/supreme_court/practice_and_procedure/administrative_notices.aspx
[12] https://canlii.ca/t/b96x
[13] https://canlii.ca/t/bgkw
[14] https://www.bccourts.ca/court_of_appeal/Practice_and_Procedure/civil_practice_directives_/index.aspx
[15] http://canlii.ca/t/849w
[16] http://canlii.ca/t/84d8
[17] http://canlii.ca/t/b96x

[18] http://canlii.ca/t/84h8
[19] http://canlii.ca/t/844v
[20] http://canlii.ca/t/bgkw
[21] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/prov-family-forms
[22] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/sup-family-forms
[23] https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/Civil_Rules_Forms.aspx
[24] http://www.provincialcourt.bc.ca/types-of-cases/family-matters/chief-judge-practice-directions
[25] https://www.clicklaw.bc.ca/resource/2627
[26] https://canlii.ca/t/srvn
[27] https://www.clicklaw.bc.ca/resource/4640
[28] http://www.provincialcourt.bc.ca/
[29] https://www.bccourts.ca/supreme_court/index.aspx
[30] https://www.bccourts.ca/Court_of_Appeal/index.aspx
[31] http://canlii.org

The Law for Family Matters

When lawyers speak about "the law," they are really talking about two different things. The first kind of law is the laws made by the provincial and federal governments, called *legislation*. The other kind of law is *the common law*, which consists of the rules and principles developed by the courts as they decide case after case.

This section provides an overview of legislated laws, the common law, and the common law system of justice in Canada. It also talks about how to decide whether to begin a family law court proceeding under the *Divorce Act* or the *Family Law Act*.

Introduction

Under the *Constitution of Canada* [7], the federal and the provincial governments both have the power to make laws. Each level of government has its own particular area of jurisdiction, meaning that a subject that the federal government can pass laws on, the provincial governments generally can't, and vice versa. For example, the provinces have jurisdiction over property rights, so they can pass laws governing real estate, the sale of cars, the division of family property, and so forth. The federal government doesn't have the ability to make laws about property rights, except in certain special circumstances. On the other hand, the federal government can pass laws dealing with the military, navigation and shipping, and divorce, things that are outside the jurisdiction of the provincial governments. This distinction is important in family law because the laws of both the federal and provincial governments can relate to a problem, and you need to know which law governs what issue.

Legislated laws are only one source of the law in Canada. Our constitution is another source of law, and another is the common law, also known as judge-made law. The fundamental principle of the common law is the idea that when a court has made a decision on a particular issue, another court facing a similar issue — with similar parties in similar circumstances — ought to make a similar decision. Courts are said to be "bound" by the decisions of earlier courts in previous cases. As no two cases are entirely alike, each court's decision is said to stand for a "principle," a statement of what the law should be in the particular circumstances of that case. Sometimes this principle is an elaboration or a clarification of the general rule on a particular subject; sometimes it is a statement about what the law ought to be.

Our constitution requires that the courts are independent from government. Despite this separation, the courts have a certain kind of authority over the government and the government has a certain kind of authority over the courts, sort of like the "checks and balances" you hear American political commentators talking about when they're upset about something the president's done. For example, if the government passes a law that the court concludes is contrary to the constitution, the court can strike the legislation, reduce the breadth of its application, or make the government change it. On the other hand, the government has the authority to pass laws that change the common law principles

developed by the courts or make laws that override the constitution, although it can't change the court's decision in a particular case.

The common law

The common law of Canada is hundreds of years old and has its roots in England in the 12th Century, when Henry II decided to start farming out the job of hearing complaints about people's disputes to judges. The judges would roam the countryside, which is where the term *circuit court* originates, deciding these problems on behalf of the king. Acting on behalf of the same employer, the judges needed to make sure that their decisions were similar. The "king" couldn't decide that breaking into someone's house was a civil offence on one day and that it wasn't on another. As a result, each judge felt themselves to be bound by the decisions of their fellow judges, and that is the meaning of "the common law." It's the law that is *common* to the whole of the country.

(This, incidentally, was a huge improvement over what was happening in Europe at the same time, where the administration of a uniform legal code had collapsed with the rule of the Roman Empire. "The law" became something that changed from village to village according to local custom, rather than having some laws that could be predicted wherever you travelled. In fact, the original job of the jury was to decide what the local law was, not to decide the facts of a case!)

The idea that a judge is bound by the decision of a previous judge is a legal principle known by its Latin name, *stare decisis*. Under this principle, a court dealing with a particular kind of problem is required, usually, to follow the decisions of previous courts that dealt with the same sort of problem in the same sort of circumstances. Court decisions are sometimes called "precedents" or "precedent decisions" because of the *stare decisis* principle. One decision stands as *precedent* for the next.

Think of it like this. A long time ago, someone sued someone else for riding a horse onto his potato field without being invited. The court decided that you shouldn't be free to enter onto the property of another unless you were invited to do so, and found that the rider had *trespassed*. Someone else riding a different horse onto a different field would be found liable for trespass based on the principle established by the first court. The first case was a precedent for the court's decision in the second case.

The common law and government

While the court is more or less free to develop the common law as it sees fit, the principles of the common law can be overridden by legislation made by the government. For example, the laws that deal with the interpretation and enforcement of contracts were at one point entirely governed by the common law. The government, as it decided it needed to regulate different aspects of the law of contracts, has made legislation covering lots of different areas of contract law, including such laws as the provincial *Sale of Goods Act* or the federal *Advance Payments for Crops Act*. The new legislation overruled the old common law principles.

From a family law perspective, it used to be the case that a husband could sue someone else for "enticing" his wife to commit adultery or to leave him. Suing someone for enticement was a claim created by the courts. The *Family Law Act* now expressly forbids a spouse from bringing a court proceeding for enticement, thus overriding the common law rule. Other old common law claims abolished by the *Family Law Act* include claims for breach of promise of marriage and loss of the benefits of marriage.

The common law and legislation

This leads to another important aspect of our legal system and the common law. The courts and the common law also play a role in interpreting laws made by the governments. Most of the case law in family law matters doesn't deal with ancient common law principles; it deals with how the courts have interpreted the legislation bearing on family law in the past. For example, section 15.2(4) [1] of the *Divorce Act* says that in considering a claim for spousal support, the court must:

> ... take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

A lot of the case law that deals with spousal support is about how this particular section of the *Divorce Act* has been interpreted in past cases, a good example of which is the 1999 Supreme Court of Canada decision in *Bracklow v Bracklow* [2]. The court said, at paragraph 36 of its decision:

> "Against the background of these objectives [in section 15.2(6)] the court must consider the factors set out in s. 15.2(4) of the *Divorce Act*. Generally, the court must look at the 'condition, means, needs and other circumstances of each spouse'. This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, 'in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse ... the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party': *Ross v Ross*. There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown."

A lawyer making an argument about why spousal support should be awarded to their client now might make an argument to the judge supported by case law, perhaps including the decision in *Bracklow*, showing how this section has been interpreted to award spousal support in the past to spouses in circumstances similar to those of their client.

Finding case law

Because the common law consists of the decisions of judges made over the past several hundred years, the common law is researched by looking through these decisions. These decisions used to be only available in books. Those books, depending on the publisher, were issued on a monthly, quarterly, or annual basis. (When you see a promotional photograph of a lawyer standing in front of a giant rack of musty, leather-bound books, the lawyer is standing in front of these collections of the case law.) These books, called *reporters*, were where the past decisions of the courts could be found if you needed to make an argument about how the law applied to your particular situation. You can still find collections of reporters in the library of your local courthouse or at a law school in your neighbourhood. These libraries are open to the public, although they may have restricted business hours.

Thankfully, these days almost every important decision is published online as well. This makes research a lot easier and saves a lot of time travelling to and from the library. CanLII [3], the Canadian Legal Information Institute, has a collection of most cases published since 1990 and a growing number of older cases from all parts of Canada. CanLII is, without a doubt, the best place to find case law.

The courts also post case law on their respective websites. You can search the judgments of:

- the Provincial Court of British Columbia [4],

- the Supreme Court of British Columbia [5],
- the Court of Appeal for British Columbia [5], and
- the Supreme Court of Canada [6].

These websites also keep lists of recently released decisions that may be published there before making it to CanLII.

Another way to look up case law is to read digests of the law on particular subjects. The best materials on family law are two books published by the Continuing Legal Education Society of British Columbia: the *Family Law Sourcebook for British Columbia* and the *British Columbia Family Practice Manual*. These books are available in some public libraries — the WorldCat [7] website will tell you if a library near you has copies — or at a branch of Courthouse Libraries BC [8].

Legal research can be terribly complex, partly because there are so many different places to look and partly because there are so many different cases. In fact, legal research is the subject of a whole course at law school. You might want to take a look at *The Canadian Legal Research and Writing Guide* [9], a free and comprehensive step-by-step guide on how to perform legal research in Canada based on the work of a well-respected legal research expert, Catherine Best. You can also get some help from the librarians at your local courthouse law library or university law library. In fact, the law library at UBC has a research desk that can help with certain limited matters. You might also consider hiring a law student to plough through the law for you. The law schools at UBC, the University of Victoria, and Thompson Rivers University will have job posting boards where you can put up a note about your needs and contact information.

If all else fails, or your issue is really complex, you could try hiring a professional legal researcher.

Legislation

Both the Parliament of Canada and the Legislative Assembly of British Columbia have the power to make laws in their different areas of authority. This kind of law is called *legislation*, *statutes*, or *acts*, all of which mean the same thing. Each piece of legislation is written to address a specific subject, like how we drive a car or how houses are built, where and when we can fish or hunt, what companies can do, and how schools, hospitals, and the post office work. Legislation governs how we interact with each other and helps implement government policy.

Government can also make regulations for a particular piece of legislation that might contain important additional rules or say how the statute is to be interpreted. The big difference between legislation and regulations is that legislation is publicly debated and voted on by the members of Parliament or the Legislative Assembly. Regulations are made by government without the necessity of a parliamentary vote, and often don't get much publicity as a result.

The two main statutes governing family law in British Columbia are the federal *Divorce Act* [6] and the provincial *Family Law Act* [8]. The Child Support Guidelines [5] is a regulation to the *Divorce Act* that has been adopted by the *Family Law Act*. The *Family Law Act* has its own regulations, including the Division of Pensions Regulation [10] and the Family Law Act Regulation [11].

Because statutes and regulations have such a big impact on how we live our lives, they are relatively easy to find and usually relatively easy to understand. (A big exception to this general rule is the federal *Income Tax Act* [1], which is a horror show I wouldn't wish on my worst enemy. Good luck understanding that when you have to file your taxes!) Unlike the common law, legislation is systematically organized, and when a law is changed, the change is recorded and it all continues to be nicely and systematically organized.

All of the current federal statutes can be found on the website of the Department of Justice [12]. All of the current provincial statutes can be found on the BC Laws [13] website run by the Queen's Printer. CanLII [14] also posts all current federal and provincial laws. It has the advantage of letting you see older versions of some laws, and you can search for cases that refer to specific statutes or regulations. You can also find the old *Family Relations Act* [5] on CanLII, which you won't be able to find on the BC Laws website.

The division of powers

The governments' different areas of legislative authority are described in sections 91 [15] and 92 [16] of the *Constitution Act, 1867* [17]. The federal government can only make laws about the subjects set out in section 91, and the provincial governments can only make laws about the subjects set out in section 92.

From a family law perspective, this means that only the federal government has the authority to make laws about marriage and divorce, while the provincial governments have the exclusive authority to make laws about marriage ceremonies, the division of property, and civil rights. As a result, the federal *Divorce Act* talks about divorce and issues that are related to divorce, like parenting children, child support, and spousal support, and the federal *Civil Marriage Act* [10] talks about marriage and issues related to marriage. The provincial *Family Law Act* talks about parenting children, child support, and spousal support as well, but also talks about the division of family property and family debt, the management of children's property, the guardianship of children, and determining the parentage of children.

The doctrine of paramountcy

Sometimes the subjects over which each level of government has authority overlap and, according to a legal principle called the *doctrine of paramountcy*, all laws are not created equal. Under this doctrine, federal legislation on a subject trumps any provincial legislation on the same subject. This is important because in family law both the *Divorce Act* and the *Family Law Act* deal with parenting children, child support, and spousal support. As a result, orders under the *Divorce Act* will usually be paramount to orders under the *Family Law Act* on the same subject.

It isn't *quite* right to say that federal legislation "trumps" provincial legislation. It's a little more complex, and this is important because the *Divorce Act* and the *Family Law Act* cover so many of the same subjects. Really, what the legal test says is that in order for the federal legislation to win, there must be a "functional incompatibility" between the provincial legislation and the federal legislation, so that it is impossible to comply with both statutes and that complying with one statute would frustrate the purpose of the other statute. Here's what the Supreme Court of Canada said in a 2007 case called *Canadian Western Bank v Alberta* [18], at paragraphs 69 and 75:

> "According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers.
>
> ...[t]he onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law."

That's a bit complicated, but what it all boils down to is what the Supreme Court of British Columbia said in a 2014 case called *B.D.M. v A.E.M.* [19]: "the doctrine of paramountcy does not preclude consideration and application of the FLA in family law proceedings in which a divorce is granted."

Family law legislation

The two most important pieces of legislation relating to family matters are, as you will have gathered, the federal *Divorce Act* and the provincial *Family Law Act*. The most important regulation is the Child Support Guidelines, a regulation to the *Divorce Act* that has also been adopted by the *Family Law Act*.

The *Divorce Act* talks about:

- divorce,
- decision-making responsibility,
- parenting time and contact with children,
- moving away, with or without children,
- child support, and
- spousal support.

The *Family Law Act* talks about:

- determining the parentage of children,
- guardianship of children,
- parental responsibilities, parenting time, and contact with children,
- moving away, with or without children,
- child support,
- spousal support,
- family property, family debt, and excluded property,
- companion animals,
- managing children's property,
- orders protecting people, and
- orders protecting property.

The Child Support Guidelines talks about:

- calculating the amount of child support and determining children's special expenses,
- determining the income of parents, and
- disclosure of financial information.

Because family law issues can be very broad and touch on other areas of law, such as contract law or company law, other pieces of legislation may also apply to a problem. For example, the *Name Act* [20] allows a spouse to change their name following a divorce, the *Adoption Act* [21] deals with adoption, the *Land Title Act* [3] deals with real property, the *Partition of Property Act* [22] allows a co-owner of real property to force the sale of the property, and the *Business Corporations Act* [23] deals with the incorporation of companies, shareholders' loans, and other things that may be important if a spouse owns or controls a company.

Choosing the law and the court

Both the federal *Divorce Act* and the provincial *Family Law Act* deal with family law issues. As well, both the Provincial Court and the Supreme Court have the authority to hear proceedings dealing with family law issues. Deciding which legislation you are going to make your claim under is called making the *choice of law*. Deciding in which court you are going to bring your claim is called making the *choice of forum*.

Jurisdictional issues

Because of the rules set out in the *Constitution Act, 1867*, that we talked about earlier in this section, the federal government has the sole authority to make laws on the following subjects:

- marriage,
- divorce,

- parenting children, and
- spousal support and child support.

Because of the same statute, provincial governments have exclusive authority to make laws dealing with these subjects:

- the formalities of the marriage ceremony,
- spousal support and child support,
- guardianship and parenting children,
- the division of property and debt,
- adoption,
- children's welfare, and
- naming and changing names.

To further complicate things, the Provincial Court and the Supreme Court can make orders about some of the same *subjects*, but not all, and under some of the same *legislation*, but not all. In family law proceedings, the Provincial Court can only deal with applications involving the following subjects:

- guardianship and parenting children under the *Family Law Act*,
- moving away, with or without children, under the *Family Law Act*,
- spousal support and child support under the *Family Law Act*,
- companion animals, and
- orders for the protection of people under the *Family Law Act*.

The Supreme Court, on the other hand, can deal with all of these subjects and everything else, including divorce:

- divorce under the *Divorce Act*,
- determining the parentage of children under the *Family Law Act*,
- guardianship under the *Family Law Act*, and parenting children under both the *Divorce Act* and the *Family Law Act*,
- managing children's property under the *Family Law Act*,
- moving away, with or without children, under both the *Divorce Act* and the *Family Law Act*,
- spousal support and child support under both the *Divorce Act* and the *Family Law Act*,
- dividing property and debt under the *Family Law Act*,
- companion animals under the *Family Law Act*,
- orders for the protection of people under the *Family Law Act*, and
- orders for the protection of property under the *Family Law Act*.

As you can see, if you wish to make claims about divorce, determining the parentage of a child, managing children's property, dividing property (other than a companion animal) and debt, or protecting property, you must make your application to the Supreme Court. Otherwise, you can make your claim in either court.

Making matters worse, there can be court proceedings happening at the same time, involving the same people and possibly the same problems, before both the Provincial Court and the Supreme Court. For example, a claim for a couple's divorce can be before the Supreme Court at the same time as an application about parental responsibilities and spousal support is being heard by the Provincial Court. That's not so bad, because each court is dealing with different legal issues. Where it gets hairy is when someone starts a claim in the Provincial Court — usually because that court doesn't charge filing fees and is a little bit easier to navigate — and the other side starts a claim in the Supreme Court on the same legal issues plus a few more that the Provincial Court can't deal with, like the division of property. In cases like that, either party can make an application that the proceedings in the Provincial Court be *joined* with those in the Supreme Court so that they are heard at the same time before the same court.

The choice of law

As we've just discussed, if you want to get a divorce, you must make your claim under the *Divorce Act*. If you wish to obtain an order dealing with property or debt, you must make your claim under the *Family Law Act*. However, if you want to make a claim about parenting children, child support and spousal support, you can make your claim under either piece of legislation. But that's not all.

Only *married spouses* can make applications under the *Divorce Act*, while *married spouses*, *unmarried spouses*, *parents* and other unmarried people may all make applications for relief under the *Family Law Act*. Also, the Provincial Court can only deal with claims under some parts of the *Family Law Act* while the Supreme Court can hear claims under the *Divorce Act* and all of the *Family Law Act*. Here's a handy chart.

	Family Law Act	***Divorce Act***
Divorce		Yes
Parenting children	Guardianship and parental responsibiities	Decision-making responsibility
Parenting time and contact	Yes	Yes
Child support	Yes	Yes
Children's property	Yes	
Spousal support	Yes	Yes
Property and debt	Yes	
Orders protecting people	Yes	
Orders protecting property	Yes	

The choice of forum

Forum means place. In family law matters, the choice of forum is about choosing which of the two trial courts to make a claim in, the *place* of your trial. The Provincial Court has certain limits to its authority and, as a result, has limits on the kinds of claims it can hear. The Supreme Court has the authority to deal with almost every legal issue. It also has something called *inherent jurisdiction*, meaning that the Supreme Court, unlike the Provincial Court, is not limited to the authority it is given by legislation. It is safe to say that, as far as family matters are concerned, the Supreme Court can deal with everything the Provincial Court can, as well as everything it can't.

Other things to think about when making the choice of forum are complexity and cost. The process of each court is guided by each court's set of rules. The Supreme Court Family Rules [9] offer a much wider variety of tools than the Provincial Court Family Rules [2], but the rules of the Supreme Court are much, much more complicated than the rules of the Provincial Court. The Provincial Court charges no filing fees and has a relatively streamlined procedure. The Supreme Court charges filing fees, and the extra tools available under the Supreme Court Family Rules are helpful but add to the cost of bringing a proceeding to trial.

This chart shows which level of court can deal with which issue:

	Provincial Court	Supreme Court
The *Divorce Act*		Yes
The *Family Law Act*	Yes	Yes
Divorce		Yes
Parenting children	Yes	Yes
Time with children	Yes	Yes
Child support	Yes	Yes
Children's property		Yes
Spousal support	Yes	Yes
Property and debt	Pets only	Yes
Orders protecting people	Yes	Yes
Orders protecting property		Yes

While it is possible to start an action in the Provincial Court to deal with one or two issues (like parental responsibilities or child support) and later start an action in the Supreme Court to deal with other issues (like dividing family property or divorce), it's usually best to confine yourself to a single court to avoid overlaps and keep things as simple as possible.

Resources and links

Legislation

- *Divorce Act* [7]
- *Family Law Act* [6]
- Child Support Guidelines [6]
- *The Constitution of Canada* [7]
- *Civil Marriage Act* [24]
- Provincial Court Family Rules [2]
- Family Law Act Regulation BC Reg 347/2012 [25]
- *Name Act* [26]
- *Adoption Act* [27]
- *Partition of Property Act* [28]

Resources

- "Canadian Legal Research and Writing Guide" [29] from CanLII

Links

- CanLII [30]
- Decisions of the Provincial Court of British Columbia [4]
- Decisions of the Supreme Court of British Columbia [5]
- Decisions of the Court of Appeal for British Columbia [5]
- Decisions of the Supreme Court of Canada [6]
- WorldCat [31]
- CanLII blog [32] (video tutorials on using CanLII)
- "Family Cases" [33] from the Provincial Court of BC

- "Do you need to go to Provincial (Family) Court or Supreme Court?" [34] from Legal Aid BC
- "Which court to go to?" [35] from Legal Aid BC
- "Courts of BC" [36] from Justice Education Society

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 19 November 2023.

References

[1] http://canlii.ca/t/7vbw#sec15.2subsec4
[2] http://canlii.ca/t/dlq
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[7] http://www.worldcat.org
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[30] https://www.canlii.org
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[34] https://family.legalaid.bc.ca/bc-legal-system/court-orders/get-order-bc/do-you-need-go-provincial-family-court-or-supreme-court
[35] https://family.legalaid.bc.ca/scenarios/which-court-go
[36] https://www.clicklaw.bc.ca/resource/1360

You and Your Lawyer

Lawyers are people with special legal training (and a law degree) who are licensed to practise law by their province's law society. The jobs of the Law Society of British Columbia [1] include regulating who can be a lawyer, deciding which lawyers can work as family law mediators, family law arbitrators and parenting coordinators, and protecting the public by setting and enforcing lawyers' standards of professional conduct. Since many people involved in family law disputes haven't had to deal with lawyers before, this section is about your relationship with your lawyer.

This section provides an overview of the lawyer-client relationship. It discusses how to find and hire a lawyer, how your lawyer bills for their services, what you can do if you're not happy with your lawyer, and how you or your lawyer can end the lawyer-client relationship.

Introduction

All lawyers in British Columbia are members of the Law Society of British Columbia [1]. Many are also members of the Canadian Bar Association [2] or the Trial Lawyers Association of British Columbia [3], or are members of local bar associations like the Vancouver Bar Association and the Victoria Bar Association. The law society's primary purpose is to govern and regulate lawyers in order to protect the public interest. The purposes of bar associations usually include providing continuing professional education for lawyers and lobbying for changes to the legal system. As officers of the court and as members of the provincial law society, lawyers are held to a high standard of conduct.

Lawyers as advocates

Your lawyer's primary role is to protect and promote your legal interests. At the same time, your lawyer must follow the high standard of conduct required by the law society and act at all times in an ethical manner. Lawyers' duties to their clients, to each other, and to the courts are governed by:

1. the provincial *Legal Profession Act* [4];
2. the Rules [5] of the Law Society of British Columbia; and,
3. the law society's Code of Professional Conduct [6].

In a way, your lawyer is like a plumber. If you tell your plumber to install your sink, they install your sink. On the other hand, if you ask your plumber to hook the hot water pipe up to the ice-making machine intake or route the toilet drain into the bathtub, you'd expect your plumber to give you some common sense advice about why that might be a bad idea. However, your lawyer is also a bit like a soldier: your lawyer is your sword and shield, protecting you from some of the more unpleasant and adversarial aspects of litigation, while fighting for you and pursuing your claim.

You should expect your lawyer to understand the law and have a deep, working familiarity with the practice and procedures involved in each dispute resolution process. While you should expect your lawyer to do just what you tell them to do, you should also expect your lawyer to tell you if your instructions are not in your best interests, and perhaps even to refuse to accept your instructions. You should especially expect your lawyer to tell you if what you want to do will be harmful to your case, to yourself or to the wellbeing of your children.

However, your lawyer is not your friend, your cheerleader or an uncritical advocate. Your lawyer is a professional who should have the strength to tell you what you need to hear about your case, whether the news is fair or foul, and offer you objective, reasoned, informed and unemotional guidance. This can at times be a bit disconcerting to someone experiencing a high level of emotional distress. Remember that your lawyer's objectivity and understanding of the system are the most important things they provide you.

The website of the Law Society of British Columbia [7] is an extremely helpful resource for people who have hired a lawyer or people who are thinking of retaining a lawyer. It provides a lot of information about the lawyer-client

relationship and about lawyers' ethical duties to their clients.

Lawyers as dispute resolution professionals

All this being said, some lawyers also work as mediators, arbitrators, and parenting coordinators. Lawyers who act in these roles are not serving as advocates in a traditional lawyer-client relationship; their jobs are much different. When working as a mediator, an arbitrator, or a parenting coordinator, the lawyer may be *a* lawyer, but they are not working as *your* lawyer.

Lawyers who are family law mediators have special, additional training in mediation. Family law mediators do not represent you or your spouse; they are providing mediation services to the both of you, rather than advocacy services for just one of you. Lawyers who act as mediators are neither party's advocate.

Lawyers who are family law arbitrators have special, additional training in arbitration and are required to meet other requirements imposed by the Law Society and the Family Law Act Regulation [11]. Family law arbitrators are like private judges; their job is to hear the evidence and arguments presented by the parties and fairly resolve a legal problem by making a decision. Lawyers who act as arbitrators are neither party's advocate: they are neutral decision-makers.

Lawyers who are parenting coordinators are trained as mediators and arbitrators, and have a great deal of additional training on top of that. The sort of services parenting coordinators provide are a blend of mediation and arbitration, with a bit of counselling thrown in. Parenting coordinators help parents deal with parenting disputes when they arise and, if an agreement cannot be reached between the parents, then the parenting coordinator will make a decision resolving the issue using a process that's a bit like arbitration. Lawyers who act as parenting coordinators are neither party's advocate. If they're anyone's advocate, they're the children's advocate.

Finding and hiring a lawyer

Sometimes the best way to find a lawyer is the same way you find a family doctor or a school for your children: by word of mouth. Ask your friends, family, and co-workers if they've ever used a family law lawyer, and, if so, how they liked that person. Did the lawyer return telephone calls promptly? Did the lawyer keep them up to speed on the progress of their file? Was the lawyer's bill reasonable? Did they feel comfortable with their lawyer? Did they *like* their lawyer? You can also ask your doctor, your accountant, or your dentist if they can refer you to someone. Some of the other things you might want to think about when hiring a lawyer are described in the section on Separating Emotionally.

The Canadian Bar Association's Lawyer Referral Service [8] is another way to find a lawyer. This service keeps a roster of subscribing lawyers in your area, a list of the areas of law they practise, and a list of the languages they speak. Call 604-687-3221 in Vancouver and the Lower Mainland or, elsewhere in British Columbia, call 1-800-663-1919.

Yet another way to find a lawyer is by contacting Legal Aid BC for Legal Aid Intake Services [9]. Legal Aid BC provides legal aid in British Columbia, and, if you meet their criteria, they will refer you to a lawyer and pay for the lawyer's services to boot. Be warned, however, that since the provincial government's catastrophic reduction of funding to LSS in 2002, legal aid will generally only be available for people dealing with situations of family violence or where the abduction of children is a possibility. Go to Legal Aid BC's website on how to apply for legal aid [10] for more information about their eligibility criteria.

If none of this works out, you can try finding a lawyer through Facebook or the internet, but only as a last resort. Typing "Vancouver family lawyer" or "best divorce lawyer" into a search engine is a terrible way to find a lawyer. While you'll certainly get a ton of results, you won't know anything about those lawyers except for the things they say about themselves on their websites. The same thing applies to picking a lawyer through an ad in the Yellow Pages or a newspaper.

Remember that not all lawyers practice family law, of course, and this is something you may want to take into consideration. Some lawyers focus exclusively on family law, so that family law is the whole of their practice; others practice family law along with other areas of the law. If a lawyer advertises online, the lawyer's ad or website will usually say exactly what area or areas of law they practice. You may wish to pay special attention to lawyers who tend to spend all or most of their time on family law disputes.

The first interview

Once you've gathered the names of a few lawyers who sound promising, check them out on the website of the Law Society of British Columbia [11] and make an appointment to meet with each of them. The Law Society's lawyer director [12] has lots of information about lawyers, including their contact information, how long they've been practicing law, their discipline history, and whether they're qualified to work as an arbitrator, a mediator or a parenting coordinator.

A few lawyers will offer you some of their time for free or at a reduced rate for an initial interview. The lawyers you meet through the Lawyer Referral Service will charge a special reduced fee for a half-hour initial interview. Most lawyers, however, will bill for initial interviews at their usual hourly rate.

Do not assume that the lawyer will not charge for their time unless the lawyer specifically advertises that they offer free initial consultations. You must expect a bill for the lawyer's time.

Use this first meeting as an opportunity to assess how you feel about each lawyer and how you relate to them; you needn't hire the first lawyer you meet. You are entitled to shop around before you choose the lawyer who is right for you. You can also use your first interview with each lawyer to get that lawyer's take on your problem. Tell them about your problem concisely, and let the lawyer ask questions which pull out the details of your problem.

Don't be shy about asking lawyers about their hourly rates, how they will bill you, and what sort of disbursements (a lawyer's out-of-pocket expenses for things like photocopying and filing fees) the lawyer will expect you to pay for. Ask what sort of retainer they will require, what their interest rate is on overdue accounts, and whether they will be charging you any additional fees based on their success or the complexity of your problem. Ask whether anyone else in their firm will be working on your file, whether you will be billed for their work, and maybe ask to meet them too.

(If you're meeting with a lawyer who also works as a family law mediator or family law arbitrator, and you're thinking of hiring them to act in that capacity, you don't want to give the lawyer too many details about your situation. Family law mediators and family law arbitrators must be neutral and impartial. Too much information from just one of you may make the lawyer unable to help resolve your dispute.)

For a summary guide to your first interview with a lawyer, see How Do I Prepare for My First Meeting with a Lawyer?. It's located in the Helpful Guides & Common Questions part of this resource in the Miscellaneous section.

Hiring your lawyer

Once you've picked a lawyer you like and have decided to hire them, your lawyer will require you to sign a retainer agreement and give them a deposit towards your first couple of bills. Hiring a lawyer is called *retaining* a lawyer. A *retainer agreement* is a contract between your lawyer and yourself that you each will sign, and describes the legal and financial aspects of your relationship to each other. Read the agreement carefully! If there are any terms you don't understand, be sure to ask your lawyer, and, likewise, if you object to any of the terms of the agreement, express your objection and ask how your concern might be addressed.

A *retainer* is a sum of money you will likely be asked to give as a deposit against your lawyer's future services and fees. The amount of the retainer the lawyer will ask you for is usually based on the lawyer's expectation about the amount of work that will likely have to be performed in the near future, which will change from case to case. In most family law cases, the lawyer will not expect that your initial retainer will cover all of the cost of bringing your case to a conclusion, especially if you will be resolving your case in court. In cases like these, the lawyer will pay their

monthly bills from your retainer and ask you for a new retainer when the old one is close to being used up.

Never hesitate to tell your lawyer about any concerns you have about their bills or services.

(A family law mediator will ask you to sign an Agreement to Mediate rather than the usual retainer agreement. The Agreement to Mediate will set out the details of the mediator's rate and expectations about payment, and how each mediation session will be paid for. The same thing applies to family law arbitrators. Parenting coordinators will want you to sign a Parenting Coordination Agreement, and will usually ask for both a retainer and a deposit.)

Unbundled family law services

Traditionally, retaining a lawyer meant handing all the legal work over to the lawyer and their staff to handle. More recently, however, a different kind of retainer agreement called a *limited scope retainer* has become more popular. Another term that's used for this arrangement is *unbundling* or *unbundled legal services*. With unbundled legal services, a lawyer or paralegal will only do some of the work. It could be helping to prepare the first documents required to start a case, or helping to negotiate a settlement with the other party, or any other task that the limited scope retainer agreement specifies. The rest of the work your case requires will be up to you to complete.

This sort of arrangement usually costs less than full-scope legal representation because the lawyer providing unbundled legal services works on, and charges you for, only those tasks that you and your lawyer agree to in advance. If you are interested in hiring a lawyer on this basis, be sure to raise the question of unbundled legal services at the first interview. Is it possible, in the lawyer's view, for them to do just some of the work on your case? Are there tasks that you can do? Is the lawyer prepared to just write an affidavit or a letter, just prepare a court document, or maybe just coach you through your court proceeding?

Not all family law lawyers offer this arrangement; however, the Unbundled Legal Services [13] roster lists those who do.

How your lawyer charges you

You should discuss with your lawyer, at the very first meeting, exactly how the lawyer will bill you for their time and for the expenses the lawyer incurs in working on your file. Most lawyers will bring this up on their own, but if your lawyer happens to forget to talk about it, you should bring it up. Don't be shy. You will, at a minimum, want to know what the lawyer's hourly rate is and what the lawyer's expectations are regarding payment of their accounts.

Your retainer

In British Columbia, family law lawyers cannot work on a contingency basis — for a percentage of the award or settlement received by the client — which is how some other lawyers, like personal injury lawyers, often get paid. Family law lawyers bill for their services by the hour, although some may bill on a fixed, flat-rate for smaller tasks where the scope of the lawyer's services is clearly limited.

Family law lawyers will usually expect to be paid some money up front, called a *retainer*. While some family law lawyers may agree to be paid from the proceeds of the sale of proeprty following trial, most often they'll expect to be paid by an initial retainer, followed by additional retainer payments as necessary, and will describe the work performed and charged for on a monthly billing cycle.

The amount you pay as your retainer is held by your lawyer *in trust*. (In other words, the money still belongs to you. It's just being held by your lawyer on your behalf.) Your lawyer will withdraw money from your retainer each time they bill you, and use that money to pay their account. After two or three bills have been paid from your retainer, your retainer may be exhausted. At that point your lawyer will usually ask you for another retainer, or your lawyer may simply bill you directly each month. On the other hand, if your problem is resolved more quickly than was expected or if you fire your lawyer, you will be entitled to a refund of however much of your retainer is left over.

The terms of how your lawyer will bill you will be set out in your retainer agreement. This is one of the reasons why it is essential that you read the lawyers's retainer agreement very carefully before you sign it. Note that lawyers' fees are subject to PST and GST. The fees of mediators, arbitrators and parenting coordinators are subject to GST alone.

Reviewing your lawyer's bill

Both you and your lawyer have the right to have the lawyer's accounts reviewed for fairness under the *Legal Profession Act* [4]. The fee review is performed by a registrar, or sometimes by an associate judge, of the Supreme Court at a court hearing.

At this hearing, the registrar will be presented with the lawyer's bills to you, any other supporting documents, such as a *time diary*, a statement of the lawyer's charges to your bill by the amount of time spent on each task on a day-by-day basis, and the documents and correspondence that were generated over the course of the lawyer's work for you. Your lawyer will attempt to satisfy the registrar that their fees and any amounts billed for disbursements were reasonable. You will have the opportunity to argue that the lawyer's bills were unreasonable and present evidence in support of your position.

The registrar will look at the bills and apply a number of considerations in deciding whether the lawyer's accounts were fair or not, including:

- the value and importance of the results obtained,
- the complexity or novelty of the issues,
- whether the time spent was reasonable, and
- whether your lawyer's hourly rate was reasonable.

After hearing the evidence and arguments, the registrar will make a decision and issue a *Certificate of Fees* setting out the amount of fees and disbursements that the registrar has approved as reasonable. That becomes the amount you owe to your lawyer for their services, and, in some cases, the amount of the refund your lawyer owes you. Most importantly, the Certificate of Fees has the same standing as a court judgment and can be used as such to enforce the amount you owe to the lawyer or the amount the lawyer owes you.

As an alternative to a review under the *Legal Profession Act*, the Law Society operates a Fee Mediation Program [14]. This is an informal process for dealing with fee disputes without having to go to court.

Tax deductions for legal fees

It is important to know that the portion of a lawyer's bill for *obtaining or enforcing an order for child support or spousal support* is tax-deductible. The cost of *defending* a claim for spousal support or child support is not deductible. (Tax deductions reduce the amount of income taxes you have to pay.)

To claim this deduction, the lawyer must write a letter to the Canada Revenue Agency describing the portion of their fees that had to do with your claim for spousal support or child support. If you have children requiring support or will be asking for spousal support and you think this kind of letter will be worth the cost of having the lawyer prepare it for you, you need to tell your lawyer as soon as possible, preferably the moment the lawyer takes your case. Lawyers generally don't keep track of things like this automatically, mostly because the extra work and cost to the client may outweigh the tax benefit.

If you don't ask your lawyer about this at the beginning of their retainer, it may be impossible for your lawyer to winnow out the parts of their bills that were dedicated to support issues, and the cost of the time your lawyer spent reviewing your file may be more than the deduction you will get. Ask your lawyer to track their time right away!

If you are dissatisfied

Most lawyers are deeply concerned about the satisfaction of their clients and will go out of their way to fix, or at least explain, any problem you might be experiencing. In light of this, if you are concerned about how your file is being handled or have a complaint about your lawyer, you should first of all discuss the matter with your lawyer. This may not always be appropriate, and you may want to contact the Law Society before you speak with your lawyer.

The Law Society exists to govern the legal profession for the benefit of the public. It is not the lawyer's friend or ally. You have the right to bring a complaint to the Law Society about a lawyer's actions, or lack of action. You can contact the Law Society at:

> The Law Society of British Columbia
> 845 Cambie Street
> Vancouver, British Columbia
> V6B 4Z9
> Telephone 604-669-2533 or 1-800-903-5300
> Facsimile 604-669-5232

There is no charge to speak to one of the Law Society's complaints officers and you do not need to hire a lawyer to make a complaint or begin the complaints process.

Ending the lawyer-client relationship

You or your lawyer can end your working relationship; you can fire your lawyer and your lawyer can fire you. From a lawyer's point of view, neither event occurs particularly often, but it does happen.

Firing your lawyer

Clients usually want to fire their lawyers when they're unhappy with the service they're receiving. You can fire your lawyer simply by sending them a letter to that effect or giving your lawyer a call, although you'll probably want to phrase things a bit more nicely than "You're fired!" The lawyer-client relationship is a business relationship, and you can terminate this relationship any time you wish for any reason you wish.

Of course, there will be a few things left to deal with after you've given your lawyer the news.

First, you'll have to pay your outstanding account, if there is one. If you disagree with the amount charged, you can apply to the court to have your lawyer's bill reviewed, which is described in more detail above. On the other hand, if there's still money in your retainer, that's *your* money and you can ask to have it sent back to you.

Then there's the matter of your file. If your case is still on-going, you'll need to get your file. If you've hired another lawyer, your lawyer will normally just send it to your new lawyer; if you haven't, you're entitled to ask that your lawyer send it straight to you. There may be a slight problem if you still owe money to your lawyer. If you still owe money, your lawyer is entitled to keep your file until their account is paid in full. In the right circumstances, your lawyer may agree to transfer your file to your new lawyer on the new lawyer's promise to make sure that their bill gets paid when the file wraps up.

When your lawyer fires you

This really doesn't happen all that frequently. Most often, a lawyer will fire their client for one of the following reasons:

- an account is unpaid and there is a low likelihood that it will get paid,
- the client refuses to give reasonable instructions or follow the lawyer's advice, or
- the trust aspect of the lawyer-client relationship has broken down.

If your lawyer fires you, they will normally do so in a letter detailing the reasons why they can no longer act for you and highlighting any important upcoming dates in your case. Many lawyers will also recommend other lawyers you may wish to consider hiring in their place.

After you've been fired, the same concerns arise as if you'd fired your lawyer. The lawyer will be concerned about any outstanding accounts and you will want your file sent to you or to your new lawyer. As far as your outstanding account is concerned, it's important to know that your lawyer can have their own bill reviewed under the *Legal Professions Act* to get a court decision about the amount owing. In fact, that's something both of you can do.

Resources and links

Legislation

- *Family Law Act* [6]
- Family Law Act Regulation [11]
- *Legal Profession Act* [4]

Links

- Law Society of British Columbia [1]
- Canadian Bar Association [2]
- Vancouver Bar Association [15]
- Victoria Bar Association [16]
- Trial Lawyers Association of British Columbia [3]
- Law Society of BC Rules [5]
- Law Society's Code of Professional Conduct [6]
- Family Law Act Regulations Explained – Ministry of Justice website [17]
- CBABC Lawyer Referral Service [8]
- Legal Aid BC's Legal Aid Intake Services [9]
- Legal Aid BC's website on how to apply for legal aid [10]
- BC Parenting Coordinators Roster Society [18]
- Mediate BC's website for Family Mediation Services [19]
- Law Society Fee Mediation Program [20]
- BC Family Unbundling Roster [21]
- People's Law School's Unbundled Legal Services [22]

Resources

- Working with Your Legal Aid lawyer [23] from Legal Aid BC
- How should I prepare before I meet a lawyer? [24] from the Justice Education Society
- Your First Meeting [25] from the Law Society

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 20 February 2023.

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[2] http://www.cba.org/
[3] http://www.tlabc.org/
[4] https://canlii.ca/t/544sl
[5] https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/
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[25] https://www.lawsociety.bc.ca/working-with-lawyers/your-first-meeting/

Access to Family Justice

At some point in our high school civics class we learn that we live in a *nomocracy*, which means *a society governed by the rule of law*. Living in a society governed by the rule of law means a whole lot more than just having police who arrest shoplifters and drunk drivers. Among other things, it means we have laws that are:

- written,
- published,
- understandable, and
- apply equally to everyone.

The rule of law also means that we have an accessible justice system that resolves legal disputes — whether between corporations, between an individual and the state, or between people leaving a family relationship — quickly, efficiently, affordably, and fairly. Unfortunately, in many parts of Canada, aspects of "living in a society governed by the rule of law" are more of an ideal than a reality.

This section talks about:

- common barriers people face when accessing family justice in British Columbia,
- a short history of the access to family justice crisis in Canada,
- ways that the courts, government, non-profit organizations, the Law Society, lawyers, mediators, paralegals, law students, and other legal advocates have responded to the problem,
- future developments and ideas about other steps that might make family justice more accessible, and
- where you can find legal help for a family law matter.

Barriers to justice

Is access to justice just about access to lawyers and courts? No, and especially not for family law matters. For people going through separation and divorce, one of the first barriers to confront is the misguided perception that court is where they need to go, or where they have to go. Popular media would have us believe that lawyers arguing before a judge is somehow the proper way to settle relationship breakdowns. That's wrong. The fact is, unless family violence is a factor or urgent intervention is needed to protect children, people, or property, most families don't need the court's help to fairly resolve their separation.

What people do need is accurate information about legal rights — their own rights, the other person's rights, and their children's rights — finances, and the risks and benefits of the choices they want to make. This information can empower people to resolve their legal issues on their own, and make appropriate and acceptable compromises as necessary. People then need certainty that the decisions they've made resolving their issues will be respected, followed, and enforced if necessary. Many efficient, sensible, and effective alternatives to court exist that can meet these core needs. And many of them are less costly, less stressful, and less time-consuming than going to court. Court is generally only better for highly contentious family law problems.

JP Boyd on Family Law is filled with chapters designed to reduce the barrier to justice that arises from our perception that court is the only or the best option:

- Resolving Family Law Problems out of Court, includes sections about non-court processes and the legal professionals who provide them, such as Collaborative Negotiation, Family Law Mediation, Family Law Arbitration, and Parenting Coordination, and
- Family Law Agreements, provides information on how people can settle their own ongoing or future disputes with minimal involvement by lawyers or courts.

There are other barriers to family justice as well, of course. The law is complex, often hard to find and often hard to understand. The rules that govern the court system, and the forms the rules require, are also complicated. (These are things *JP Boyd on Family Law* tries to address as well.) If you decide that you'd like to hire a lawyer to help guide

you through the law and the rules, lawyers' fees can be very expensive and are sometimes out of reach. Even if you can afford a lawyer, there may not be a lawyer near you who specializes in family law.

Cost barriers

For those who do end up in court, the stakes can be high, the process can feel intimidating, and having a lawyer by your side can feel like a priority. The cost of this can be a significant barrier, however. Based on a 2021 legal fees survey [1], British Columbians can expect to pay on average more than $6,000 per day for a lawyer's time in trial. Many people simply cannot afford to pay for full legal representation.

You might apply to Legal Aid BC [10] to see if you qualify for free legal representation, but finite public funding for these services is another barrier. Universal legal aid is not a reality in BC. You probably won't qualify for help, unless your annual income is below the poverty line and your legal problem is one of the few problems legal aid will help with. Even if you do qualify, you won't get a legal aid lawyer to help you with all of your case, just some of it, and only for a limited amount of time.

Apart from legal aid lawyers, Legal Aid BC also runs several services to connect people to family law legal advice [2]. Although these services are even more limited in terms of the number of hours of advice one can get, and while most are still for low income individuals, you may qualify for these even if you don't qualify for a legal aid lawyer. These programs include:

- *Family Duty Counsel*,
- *Family Advice Lawyers*, and
- *FamilyLawLINE*

Service confusion barriers

There is a vast array of legal information resources, legal clinics, support organizations, online tools and guides, and lower-cost options for hiring legal professionals. But what are they? Where and when do they operate? Whom do they help? The legal assistance landscape is badly fragmented. The relative obscurity of some of these services, geographical limitations for certain services, confusion about eligibility criteria, the lack of an integrated referral process, and the exhaustion many experience from having to retell one's story again and again to different intake workers, all raise barriers to accessing justice.

Websites like Clicklaw [3], and services like PovNet's Find an Advocate Tool [4] can help people sort through the confusion, and reveal options like Rise Women's Legal Centre [5], and other advocates and clinics who can help in family law matters.

Time barriers

It's not unusual to have to represent oneself in court. The rates of people without lawyers are as high as 80% in some courts. But being in that position means having to learn about the law and court processes. The laws of British Columbia and Canada are published in print and online, and can be found through the provincial government's BC Laws website [6], from the Canadian Department of Justice [7], or, even better, through the awesome website provided by the Canadian Legal Information Institute [3]. Courthouse Libraries BC also operates library branches in courthouses throughout the province, and the librarians who work there are skilled at helping members of the public locate legislation and other forms of legal information.

This wide availability of legal information is a good thing, but it takes time to educate yourself. Did you do a poor job filling out a legal form because you couldn't make the time to research how to do it well? Did you get a bad outcome as a result? You may have non-negotiable time commitments like kids, a dependent relative, a critical healthcare appointment, or a job that you cannot afford to lose. It takes time to be an informed self-represented litigant, and people sometimes resign themselves to unfair outcomes because they don't have the time to do anything

else. The time needed to self-educate and digest information is one of the biggest barriers to justice.

Complexity barriers

While public legal information can help explain court procedures, case law and legislation, ultimately the primary materials that must be understood are the legal authorities. Unfortunately, statutes and reasons for judgement are not written for the average person; they're written by lawyers (or by judges who used to be lawyers) for lawyers. For many, the complexity of intricate court rules and the dense legal language in statutes and case law leads to confusion and misunderstanding. The complexity of the law undermines people's ability to understand it, and this complexity is another barrier to justice.

Some of the complexity can be minimized by trustworthy plain language resources that are written for the public. Going to the Clicklaw website [3] is a good place to start. That website is a clearing house of reliable public legal education and information about family law in British Columbia. There's also:

- Legal Aid BC's Family Law website [13],
- the Justice Education Society's Online Help Guide for Supreme Court family law matters [8],
- the People's Law School's Dial-A-Law website for families and children [9], and
- the Ministry of Attorney General's Family Justice website [10].

If you go to court, you'll want to learn about the British Columbia Supreme Court or the Provincial Court, and their rules as well.

The Provincial Court, has relatively easy-to-understand rules that can be printed into a thick brochure, doesn't charge any filing fees, and has forms that are easy to fill out. The Provincial Court website has a Going to Court webpage [11] with helpful materials for self-represented litigants.

If you need to divide property upon separation or get a divorce, you have to go to the Supreme Court. This court has rules the width of the Kelowna phone book, charges fees for almost every step of the process, and uses more complicated forms. The Supreme Court also has some information for self-represented litigants on its website [12].

Equity and inclusion barriers

Barriers have a tendency to add up. Statistically speaking, being part of certain marginalized or vulnerable groups can — for a variety of reasons outside that person's direct control — increase the risk that they will experience a family law problem. And once they do, being a member of a marginalized or vulnerable group can mean they face further barriers trying to access to family justice. Disability, language, financial status, mental health capacity, geographical remoteness, gender, class, religion, sexual orientation, immigration status, and Indigenous status are all factors that can increase the prejudice individuals face, increase the complexity of the problems they face, limit their access to comprehensible information, and more. Not all of these barriers are unique to family justice, but they are most certainly present.

Efforts within the justice system to ease these barriers should focus on law reforms, supportive services, cultural competency in the legal profession, and more accessible, inclusive legal information.

The point is that there are a lot of barriers to accessing justice in this province — and everywhere else in Canada, really — which include common perceptions about court being the best place to solve problems and challenges accessing out-of-court-options, the complexity of the governing legislation and the common law, the complexity of the rules of court, the difficulty of navigating the free or low-cost options that do exist, the cumulative impacts of being marginalized, and, of course, the cost of accessing professionals when needed, whether that's a lawyer or a mediator, parenting coordinator, collaborative family law practitioner, or someone else altogether.

If we do live in a society governed by the rule of law, and I believe we do, it seems important to advocate for better access to justice for everyone, including the children of separation and divorce.

An impressive pile of reports...

Beginning in the 1960s and early 70s, lawyers and judges began to be concerned about the justice system, partly because litigation associated with the civil rights struggle revealed gross inequalities in people's ability to access justice as a result of their income, their sexual orientation, their gender, their religious inclinations, their ethnicity and the colour of their skin. People protested, wrote lots of important papers about access to justice, and lobbied government for change. As impotent as protests and lobbying can seem today, things did in fact change.

First, we saw the creation of provincial courts throughout the west. (The Provincial Court of British Columbia was founded in 1969.) Second, law schools across Canada began to develop student legal advice programs, through which law students provided legal services for free while learning more about the law and their future careers, including the Law Students' Legal Advice Program [13] at the University of British Columbia. We also saw human and civil rights legislation being introduced across Canada, including the Canadian Bill of Rights [14] in 1960, the British Columbia *Human Rights Code* in 1973, and the *Canadian Human Rights Act* in 1977.

These were all important steps, but none of them was the silver bullet that solved the access to justice problem, and the problem continued. And got worse. In hindsight, it seems as if every 15 to 20 years after that point, concern about access to justice would build and build and then crest with a flurry of academic reports, government commissions and law society task forces. A few initiatives would be launched, some with lasting effect, like Canada's pro bono legal advice programs, and concerns about access to justice would again subside.

The most recent flurry happened in 2013. In that year, we had four very important national reports on the problems affecting Canadians' ability to access justice, and it seemed as though a moment of significant change was at hand. These papers are all very good and are all worth reading:

1. Professor Julie Macfarlane's landmark study on the experiences of litigants without lawyers, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants [15]",
2. the report of the Canadian Bar Association's Access to Justice Committee, "Equal Justice: Balancing the Scales [16]",
3. the final report of the Family Justice Working Group of the Canada-wide Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words [17]," which provided a particularly powerful call to action, and is really worthwhile reading, and
4. the final summary report of the Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change [18]."

The report of the national committee's Family Justice Working Group was especially important. The authors observed that:

> "Canadians do not have adequate access to family justice. For many years now reports have been telling us that cost, delay, complexity and other barriers are making it impossible for many Canadians to exercise their legal rights. More recently, a growing body of research has begun to quantify the extent of unmet legal need in our communities and to describe the disquieting individual and social consequences of failing to respond adequately to family legal problems."

But, commenting on that "growing body of research," they further observed that the pile of reports which had already been generated on the access to justice problem were remarkably consistent in both their diagnosis of the problem and their recommendations for its cure:

> "The [working group] is very mindful of the many family justice reform reports that precede this one. These reports are remarkably consistent in their diagnosis of the problems and their prescriptions for change. A key theme of all reports is the place of adversarial (rights-based) and non-adversarial (interest-based) dispute resolution processes in the family justice system and the still untapped potential for non-adversarial values and consensual dispute resolution processes to enhance access to the family justice system.

> "Steps have been taken to respond to these reports across Canada and the Commonwealth and, in many respects, the practice of family law looks very different today than it did 25 years ago. Changes to court rules and forms have made courts more accessible and judges have become increasingly involved in case management and settlement facilitation. Legal information programs, subsidized mediation and post-separation parenting programs are widespread. The legal profession has adopted non-adversarial approaches to family law disputes and processes like mediation and collaborative law are now widely used across Canada.
>
> "Despite these changes, reports and inquiries continue to call for further reform, saying that the changes to date, while welcome, are simply not enough. The reports continue to advocate for a more dramatic shift to non-adversarial approaches, calling for 'drastic change', a 'fundamental overhaul' and a 'paradigm shift'."

Now, more than sixty years after the access to justice revolution first began, the problem continues and persists. In fact, it is arguably worsening. The number of people without lawyers continues to climb in all areas of the court system, but especially in our provincial courts and especially in family law cases. The availability of out-of-court options for resolving family matters has increased, which is a positive development for families. However, court processes continue to be affected by under-resourcing and delays, which increases stress on families.

...and some partial progress

This is not, of course, to say that nothing is being done. After that flurry of reports in 2013, groups were established in many provinces to pursue the access to justice problem and potential solutions to the problem. Some of these efforts have floundered, while others have produced notable successes. We are lucky to live in British Columbia, which seems to be leading the country in experimenting with new programs and different initiatives. The changes that have been made in just the last ten or fifteen years in British Columbia are impressive and inspiring.

Progress by the courts

Here are a few of the steps the courts have taken:

- The Supreme Court deserves credit for implementing specific family rules and forms in 2010. While they remain more complex than those in Provincial Court, the Supreme Court's forms are now closer to a "fill in the blanks" approach. The Supreme Court also expanded its use of *conferences* (there are several versions of these, but they are all generally more informal opportunities for the parties to meet with a judge who can often work out a settlement to some of the issues in dispute, and in some cases full settlement). Anyone can schedule a judicial case conference at any time, and in 2023 the court introduced a new case planning conference to give parties greater access to a judge who can help streamline and simplify their litigation.
- For its part, the Provincial Court has been extraordinarily active, experimenting with an ongoing and vast redesign of its approach to handling family law cases. The *early resolution* process at some registries has involved a major redesign of the court experience. And new Provincial Court Family Rules and forms were launched in 2021. The new rules are focused on the experience of participants, not just the needs of the court, and aim to change how court appearances work to ensure that each court appearance has a more meaningful outcome. The court has embraced the recommendations of the Action Committee on Access to Justice in Civil and Family Matters. For those whose goal is to keep a family law resource like this wikibook up-to-date, it's been hard to keep up with the Provincial Court!
- Both courts deserve credit for their efforts towards ensuring transparency by explaining the specific legal wording common in family law orders that they issue, including the Provincial Court's Family Law Orders Picklist [19] and the Supreme Court's Family Law Orders Picklist [20].
- The courts and the judges that lead them are also working more in conjunction with other policy leaders to make high-level plans for change. An initiative called the Transform the Family Justice System Collaborative [21], led

by Access to Justice BC (itself a collaboration among leaders from basically all the province's justice-related organizations), was launched in 2022 with the aim of transforming the family justice system in BC by focusing it on achieving family well-being. This represents a shift to focus on better outcomes for children of separated parents.

- The pandemic all but forced the courts to embrace video conferencing and other remote methods for attendance. For many people, this is clearly an improvement for access to justice. Changes to both courts' rules and forms have also acknowledged that exchanging court materials by email is routine, and should be the default.

Progress by the government

Here are some of the steps the government in BC has taken:

- The introduction of Family Justice Centres [22] has been very important. These centres are staffed by Family Justice Counsellors specially trained to help families with parenting arrangements, contact with children, guardianship, and support issues. They can help parents resolve disagreements without going to court and provide short-term counselling, mediation, emergency and community referrals, along with other free services. There are 24 of these centres across the province, and virtual appointment options are available.
- In 2024, the Government of British Columbia announced a $29 million expansion in legal aid for individuals experiencing family violence [23]. A multidisciplinary, trauma-informed family law clinic model will assist people fleeing family violence. Eligibility criteria will be broader, effective 1 April 2024. This change was planned with Legal Aid BC and the Centre for Family Equity to resolve constitutional challenges to secure more responsive legal supports for single mothers experiencing family violence.
- The new Indigenous Justice Centres [24] (IJCs) are the product of collaboration between the provincial government and the BC First Nations Justice Council. The plan is for 15 IJCs by the end of 2024, plus a Virtual Indigenous Justice Centre. This commitment to providing Indigenous families with accessible, culturally attuned legal assistance, supports the broader goal of fostering family well-being within Indigenous communities.
- Another noteworthy new service is the Online FLA Assistant [25], which helps anyone apply for a Family Law Act order in Provincial Court. This is more than an information website. The Online FLA Assistant will ask questions and take information from self-represented litigants to assemble completed forms that can then be filed in the Provincial Court.
- Similar to the Online FLA Assistant, but for uncontested divorce applications, the Ministry of Attorney General's Online Divorce Assistant [26] lets people jointly apply for a divorce. It's free, takes in information through an online questionnaire, and then prepares forms that can be filed jointly by people seeking a divorce.
- Ongoing reforms to the *Family Law Act* in recent years encourage arbitration, clarify areas of the law that were confusing, like the division of property, and introduced new laws for dealing with pet ownership after separation.
- Before the pandemic, the provincial government had been planning changes to how the Family Maintenance Enforcement Program was managed. (FMEP is a free program has helped enforce child and spousal support orders since 1988.) A new agency was formed, called the BC Family Maintenance Agency, but the pandemic resulted in delays. In late September 2023, government announced that they are going ahead with the changes. It's clear a primary goal is to make the system easier to use online through apps and modern websites, with less paperwork, printing, and faxing.

Progress by the legal profession and its regulator

The Law Society of BC's Innovation Sandbox initiative aims to improve access to justice by improving access to legal advice and assistance from less conventional sources. The Law Society describes their "sandbox" as a "safe space" for people and organizations that are not otherwise authorized to offer legal services to experiment with new ways to do so that could benefit the public. It's a response to the fact that 85% of people in British Columbia who have a serious legal problem get no help from a lawyer, and often go to someone other than a lawyer for assistance. Basically, the regulator is allowing groups to experiment, so long as they make a proposal to the Law Society,

without fear of the regulator coming down on them. For a regulatory system that's premised on protecting the public by ensuring lawyers maintain a monopoly over the practice of law, this is a significant step.

We have also seen family law lawyers and other family law professionals take on the access to justice issue by participating in a range of different initiatives:

- the Pro Bono Collaborative Family Law Project [27] offers free collaborative lawyers for each party, plus other collaborative professionals as needed, and is for people who could not afford a collaborative team ordinarily,
- Access Pro Bono, an important organization where lawyers and legal professionals donate their time and advocacy, has assumed responsibility for or pioneered a number of innovative services, including
  - a free online family mediation service for people of modest means, called the Virtual Family Mediation Project [28],
  - the Lawyer Referral Service [29], which connects lawyers and clients with a free 15-minute consultation, and
  - the Everyone Legal Clinic [30], which is relatively new and offers affordable legal services, including transparent pricing for family law agreements, uncontested divorce applications, and dispute resolution assistance.
- Mediate BC offers https://www.mediatebc.com/learn/pro-bono-clinics online pro bono mediation clinics] where people can ask a Registered Roster Mediator questions about family law mediation, discuss specific circumstances with them, for free, and
- different groups of lawyers and mental health professionals deserve credit for their work in promoting a family law system that is kinder on children including,
  - The BC Hear the Child Society [31], which aims to give children the opportunity to share their views with the courts when their best interests are decided in the family justice system. It hosts a roster of lawyers who can prepare *hear the child reports*.
  - The BC Parenting Coordinators Roster Society [32], which hosts a roster of qualified parenting coordinators, and promotes *parenting coordination* as a mechanism for dealing with issues in high-conflict relationships between parents.

Many more lawyers are now also willing to try to resolve cases using mediation, collaborative negotiation, and arbitration than ever before.

Unbundling is something else lawyers are exploring, and a number of family law lawyers are offering *Unbundled legal services*, or *limited scope retainers*, as a part of their ordinary practice.

To work on an "unbundled" or "limited scope" basis means that, instead of the usual sort of retainer where a lawyer expects to handle all aspects of a file from start to finish, the lawyer will work with their client to identify the specific services they will offer while the client does the rest. The sort of legal services that are best suited to a limited scope approach include:

1. drafting affidavits and applications,
2. preparing legal opinions,
3. completing court forms, including financial statements,
4. evaluating or drafting settlement proposals, and
5. coaching the client through the litigation process.

A directory of lawyers offering unbundled legal services is available online at unbundlinglaw.peopleslawschool.ca [33].

Progress by libraries

Courthouse Libraries BC [34] has produced this wikibook since 2013 when *JP Boyd on Family Law* first appeared, not just online, but in a full-size book, printed and distributed to public libraries and courthouse libraries and across the province. CLBC operates many access to justice services:

- each of its 30 branches, in courthouses throughout the province, are open to the public whenever they are staffed and provide access to:
  - law librarians who can answer questions about legal reference and finding legal information in person, by email, or by telephone,
  - a vast collection of printed legal information, including law books, journals, practice manuals, historical and contemporary print volumes of legislation and regulation, and legislative debates,
  - special databases [35], accessible within the branches, used for legal research, and
  - a website with many custom and helpful tools specific to British Columbia law, including guides and the *Our Legal Knowledge Base* [36],
- the Clicklaw website, which is referenced throughout this wikibook and provides an authoritative listing of vetted sources for legal information by topic, and
- LawMatters, a program that supports people's access to legal information in public libraries throughout hundreds of communities in the province by training public librarians on how to make better legal referrals and handle legal reference questions, providing grants to support public libraries' collections of legal information, and finding ways to turn public libraries into places people can come to for more support with their legal questions — when you hold a print copy of *JP Boyd on Family Law* in your hand, it's because the LawMatters program funded its printing!

CLBC is a very old organization, and its work supporting self-represented litigants and members of the public seeking legal information has grown significantly over the years. CLBC's librarians routinely help members of the public find and get copies of information from law books and databases that are designed and written primarily for lawyers. These include important books published by the Continuing Legal Education Society of British Columbia that nearly every family lawyer in the province relies upon to practice family law:

- *British Columbia Family Practice Manual*,
- *Family Law Agreements: Annotated Precedents*,
- *Family Law Deskbook*, and
- *Family Law Sourcebook for British Columbia*

CLBC can also help people find relevant course materials from CLEBC on specific topics within family law, as well as precedents and how to tips on court procedure from other legal publishers.

Progress by other groups

Law students, paralegals, and others also deserve major credit for their efforts to improve access to family justice in British Columbia.

Amicus Curiae [37] is a volunteer-driven program that offers workshops on filling forms and completing paperwork for court. It involves paralegals, new lawyers, law students, law librarians and accountants, all supervised by lawyers.

The Law Students Legal Advice Program [13] at UBC's law school has been providing assistance through supervised law student clinicians for decades, while the Law Centre [38] clinic at the University of Victoria, and the Community Legal Clinic [39] at Thompson Rivers University do the same. The degree of family law assistance may be limited, but some assistance is offered.

There are many other organizations and services I haven't mentioned, of course. Go to the Clicklaw website [40] to explore other options for help with family law.

What else needs to be done?

The practice of family law in British Columbia is, from a lawyer's point of view, very different today than it was just twenty years ago. As a young lawyer just starting out, I remember treating every new case that came in the door as if it was going to be resolved at trial. That was just the assumption we made then. We didn't think about mediation or arbitration, and collaborative negotiation had yet to be introduced in the province. Parenting coordination hadn't been established, and unbundled legal services were just starting to be discussed.

Very few lawyers make the same assumption today. Most of us assess new cases for certain factors that might make litigation inevitable — including the presence of family violence, the need for orders protecting people or orders protecting property, and applications to move away with children — and our first inclination is often to pick up the phone and call the lawyer on the other side to talk about what's going on rather than filing a claim in court. We have more tools to settle cases these days than ever before, and the fact that less than 5% of family law court cases are resolved by trial seems to reflect the growth of these options.

The bigger problems — the cost of legal services, the complexity of the legislation and case law, the difficult and adversarial nature of court processes, the chronic delays affecting the court system, and our failure to properly fund alternatives to court — have barely been touched, and I'm not sure that any government is really prepared to tackle these problems head-on.

British Columbians deserve a system that is focused on the short- and long-term wellbeing of children, that is built to minimize the impact of parental conflict on children, that provides the social and economic supports families in crisis need, that includes social and psychological services as well as legal services, and that is fundamentally designed to promote the future functioning of families living apart. We deserve a system in which court is the last resort and collaborative negotiation is the first, and a system in which people don't necessarily have to hire a lawyer to move forward with their lives.

If the justice system is going to change, it's going to change because a lot of people realize that business-as-usual hasn't worked for the last sixty years and that the status quo is not only unacceptable, it's harmful.

If this wikibook is being used to help you through a family law matter, and if you learn things through your process that should be heard by law and policy makers, please consider writing to your MP and your MLA, the federal Minister of Justice, and the provincial Attorney General. Write letters to your local media, and press for continuing coverage of justice system issues rather than the usual one-and-done article published when something scandalous happens. Get on your local Provincial Court family law committee. Run for election. Become a lawyer, a paralegal, or a mediator. Start community groups and Facebook groups. Volunteer with local advocacy centres, and if there isn't one, create one.

Change can happen, but it's not going to happen until enough people begin to put pressure on the system and demand change. What we've got is simply not good enough. Help make a difference!

Resources and links

In *JP Boyd on Family Law,* we emphasize the importance of accessible legal information and resources to support self-represented litigants and those seeking a deeper understanding of family law. This section reflects our commitment to providing comprehensive and reliable resources. We categorize these resources to help you easily navigate through them, prioritizing those that offer direct support or valuable information to self-represented litigants.

Legal representation, advice, or support

- Apply to Legal Aid BC [10] - Check eligibility for free legal representation.
- Legal Aid BC's family law legal advice offerings [2] - Family Duty Counsel, Family Advice Lawyers, and FamilyLawLine.
- Family Justice Centres [22] - Offering mediation, counselling, and referral services from Family Justice Counsellors.
- Virtual Family Mediation Project [28] - Free online family mediation service.
- Pro Bono Collaborative Family Law Project [27] - Free collaborative law services for eligible individuals.
- Lawyer Referral Service [29] - Connects lawyers and clients for a free initial consultation.
- Everyone Legal Clinic [30] - Affordable legal services with transparent pricing.
- Directory of lawyers offering unbundled legal services [41] - Find lawyers for limited scope legal assistance.
- Rise Women's Legal Centre [5] - Pro bono community legal clinic and teaching facility serving women and gender diverse people.
- PovNet's Find an Advocate Tool [4] - Search online for other advocates and clinics who can help in family law matters.
- Law Students' Legal Advice Program [13] - Legal services provided by law students.
- Amicus Curiae [37] - Workshops on court form completion and paperwork, but no legal advice.

Educational and informational resources

- Clicklaw [3] - Clearing house of public legal education and information in BC.
- Legal Aid BC's Family Law website [13] - An essential resource for information and resources on family law.
- Online Help Guide for Supreme Court family law matters [8] by Justice Education Society - Guidance for navigating Supreme Court family law matters.
- Dial-A-Law website for families and children [9] by People's Law School - Plain language legal information on family law topics.
- BC Ministry of Attorney General's Family Justice website [10] - More essential information about how family law works in BC.

Court information and forms support

- Going to Court webpage [11] by BC Provincial Court - Resources for self-represented litigants in Provincial Court.
- BC Supreme Court's information for self-represented litigants [12] - Guidance for navigating the BC Supreme Court.
- Online FLA Assistant [25] - A tool for applying for Family Law Act orders in the BC Provincial Court, assisting with the completion of necessary forms.
- Online Divorce Assistant [26] - Facilitates the process of filing for an uncontested divorce in BC, allowing joint applicants to prepare required forms.
- Provincial Court's Family Law Orders Picklist [19] - A comprehensive list of standardized terms for common orders in family law cases.

- Supreme Court's Family Law Orders Picklist [20] - Standard terms for most of the usual orders made in family cases.

Primary legislation and caselaw sources

- Canadian Legal Information Institute [3] - Comprehensive database of Canadian statutes and case law.
- BC Laws website [6] - Official source for BC statutes and regulations.
- Department of Justice Canada [7] - Access to federal statutes and regulations.

Libraries and publishers

- Courthouse Libraries BC (CLBC) [34] - Offers access to a wide range of legal information resources, including specialized databases and knowledgeable law librarians.
- CLBC Subscription Databases [35] - Specialized legal research databases accessible within CLBC branches.
- CLBC's Legal Knowledge Base [36].
- The Continuing Legal Education Society of British Columbia (CLEBC) [42] - Publisher of essential legal resources for family law practitioners in BC (available through CLBC):
  - *British Columbia Family Practice Manual* - A comprehensive resource for family law issues in BC.
  - *Family Law Agreements: Annotated Precedents* - Provides precedents for various family law agreements.
  - *Family Law Deskbook* - A quick-reference tool for family law practitioners.
  - *Family Law Sourcebook for British Columbia* - An essential guide to family law legislation and case law.
- CanLII Commentaries [43] - Free access to secondary law materials, from law reviews and treatises to reports and articles, from the same website that aggregates Canadian legislation and caselaw.

Progressive initiatives led by legal professionals

- Mediate BC [44] - Offers online pro bono mediation workshops to discuss specific circumstances with Registered Roster Mediators (RRMs) specializing in family law mediation.
- BC Hear the Child Society [31] - Provides children a voice in the family justice system and hosts a roster of lawyers who prepare *hear the child reports*.
- BC Parenting Coordinators Roster Society [32] - Features a roster of qualified parenting coordinators for handling high-conflict parental relationships and promoting children's well-being.

Collaborative initiatives and reports

- The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants [15] by Professor Julie Macfarlane - A landmark study on the experiences of self-represented litigants.
- Equal Justice: Balancing the Scales [16] - A report by the Canadian Bar Association's Access to Justice Committee.
- Meaningful Change for Family Justice: Beyond Wise Words [17] - The final report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters.
- Access to Civil and Family Justice: A Roadmap for Change [18] - A summary report by the Action Committee on Access to Justice in Civil and Family Matters.
- Transform the Family Justice System (TFJS) Collaborative [21] - Initiative to transform the family justice system in BC.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 28 November 2023.

References

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[4] https://www.povnet.org/find-an-advocate
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[6] https://www.bclaws.gov.bc.ca/
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[12] https://www.bccourts.ca/supreme_court/self-represented_litigants/
[13] https://www.lslap.bc.ca
[14] https://laws-lois.justice.gc.ca/eng/acts/C-12.3/FullText.html
[15] https://perma.cc/PV9C-UE4X
[16] https://perma.cc/7Q94-VTML
[17] https://perma.cc/4YKG-TQGF
[18] https://perma.cc/4574-YC3D
[19] https://www.clicklaw.bc.ca/resource/4130
[20] https://www.clicklaw.bc.ca/resource/4085
[21] https://transformfamilyjusticebc.ca/about/
[22] https://www.clicklaw.bc.ca/helpmap/service/1019
[23] https://news.gov.bc.ca/releases/2024AG0010-000203
[24] https://bcfnjc.com/indigenous-justice-centres-in-british-columbia/
[25] https://justice.gov.bc.ca/apply-for-family-order/
[26] https://justice.gov.bc.ca/divorce
[27] https://www.bccollaborativerostersociety.com/pro-bono-collaborative-family-law-project/about/
[28] https://www.accessprobono.ca/program/virtual-family-mediation-program
[29] https://www.accessprobono.ca/our-programs/lawyer-referral-service
[30] https://everyonelegal.ca/
[31] https://hearthechild.ca/
[32] https://www.bcparentingcoordinators.com/
[33] https://unbundlinglaw.peopleslawschool.ca
[34] https://www.courthouselibrary.ca/
[35] https://www.courthouselibrary.ca/how-we-can-help/legislation-case-law/subscription-databases
[36] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base
[37] https://www.legalformsbc.ca
[38] https://thelawcentre.ca
[39] https://www.tru.ca/law/students/outreach/legal-clinic.html
[40] https://www.clicklaw.bc.ca/
[41] https://www.unbundlinglaw.ca
[42] https://www.cle.bc.ca/
[43] https://www.canlii.org/en/commentary/
[44] https://www.mediatebc.com/learn/pro-bono-clinics

Family Relationships

Family Relationships

People in virtually any kind of relationship can wind up having a family law problem. Some people are married, others have lived together long enough to qualify as spouses without being married, while others have had a child together without having much more of a relationship with each other at all. But family law isn't just about relationships between spouses or parents. It also concerns the relationships between grandchildren and grandparents, between nieces and nephews and aunts and uncles, and between children and other adults with significant roles in their lives.

The first section of this chapter — the part you're reading now — focuses on the different kinds of family relationships recognized by the *Family Law Act* and the *Divorce Act*. In this part, you'll learn about the range of family relationships that the law is concerned with, and how the law impacts on people in these relationships. (We'll also talk about some common urban myths involving married and unmarried relationships.) More detail about the legal rights and duties involved in married relationships, unmarried spousal relationships, and relationships involving unmarried people who have had a child but never lived together is provided in the sections that follow. Other sections in this chapter talk about adopting children and provide more information about having children using assisted reproduction.

Introduction

Being in a family relationship can create legal obligations in addition to the moral and social obligations that we usually associate with family relationships. Under the old common law, for example, a husband had the legal duty to provide his wife and children with shelter, food, and the other basic necessities of life. Although this obligation still exists under the federal *Criminal Code* [3], and is shared by both husbands and wives, it hasn't been a part of the legislation on family law since the English *Divorce and Matrimonial Causes Act* was passed in 1857. As society has evolved, so have the obligations different kinds of family relationships trigger.

Family law in British Columbia deals with four kinds of family relationships:

- **Married spouses:** People who are married spouses have been wed at a ceremony conducted by someone licensed by the province to perform marriages. Married relationships end when a court makes an order for the spouses' divorce.
- **Unmarried spouses:** People who are unmarried spouses have lived with each other in a "marriage-like relationship" for a certain minimum amount of time. (This is the sort of relationship people mean when they talk about "common-law spouses.") The relationship between unmarried spouses ends when they separate. Unmarried spouses do not need to get a divorce.
- **Parents:** People who are parents have had a child together. They might be married to each other or have no relationship with each other at all, apart from the fact that they are both parents. "Parent" can include people who have helped someone have a child through assisted reproduction, by being an egg donor, a sperm donor, or a surrogate mother, depending on what an assisted reproduction agreement might say about who's a parent and who's not.
- **Grandparents and extended family members:** Grandparents and other family members may have a parent-like relationship with a child who is not their biological child, especially when they have spent a lot of time caring for the child.

It's important to know what kind of relationship you're in, as each of these different kinds of family relationship involve different rights and different obligations.

Married spouses

To be able to marry, you must be unmarried, sane, relatively sober, and over a certain age, among other things. You must be married by a person properly licensed to conduct marriages, who might be a civil marriage commissioner or an authorized religious official. The process for getting married in British Columbia, and the law about marriage, is described in detail in the Married Spouses and the Law on Marriage section of this chapter.

Living together

Many, if not most, people who marry live together before they tie the knot. It is important to know that a lot of the rules about property and debt under the provincial *Family Law Act* are based on the date when a married couple began to live together *or* the date they marry, whichever is earlier.

Marriage

Social attitudes about marriage have changed a lot over the last three centuries. Marriage once had a much more important legal significance than it does today. Before about 1890, a married couple was legally considered to be one person. A husband took ownership of all of his wife's property on marriage and could use his wife's assets as collateral for loans. His wife, on the other hand, lost the ability to hold a bank account in her own name, sell her property without her husband's consent, or start a court proceeding or run a business in her own name. Women who hadn't married, on the other hand, could own property in their own names, have bank accounts, sue and be sued, and run a business as they like.

Marriage was once of such importance that people could be sued for interfering, or even attempting to interfere, with a married couple's relationship. Until 1972, it was a civil offence to falsely boast that you were married to someone (called *jactitation of marriage*) or to lure a spouse away from a married relationship (called *criminal conversation*), and a court proceeding could be brought against someone for loss of the benefits of marriage (called *loss of consortium*).

All of these old rules are now extinguished in British Columbia and married couples are no longer considered to be a single legal person, with the husband having absolute power over his wife and her property. Since 1978, married women have had exactly the same property rights as both single women and men. A husband can no longer apply for credit in his wife's name or use her property to get a loan without her permission. On top of this, the old rules restricting marriage to opposite-sex couples have now been abolished, first by the courts and then as a result of the federal *Civil Marriage Act* [24].

If there's a difference between married and unmarried spousal relationships, it's probably that today marriage implies a greater sense of personal commitment to a relationship and a willingness to treat the relationship as a true partnership. Marriage suggests something more permanent than an unmarried relationship. It may signal a greater personal dedication to the relationship and a willingness to stick it out through the good times and the bad.

Under the law of British Columbia, however, the most significant difference between married and unmarried spousal relationships is that only married spouses need a divorce or an annulment to end their relationship.

Annulment

If one or more of the requirements of a valid marriage are lacking, a marriage may be cancelled, or *annulled*. To obtain an annulment, one of the parties must begin a court proceeding asking for a declaration that the marriage is void. A marriage may be annulled if:

- a female spouse was under the age of 12 or a male spouse was under the age of 14, the common law ages of puberty,
- one or both of the spouses did not consent to the marriage,
- a male spouse is impotent or a female spouse is sterile going into the marriage,
- the marriage cannot be consummated,
- the marriage was a sham, or
- one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

You can find more information about void marriages, voidable marriages, and annulment in this chapter's section on Married Spouses and the Law on Marriage.

Separation

Separation is simple. To separate, the spouses simply start living "separate and apart" from each other, whether under the same roof or in separate homes. Contrary to popular opinion, you do not need to see a lawyer, sign something, or file some sort of document in court to obtain a separation. To separate, you just need to call it quits, tell your spouse that it's over and then start acting like it's over.

Even though separation may signal the breakdown of an emotional relationship, it doesn't end the legal relationship between married spouses. The only way marriages really end is through death or divorce.

Divorce

Divorce is the legal termination of a marriage. To obtain a divorce in British Columbia, one or both spouses must begin a proceeding in the Supreme Court asking for a divorce order, and at least one of the spouses must have normally lived in the province — they must have been *habitually resident* in the province — for at least one year before the court proceedings start.

The court will make a divorce order only if it believes that the married relationship has broken down. Under the federal *Divorce Act*, there are three ways to prove marriage breakdown:

1. the spouses have been separated for at least one year,
2. one of the spouses committed adultery, or
3. one of the spouses treated the other spouse with such mental or physical cruelty that they could not continue living together.

It is possible to oppose an application for a divorce order, although this rarely happens. In general, once one of the grounds for marriage breakdown has been established, the courts will allow the divorce application, regardless of any objections the other spouse may raise.

Unmarried spouses

Section 3(1) of the provincial *Family Law Act* defines *spouse* as including people who married each other as well as:

1. people who have lived together in a marriage-like relationship for *at least two years* and,
2. people who have lived together in a marriage-like relationship for *less than two years* but have had a child together.

That's why this resource talks about "married spouses" and "unmarried spouses."

In British Columbia, unmarried spouses who have lived together for at least two years have all of the same rights and obligations under the *Family Law Act* as married spouses. However, unmarried spouses who lived together for less than two years don't qualify as "spouses" for the parts of the act that talk about dividing property and debt, but they are spouses for the parts about spousal support and child support:

	Have lived together for at least two years	**Have lived together for less than two years but have a child together**
Guardianship and parenting children	Yes	Yes
Time with children	Yes	Yes
Child support	Yes	Yes
Spousal support	Yes	Yes
Family property and family debt	Yes	

The federal *Divorce Act* doesn't apply to people in unmarried relationships, whether they're "spouses" under provincial law or not.

Living together

The relationship between unmarried spouses begins on the date they began to live together in a "marriage-like relationship." This might be the date that a couple who are dating moves in together, or it might be the date that a relationship between housemates becomes a committed, romantic relationship.

The section on Unmarried Spouses talks about when a relationship becomes "marriage-like."

Separation

Unmarried spouses are separated when they begin to live "separate and apart" from each other, whether under the same roof or in separate homes. You do not need to see a lawyer, sign something, or file some sort of document in court to be separated. You just need to call it quits and tell your spouse that it's over, and then start acting like it's over.

Unmarried spouses do not need to get divorced.

Parents

You are a parent if you have a child, including by adoption and, in some circumstances, by assisted reproduction.

Natural reproduction

Under section 26(1) of the *Family Law Act*, a child's parents are presumed to be the child's *birth mother* and *biological father*, regardless of the nature of the parents' relationship with each other.

It's normally pretty easy to tell who the birth mother of a child is. It's not always so easy to tell when a man is the biological father of a child. Section 26(2) of the *Family Law Act* says when a man is *presumed* to be the father of a child:

- if he was married to the birth mother when the child was born or within 300 days of the child's birth,
- if he married the birth mother after the child's birth and acknowledged that he is the father of the child,
- if he lived with the birth mother in a "marriage-like relationship" within 300 days of the child's birth, or
- if he signed the child's record of live birth.

These legal presumptions are helpful, but none of them prove that a man is the biological father of a child. However, the court may order, under section 33 of the *Family Law Act*, that a person take a DNA test to establish the paternity of a child.

Assisted reproduction

When one or two people need the help of others to have a child, some additional rules apply:

- one or two people who want to have the child, the *intended parents*, can be the parents of the child,
- the donor of sperm or an egg is not usually a parent of the child,
- a surrogate mother is usually a parent of the child, and
- the spouse of a surrogate mother is usually a parent of a child.

That's a lot of parents! A written agreement made before the child is conceived can say that a donor of sperm or eggs *is* a parent, that a surrogate mother *is not* a parent, and that the spouse of a surrogate mother *is not* a parent. These agreements can be really complicated, and it's a very good idea to hire a lawyer who often deals with assisted reproduction issues to prepare an assisted reproduction agreement.

Grandparents and extended family members

In addition to parents, other people can have a legal relationship with a child. Most of the time these people are extended family members who have had a parent-like relationship with a child, such as a grandparent, an aunt or an uncle, or even a much older sibling, but any adult who has had a parenting role in a child's life may have a legal relationship.

Caring for children

Where a child's parents are no longer in the picture or if the child's parents aren't doing a good enough job, an extended family member might apply for *guardianship* of the child under the *Family Law Act*. (Guardians have the right to care for and make decisions on behalf of a child.) Section 51(1)(a) of the act says that the court may appoint *a person* as the guardian of a child, and an extended family member is certainly "a person."

Under the *Divorce Act*, a court can make an order giving someone who "stands in the place of a parent or intends to stand in the place of a parent" something called *decision-making responsibility*, the right to make decisions on behalf of a child, but only if:

- the child's parents are married to each other and involved in a court proceeding under the *Divorce Act*, and
- they get the court's permission to apply for decision-making responsibility.

Spending time with children

If a child's parents are doing a good enough job, on the other hand, an extended family member might want *contact* with the child, especially if time with the child is being withheld. Section 59(2) of the *Family Law Act* says this:

> A court may grant contact to any person who is not a guardian, including, without limiting the meaning of "person" in any other provision of this Act or a regulation made under it, to a parent or grandparent.

Under the *Divorce Act*, a court can make an order giving someone who "stands in the place of a parent or intends to stand in the place of a parent" something called *parenting time*. Someone who does *not* stand in the place of a parent can ask for *contact*. In both cases, an extended family member can only ask for an order if:

- the child's parents are married to each other and involved in a court proceeding under the *Divorce Act*, and
- they get the court's permission to apply for parenting time or contact.

People in dating relationships

Family law doesn't have much at all to do with people who are dating and don't have a child. They're not "spouses" under the *Family Law Act* or the *Divorce Act*, they're not "parents" under the *Family Law Act*, and since they don't have a child, they're not "guardians" under the *Family Law Act*. The *Divorce Act* and the *Family Law Act* don't apply to them because their relationship isn't one of the relationships the acts talk about.

There are only a few ways the law can affect people in relationships like this. If there is violence or non-consensual sexual activity, the parts of the *Criminal Code* [3] that talk about things like assault, battery, sexual assault, rape, stalking, unlawful confinement, and abduction might apply, and those are issues that the police will deal with. If they sign a lease together, buy something together or take out a loan together, then the law of contract or the law of property might be used to figure out who's entitled to what assets and responsible for which obligations. If they buy property together, the provincial *Partition of Property Act* [1] will let them ask the court to sell the property and divvy up the proceeds. I suppose that if they split up and start bad-mouthing each other on social media, then tort law and the law about defamation might also be relevant.

Unless there is something like this going on, when people who are dating each other split up, that's it, their relationship is over without any legal entitlements at all.

Different relationships, different rights, different responsibilities

Married spouses and unmarried spouses

Married spouses and unmarried spouses who have lived together for at least two years have exactly the same rights in British Columbia under the provincial *Family Law Act*. People in both kinds of relationship may:

- be the *guardians* of any children they happen to have, and as guardians have parental responsibilities and parenting time with respect to those children,
- have *contact* with a child if they are not a guardian of that child,
- ask for, or be responsible to pay, *child support*,
- ask for, or be responsible to pay, *spousal support*,
- share in *family property* and any *family debt*, and
- apply for orders for the *protection of people* or the *protection of property*.

The only legal differences between married spouses and unmarried spouses who have lived together for at least two years are that:

- only married spouses must get a *divorce* to end their relationship with one another,
- only married spouses can ask the court for orders under the federal *Divorce Act*, and

- the time limit for married spouses to ask for spousal support or orders dividing property and debt under section 198 of the *Family Law Act* begins to run from the date they are divorced or the date their marriage is annulled.

That's it.

And the only legal differences between unmarried spouses who have lived together for at least two years and unmarried spouses who have lived together for less than two years are that couples who have lived together for less than two years can't:

- share in *family property* and any *family debt*, and
- apply for orders for the *protection of property*.

People in both kinds of relationship may be the *guardians* of their children, and as guardians have parental responsibilities and parenting time with respect to those children, have *contact* with a child, ask for or be responsible to pay *child support*, ask for or be responsible to pay *spousal support*, and apply for orders for the *protection of people*. For unmarried spouses, the time limit to ask for spousal support under section 198 of the *Family Law Act* begins to run from the date they separated.

Although unmarried spouses who have lived together for less than two years are cut out of the part of the *Family Law Act* that deals with property and debt, they will still share in property they own jointly and they can still make claims to property owned only by one spouse under the law of trusts and the law of equity. These claims are discussed in the introductory part of the Property and Debt in Family Law Matters chapter.

People who are parents but aren't spouses

Although people who are not spouses can have all sorts of legal relationships with each other, from co-owning land to running a business together, from a family law perspective their most important relationship is as parents. People who are parents may:

- be the *guardians* of their children, and as guardians have parental responsibilities and parenting time with respect to those children,
- have *contact* with a child if they are not a guardian of that child,
- ask for, or be responsible to pay, *child support*, and
- apply for orders for the *protection of people*.

Like unmarried spouses who have lived together for less than two years, people who are parents are entitled to share in property they own jointly and may make claims to property owned only by one spouse under the law of trusts and the law of equity.

Family law doesn't really deal with people who aren't spouses, aren't parents, and don't live together. The only claims people like this can make under the *Family Law Act* are for orders appointing them as the guardian of the other person's child or giving them contact with that person's child. They can't even apply for orders for the protection of people under the *Family Law Act*.

A few surprisingly common misunderstandings

People have a whole lot of bad ideas about what's involved in marriage, unmarried relationships, separation, and divorce, like the idea that a couple who've lived together for a long time are somehow automatically married. Some of these misunderstandings, I'm sure, come from television and movies. Others are just urban myths.

Married spouses

Marriage and getting married

It is not true that an unmarried couple is automatically "married" once they've lived together for a certain amount of time. An unmarried couple is never legally married unless they have actually had a marriage ceremony. We don't have "common-law marriages" anymore, and haven't for the last few hundred years.

You are not legally married unless you have a marriage ceremony and the ceremony is conducted by someone authorized by the provincial government to perform marriages. Your car mechanic can perform your marriage, if your car mechanic is a marriage commissioner, but your Wiccan high priestess cannot legally marry you unless she also happens to be a licensed marriage commissioner.

Las Vegas marriages and other sorts of quickie marriages are valid and binding marriages, as long as the marriages meet the criteria for valid marriages discussed in the next section. If you want to undo the marriage, you'll have to get divorced just like every other person in a valid marriage, and that will usually mean waiting until one year has passed since your separation. (An alcohol-induced Las Vegas marriage was upheld in the 2005 Supreme Court case of *Davison v Sweeney* [1], because the spouses knew what they were doing when they married, despite the fact that they had never had sex with each other and separated when their respective holidays ended, two days after they were married.)

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia anymore, nor is it possible to be "legally separated." Whether you're in an unmarried relationship or a marriage, you are separated the moment you decide that the relationship is over and you start acting like it's over. That's it, there's no magic to it. When you or your partner announces that the relationship is over and there's no chance of getting back together, boom: you're separated. Congratulations.

To be crystal clear:

- you do not need to "file for separation" to be separated; in fact, there's no such thing in British Columbia as "filing for separation," despite what you might see on the websites of the people who sell do-it-yourself legal kits,
- there are no court documents or other papers you have to sign to be separated, and
- you don't need to appear before a judge, a lawyer, a government official, or anyone else to be separated.

To be separated, you just need to decide that your relationship is over and say so, and then start acting like it's over.

The fact that a married couple is separated, however, isn't enough to let either of them remarry. You must be formally divorced by an order of the court in order to remarry. If you remarry without being divorced from the first marriage, the new marriage will be invalid and you may be guilty of bigamy.

On the other hand, the fact that you're separated won't stop you from having a new relationship, including a new relationship that would qualify as an unmarried spousal relationship. Technically, this is adultery, but no one except the Pope or your in-laws is likely to care. There's a lot more information about new relationships after separation in this chapter's section on Separation and the Law.

Divorce and getting divorced

As far as divorce is concerned, a court must make an order for your divorce or you'll never be divorced as long as your spouse is alive. You may have been separated for twenty years, but unless your spouse has died or a court has actually made an order for your divorce, you're still married. It'd be nice, and whole lot cheaper, if the passage of time provided an automatic divorce, but it just doesn't work that way.

It is not true that you need to have a separation agreement to get a divorce. Separation agreements are helpful to record a settlement of the legal issues arising when a couple separates, like the dividing property or paying support, but they're not a requirement of the divorce process. You especially don't need a separation agreement if there are no other legal issues — such as issues about parenting after separation, support or property — apart from getting divorced.

It is not true that you remain married if your spouse dies. Once that happens, your marriage is at an end. You don't need to get divorced, the sands of time have done that for you.

It is also not true that a lack of sex in your relationship automatically ends your marriage, allows the marriage to be annulled, or is otherwise a ground of divorce. Sex has very little to do with divorce, just as it often has little to do with marriage. A lack of sex may spell the end of a relationship and spur a couple's separation, but at law, whether you and your spouse are having sex or not is irrelevant.

The one exception to this general rule has to do with the "consummation" of a marriage, and this exception doesn't mean what most people think it means. A marriage does *not* need to be consummated to be a valid, binding marriage. In order to escape a marriage on this ground, you or your partner must — I kid you not — have an "invincible repugnance" to the act of sexual intercourse or some other condition that makes sex impossible.

Unmarried spouses

The automatic marriage

It is not true that an unmarried couple are automatically married once they've lived together for a certain amount of time, nor is there any such thing as a "common-law marriage." You can have lived together for twenty years and still not be legally married. An unmarried couple is never married unless there is an actual marriage ceremony performed by someone licensed to perform marriages.

Applying for spousal status

A couple becomes spouses when they qualify as "spouses" under whatever law applies; for most federal laws, the couple must have lived together for at least one year, and for most provincial laws the couple must have lived together for at least two years. There's no application to make and no one to apply to. It's all about whether you meet the applicable definition.

The accidental spouse

It is not true that you become an unmarried spouse just by living with someone for long enough. You must be living together in a "marriage-like relationship" to become unmarried spouses; mere roommates will not become spouses by accident. There wouldn't be any frat houses if this wasn't the case.

Likewise, a dating couple don't become spouses just because they have a child together. They must also be living together in a "marriage-like relationship."

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia, nor is it possible to be "legally separated." Whether you're in a unmarried relationship, a marriage, or you're just dating, you are separated the moment you decide that the relationship is over and you start acting like it's over. That's it, there's no magic to it. When you've split up, boom: you're separated.

Getting divorced

Unmarried spouses do not need to be divorced. Once you've decided to separate, the relationship is over, regardless of how long the relationship may have been. There is no need to get a divorce order because there's no marriage that must be terminated.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Civil Marriage Act* [24]
- *Marriage Act* [11]
- *Criminal Code* [2]
- *Partition of Property Act* [28]

Links

- Introduction to Family Law [3] from Dial-a-Law by the People's Law School
- Getting Married in British Columbia [4] from Dial-a-Law by the People's Law School
- Marriage Registration and Certifications [5] from BC Vital Statistics Agency
- Marriage Agreements and Cohabitation Agreements [6] from Dial-a-Law by the People's Law School
- Common-law Couples [7] from Legal Aid BC
- Thinking about Leaving? [8] from Legal Aid BC
- Make a Separation Plan Pathway [9] from My Law BC
- Legal Services Society's Family Law website's common questions on Separation & Divorce [10]
- Parenting Apart [11] from the BC Ministry of Attorney General
- Divorce Assistant [26] from the Ministry of Justice

Resources

- "Starting Relationships" video [12] from JP Boyd
- "Separation Agreements" [13] from Legal Aid BC and West Coast LEAF
- Legal Services Society's *Living Together or Living Apart* [14]
- "Coping with Separation Handbook" [15] from Legal Aid BC
- "Coping with Separation During Covid-19 Handbook" [16] from Legal Aid BC
- "Ending Relationships" vidoe [17] from JP Boyd
- "Getting Divorced in British Columbia" video [18] from JP Boyd

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, March 25, 2023.

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[18] https://www.clicklaw.bc.ca/resource/4763

Married Spouses and the Law on Marriage

Marriage creates a legal relationship between two people, a relationship that gives each spouse certain rights and obligations on top of whatever promises they may have made during their marriage ceremony. A proper marriage must comply with certain legal requirements, however, and, as a result, not all marriages must be ended by divorce. Some marriages are invalid from the start and can be annulled.

This section talks about the legal requirements of valid marriages. It looks at *void* marriages and *voidable* marriages — there is a difference! — and at marriages that are *invalid*, and ends by looking at the legal rights resulting from marriage.

Legal requirements of marriage

The legal requirements of a valid marriage are governed by the common law, the federal *Marriage (Prohibited Degrees) Act* [9], the federal *Civil Marriage Act* [10] and the provincial *Marriage Act* [11]. Part of why there are so many different laws involved in this is that under our Constitution, only the federal government has the authority to pass laws dealing with marriage and divorce, while only the provincial governments have the authority to pass laws dealing with the mechanics of how marriages are performed.

The basic requirements of a valid British Columbia marriage are these:

- **Relatedness:** under the *Marriage (Prohibited Degrees) Act*, the spouses cannot be related *lineally*, as *siblings*, or as *stepsiblings*.
- **Marital status:** both spouses must be *unmarried* at the time of their marriage.
- **Mental capacity:** both spouses must have the mental capacity, at the time of the ceremony, to *understand* the nature of the ceremony and the rights and responsibilities marriage involves.
- **Age:** with some exceptions, both spouses must be of the *age of majority* or older.
- **Solemnization:** the marriage must be performed by a person *authorized* by the government of British Columbia to perform marriages.

Being of opposite genders used to be one of the requirements for a valid marriage. Gay and lesbian couples have been able to marry in British Columbia since 8 July 2003. With the passage of the *Civil Marriage Act* on 20 July 2005, same-sex couples became able to marry throughout Canada.

For a quick summary on getting married in British Columbia, see How Do I Get Married in British Columbia?. It's located in the section Marriage, Separation & Divorce in the Helpful Guides & Common Questions part of this resource.

Relatedness

Section 2(2) of the federal *Marriage (Prohibited Degrees) Act* states that:

> No person shall marry another person if they are related
>
> (a) lineally by consanguinity or adoption;
>
> (b) as brother and sister by consanguinity, whether by the whole blood or by the half-blood; or
>
> (c) as brother and sister by adoption.

In other words, the spouses cannot be related:

- as parent and child or as grandparent and child, including by adoption,
- as brothers or sisters, including by adoption, or
- as half-brothers or half-sisters.

When you think about it, that's a pretty short list. First cousins, for example, can marry each other, if they don't mind the banjo music. However short the list may be, a marriage that violates this rule is void *ab initio*; that is, the marriage is void as if it had never occurred.

Age

Both spouses must, in general, be over the *age of majority* at the time of their marriage.

Under the *Marriage Act* [1], youths *aged 16 to 18* can marry if they have the consent of all their guardians, or, if they have no guardians, the consent of the Public Guardian and Trustee. However, if a guardian is unreasonably withholding their consent, or can't be found to give their consent, the youth may apply to court for permission to marry.

While the marriages of people under the age of 16 are generally forbidden, under section 29 of the provincial *Marriage Act*, the court may allow such marriages if they are "expedient" and "in the interests of the parties:"

> (1) Except as provided in subsections (2) and (3), a marriage of any person under 16 years of age must not be solemnized, and a licence must not be issued.
>
> (2) If, on application to the Supreme Court, a marriage is shown to be expedient and in the interests of the parties, the court may, in its discretion, make an order authorizing the solemnization of and the issuing of a licence for the marriage of any person under 16 years of age.

Foreign marriages

Two rules of the common law govern the validity, in British Columbia, of marriages performed outside the province:

1. the formalities of the marriage (the mechanics of the marriage ceremony) are those of the law in the place where the marriage occurred, and
2. the legal capacity of each party to marry is governed by the law of each party's "domicile," the place where they usually live.

This means that people who live in British Columbia may be married elsewhere by a hairdresser holding a badger, for example, if the laws of that place allow hairdressers holding badgers to marry people (the *formalities of marriage*). On the other hand, if two 12-year-olds who live in British Columbia are married outside of Canada by a priest or marriage commissioner, their marriage will be voidable (the *capacity to marry*), even though the formalities of the foreign marriage are perfectly fine.

Invalid foreign marriages may be considered, in exceptional circumstances, to be valid in Canada. A marriage occurring in a place where it is impossible to comply with the local law governing the formalities of marriage for some reason, perhaps because of civil war or religious discrimination, might well be found to be valid in British Columbia if the parties have the capacity to marry under British Columbia law.

Void marriages

A marriage that is void *ab initio* — void "from the beginning" — is void as if it had never occurred. A marriage will be void *ab initio* if:

- one or both spouses were seven years old or younger (the absolute minimum age required to consent to marry under the old common law) at the time of the marriage,
- the spouses were within the prohibited degrees of relatedness,
- one or both of the spouses did not have the mental capacity to marry, or
- one or both of the spouses were already married at the time of the marriage.

In general, an application to the court is not required to dissolve a marriage that is void *ab initio* since void marriages are void from the get-go. However, you may want to apply to court for a *declaration* that your marriage is void if someone is making a claim against you based on the fact that you are supposed to be married.

It is important to know that even if a marriage is declared void, the parties may still have certain legal rights and obligations towards each other as long as they qualify as "spouses" under the provincial *Family Law Act*.

Voidable marriages

A voidable marriage is a marriage that is *potentially* void *ab initio* but is presumed to be valid until an application is successfully made to the court for an *annulment*, a declaration that the marriage is in fact void. A marriage may be annulled if:

- the spouses were over seven years of age, but a female spouse was under the age of 12 or a male spouse was under the age of 14 (the old common-law ages of puberty) at the date of the marriage,
- one or both of the spouses did not consent to the marriage, or were under duress or some other kind of coercion, when they married,
- a male spouse is impotent or a female spouse is sterile going into the marriage,
- the marriage cannot be consummated,
- the marriage was a sham, or
- one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

Remember that marriages celebrated in these circumstances are presumed to be valid until the court declares them to be void. Without that declaration, an otherwise voidable marriage remains legal and binding.

It is important to know that even if a marriage is annulled, the parties may still have certain legal rights and obligations towards each other as long as they qualify as "spouses" under the provincial *Family Law Act*.

Consent and duress

As with any contract, which is how marriage was historically described, if either party has not given their free consent to marry, or was under some kind of pressure to agree to the marriage, the marriage may be voidable. Essentially, the argument here is that you didn't go into the marriage of your own free will. You were forced into it.

Sham marriages

Sham marriages are marriages that are entered into without the parties intending to ever live together as spouses, but for some other purpose, such as a tax benefit or an immigration status.

While these marriages might be voidable for lack of intent, the courts have, in some cases, found them to be binding on the parties nonetheless. If you are thinking of marrying someone to help them get into Canada, think twice. You may not be able to get out of the marriage quickly if something goes wrong.

Misrepresentation and fraud

Fraud and misrepresentation, terms also found in the law of contracts, may also make a marriage voidable. The argument here is that you were tricked into the marriage in some way. A classic case of fraud and misrepresentation involved the marriage of a woman to the identical twin of the man whom she had been dating and had intended to marry — the marriage was declared void on the wife's application once the deception was discovered.

If misrepresentation is claimed, the deception must usually be as to the identity of one of the spouses or some other fundamental fact about the marriage itself, rather than about something like income or social standing.

Capacity to reproduce

A marriage may be voidable if either spouse lacked the biological capacity to have children going into the marriage.

Inability to consummate a marriage

It used to be the case, and many people think this is still true, that a marriage can be annulled if the spouses never have sex. The common law on this subject has developed in a somewhat different direction. A spouse must have either a complete inability to have sex, because of some physical problem, or an "invincible repugnance" to the prospect of sex which is psychological in nature. Be warned that one instance of consummation will defeat either spouse's ability to claim "inability to consummate" as a ground of voidability.

A 2004 case of the British Columbia Supreme Court, *Grewal v Sohal* [2], reviewed the law on applications to annul a marriage based on an inability to consummate. The court held that the applicant must prove that:

- the spouses had never consummated the marriage,
- the refusal to consummate the marriage was persistent and not due to a "capricious obstinacy,"
- the applicant has an "invincible aversion" to sex with the other spouse, and
- the aversion was the result of some sort of incapacity.

Invalid marriages

An invalid marriage is a marriage that does not comply with the formalities of marriage. These formalities include the authority of the person conducting the marriage to actually perform the marriage, an error in the marriage ceremony, or errors in the parties' marriage license.

There is a common-law presumption that a marriage should not be declared invalid merely because the marriage didn't meet the required formalities, and the court will try to uphold invalid marriages when it can. Section 16 of the provincial *Marriage Act* provides, for example, that irregularities in a marriage license won't invalidate a marriage entered into in good faith; section 11 similarly provides that a marriage conducted by an unauthorized person won't be declared invalid if the marriage is unchallenged.

Criminal marriages

In a few circumstances, marriage may wind up getting you charged with an offence under the *Criminal Code* [3]. Section 290 of the *Code* makes it an offence to commit *bigamy*. This section says that:

> (1) Every one commits bigamy who
>
> (a) in Canada,
>
> (i) being married, goes through a form of marriage with another person,
>
> (ii) knowing that another person is married, goes through a form of marriage with that person, or
>
> (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or
>
> (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

That's a long way of saying that you can't marry someone else if you're already married, and that you can't try to get around this restriction by marrying two people at the same time.

Section 293 of the *Code* makes it an offence to commit *polygamy*. If bigamy means "two marriages", polygamy must mean more than two marriages, but what this section is really trying to get at is the "plural marriage" idea promoted by fundamentalist adherents of the Church of Jesus Christ of Latter-day Saints, as seen on TLC's long-running reality show Sister Wives [3]. From a technical perspective, bigamy and polygamy are pretty hard to tell apart. Either way, you're marrying more than one other person.

Believe it or not, the *Criminal Code* includes a number of other offences related to marriage, including:

- procuring a feigned marriage, section 292,
- pretending to solemnize a marriage, section 294, and
- solemnizing a marriage contrary to law, section 295.

Now, to be clear, *polyamory* is not a criminal offence. Polyamory, which is discussed in the section Polyamorous Relationships later in this chapter, is about consensual relationships between more than two adults, not marriages between more than two adults.

The rights and responsibilities of married spouses

While a couple is married, section 215(1) of the federal *Criminal Code* [3] requires each spouse to provide the other with the "necessaries of life," whatever that might exactly mean. Apart from this one provision of the criminal law, there is no legislation that defines the duties spouses owe to each other during their marriage. (Under the old common law, marriage actually involved a number of specific obligations, including the duty of married spouses to live together and to provide each other with companionship and the other benefits of married life, as well as a number of other obligations that depended on the spouse's gender.)

When a married couple separates, however, each of them has certain entitlements under the federal *Divorce Act* and the provincial *Family Law Act*. Under the *Divorce Act*, a separated spouse can ask for:

- a divorce, to legally end the marriage,
- decision-making responsibility for, and parenting time with, the children,
- child support for any children born during the marriage, and for any stepchildren brought into the marriage, and
- spousal support.

Under the *Family Law Act*, a separated spouse can ask for:

- parental responsibilities for, and parenting time with, the children,
- child support for any children born during the marriage, and for any stepchildren brought into the marriage,
- spousal support,
- the division of the family property and any family debt,
- an order protecting persons, and
- an order protecting property.

All these issues except for divorce can be resolved by the spouses' agreement rather than be argued about in court. To get a divorce, the court must make a divorce order.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Civil Marriage Act* [10]
- *Marriage (Prohibited Degrees) Act* [9]
- *Marriage Act* [11]
- *Criminal Code* [2]

Links

- Vital Statistics Agency: Search for marriage commissioners [4]
- Vital Statistics Agency: Marriage registration and certificates information [5]
- Getting Married in British Columbia [6] from Dial-a-Law by the People's Law School
- Requirements for Divorce and Annulment [7] from Dial-a-Law by the People's Law School
- Marriages, divorces, and annulments inside and outside Canada [8] from Legal Aid BC

Resources

- "Endings Relationships" video [17] from JP Boyd

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 26 February 2023.

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[6] https://www.clicklaw.bc.ca/resource/1257
[7] https://www.clicklaw.bc.ca/resource/1236
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Unmarried Spouses

The provincial *Family Law Act* defines "spouse" as including both *married people* and *unmarried people*. To qualify as "spouses" under the act, unmarried people must have lived together in a "marriage-like relationship" for at least two years, or for less than two years if they have had a child together. Because the federal *Divorce Act* only applies to married spouses, all of the rules that apply to unmarried relationships are in the *Family Law Act*.

This section talks about how people qualify as unmarried spouses, the consequences of being in — and leaving — a spousal relationship, and unmarried spouses' entitlement to government benefits. This section also talks about the legal issues involved when a relationship breaks down. The next section in this chapter talks about people who are parents but not spouses.

Introduction

The rights and responsibilities of people in unmarried relationships, and the government benefits to which they might be entitled, are described in a number of different laws. These rights, responsibilities and benefits don't apply to everyone in an unmarried relationship. To figure out whether they apply to you and your relationship, you need to look at the law and how it describes the people to which it applies.

For example, family law in British Columbia generally applies to people who are *spouses*, *parents* and *guardians*, and the *Family Law Act* has definitions of the terms "spouse," "parent" and "guardian." You won't have any of the rights and responsibilities that guardians have, for example, unless you meet the act's definition of "guardian."

The *Canada Pension Plan* [1], on the other hand, applies to people who are *spouses* or *common-law partners*, while Alberta's *Family Property Act* applies to people who are *spouses* or *adult interdependent partners*, and the *Family Law Act* of Newfoundland and Labrador applies to people who are *spouses*, *partners* and *parents*. Each law defines what it means by these terms. Under section 2(1) of the *Canada Pension Plan*, for example, a "common-law partner" is:

> a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year.

Section 1 of Alberta's *Family Property Act* says that an "adult interdependent partner" is someone who is "an adult interdependent partner within the meaning of the *Adult Interdependent Relationships Act*," which means that you now have to hunt down the Alberta *Adult Interdependent Relationships Act*. When you do that, you'll find that section 3 of the *Adult Interdependent Relationships Act* says:

> (1) Subject to subsection (2), a person is the adult interdependent partner of another person if
>
> (a) the person has lived with the other person in a relationship of interdependence
>
> (i) for a continuous period of not less than 3 years, or
>
> (ii) of some permanence, if there is a child of the relationship by birth or adoption,
>
> or
>
> (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.
>
> (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

So, to qualify as a "common-law partner" under the *Canada Pension Plan*, you have to:

- have lived with someone else...
- ...in "a conjugal relationship"...
- ...for at least one year...
- ...at "the relevant time."

To qualify as an an "adult interdependent partner" under Alberta's *Family Property Act*, on the other hand, you have to:

- have lived with someone else...
- ...in a "relationship of interdependence"...
- ...for at least three years,

or you have to:

- have lived with someone else...
- ...in a "relationship of some permanence" and...
- ...have had a child together,

or you have to:

- have signed an adult interdependent partner agreement with someone else.

As a result of these definitions, and how they change depending on the legislation you're looking at, people might qualify as "common-law partners" under the *Canada Pension Plan* but not as "spouses" under British Columbia's *Family Law Act*, or they might qualify as "partners" under the *Family Law Act* of Newfoundland and Labrador but not as "adult interdependent partners" under Alberta's *Family Property Act*.

I know that this is more than a little confusing, but what it boils down to is the question "Do I qualify as _____ for the purposes of _____ legislation?," and to answer that question you usually have to read that legislation very carefully.

Provincial legislation

For most provincial laws, the question is whether or not a particular couple are "spouses." Qualifying as a spouse might mean that you're entitled to the family rate for MSP, that you can share in your spouse's estate if your spouse dies, or that you're no longer entitled to social assistance under the *Employment and Assistance Act* [2]. It also might mean that you're entitled to ask for spousal support or the division of property under the *Family Law Act* if your relationship ends.

In general, for most but not all provincial laws, you must have lived with your partner for at least two years to qualify as a spouse. Here's the definition of "spouse" from section 2(1) of the provincial *Wills, Estates and Succession Act* [3]:

> ... 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
>
> (a) they were married to each other, or
>
> (b) they had lived with each other in a marriage-like relationship for at least 2 years.

And here's the definition from section 3 of the provincial *Family Law Act*:

> (1) A person is a spouse for the purposes of this Act if the person
>
> (a) is married to another person, or
>
> (b) has lived with another person in a marriage-like relationship, and
>
> (i) has done so for a continuous period of at least 2 years, or
>
> (ii) except in Parts 5 and 6, has a child with the other person.
>
> (2) A spouse includes a former spouse.

Here's the definition from section 1 of the provincial *Adult Guardianship Act* [4]:

> "spouse" means a person who
>
> (a) is married to another person, and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or
>
> (b) is living with another person in a marriage-like relationship;

As you can see, there are subtle differences between these definitions, but lots of similarities as well. For people who aren't married to each other, the common thread involved in being a "spouse" under the legislation of British Columbia is the idea of living together in a "marriage-like relationship."

Federal legislation

Most federal laws distinguish between "spouses," people who are legally married, and "common-law partners," who aren't. Qualifying as a common-law partner might mean that you are entitled to a share of your partner's CPP credits, receive the Old Age Security spouse allowance or survivor's benefits, or the spouse amount for the GST Credit.

In general, you must have lived with your partner for at least one year to qualify as a common-law partner under federal legislation. Here's the definition from section 2 of the *Old Age Security Act* [5]:

> "common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited with the individual for a continuous period of at least one year.

Here's the definition from section 248 of the *Income Tax Act* [6]:

> "common-law partner", with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and
>
> (a) has so cohabited throughout the 12-month period that ends at that time, or
>
> (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),
>
> and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

"Conjugal relationship" is the federal equivalent of British Columbia's "marriage-like relationship."

"Common-law spouses"

Family law in British Columbia doesn't talk about people who are "common-law spouses" and never has. Once upon a time, people could marry each other and create a legal relationship simply by agreeing to marry, without getting a licence from the government, the publishing of banns by the church, or having a particular kind of ceremony. Because the rights between the spouses came from principles established by the common law, these became known as common-law marriages. Common-law marriages were valid in England until the *Marriage Act* of 1753, better known by its full flowery name, *An Act for the Better Preventing of Clandestine Marriage*.

Normally I wouldn't make a fuss about terminology like this, except that the phrase "common-law spouses" kind of suggests that there are certain rights and entitlements that a couple get from the operation of the common law, and this really isn't the case and it hasn't been the case for two-and-a-half centuries. What's really important is whether people qualify as "spouses" — or as "common-law partners" or "adult interdependent partners" or whatever — under the particular law that they're looking at.

There is no such thing as a "common-law spouse" or a "common-law marriage" in British Columbia. If you're not married but you're a "spouse," it's because of section 3 of the *Family Law Act*. Marriage and the legal requirements of marriage are discussed in the Married Spouses and the Law on Marriage section of this chapter.

Qualifying as an unmarried spouse

It's usually pretty hard to argue that you're not married if you're a married spouse. You had a ceremony in front of a bunch of people, including at least two witnesses as required by section 9 of the provincial *Marriage Act* [7], and exchanged vows and rings. Even if you've lost your ring and hidden your marriage certificate, those witnesses will still be around to talk about your wedding.

It's a lot easier for unmarried spouses to argue about the status of their relationship, and the stakes can be quite high. If a couple were just roommates, for example, neither of them will be able to ask for a share of the family property or for a contribution to the family debt, and neither will be able to ask the other to pay spousal support.

The definition of "spouse" from section 3 of the *Family Law Act* is reprinted above, under the heading "Provincial legislation." It requires that unmarried people have *lived together* in a *marriage-like relationship* for *at least two years*, or for less than two years if they've had a child together. Let's break this down a bit.

"Living together..."

"Living together" means, well, living together or cohabiting. (The thing that separates relatives and roommates from spouses is the "marriage-like relationship" requirement, and we'll talk about this next.) There are two aspects of "living together" that may not be obvious.

First, the two-year period doesn't need to be *continuous*. Going out of town for work for three months, for example, won't be considered to have interrupted the two-year period unless one or more of you thought your relationship was over while you were out of town. Neither will the two-year period be interrupted because you went on separate holidays or left to visit your parents for a few days.

Second, living together doesn't necessarily mean living together *all the time*. Some people try to avoid their relationships qualifying as "spousal" by making sure that they don't spend more than three days out of every seven together, by rotating weeks between living in a shared home and living in a separate home, or trying to figure out some other way of splitting time. You cannot count on this sort of cleverness to save you from being found to have been "living together," especially if the court sees you as trying to duck your responsibility to another person.

"...In a marriage-like relationship"

This is a more difficult question, because we're talking about people's *intentions* and *beliefs*, and not simply where they keep their socks and underwear. Whether a relationship is *marriage-like* also typically depends on more than just their intentions. Objective evidence of the parties' lifestyle and interactions provides direct guidance on the question of whether the relationship is marriage-like.

This question comes up often enough that there are some really good cases that talk about what a "marriage-like relationship" involves. *L.T.F. v R.B.F* [8], 2023 BCSC 834, is a recent case where the court summarizes leading cases and various factors to bear in mind when trying to determine the starting date of a marriage-like relationship.

In a 1998 case called *Takacs v Gallo* [9], our Court of Appeal said that you can sometimes tell whether a relationship is marriage-like or not by looking at these factors:

- **Shelter:**

  Did the parties live under the same roof? What were the sleeping arrangements? Did anyone else occupy or share the available accommodation?

- **Sexual and personal behaviour:**

  Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings towards each other? Did they communicate on a personal level? Did they eat their meals together? What, if anything, did they do to assist each other with problems or during illness? Did they buy gifts for each other on special occasions?

- **Household chores:**

  What was the conduct and habit of the parties in relation to the preparation of meals, washing and mending clothes, shopping, household maintenance, and other domestic services?

- **Social:**

  Did they participate together or separately in neighbourhood and community activities? What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties? What was the attitude and conduct of the community toward each of them and as a couple?

- **Economic support:**

  What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life? What were the arrangements concerning the acquisition and ownership of property? Was there any special financial arrangement between them that both agreed would be a

determinant of their overall relationship?

- **Children:**

  What was the attitude and conduct of the parties concerning children?

In a nutshell, where people don't agree whether their relationship is "marriage-like," the court will look at how the people involved in the relationship presented themselves to their family and friends, how they ran their household and how they arranged their finances. Did they present themselves as a family unit? Did they conduct their personal affairs as a family unit? Did they have shared bank accounts? Did they go to parties together? Were they sexually exclusive? Did they have or plan on having children?

The judge in a 2003 case from the Saskatchewan Court of Queen's Bench, *Yakiwchuk v Oaks* [10], talked about the difficulty of determining what is and what is not a "marriage-like" relationship by looking at how varied marriages themselves can be:

> "Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property — in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important — for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their 'spouse' by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some 'spouses' do everything together — others do nothing together. Some 'spouses' vacation together and some spend their holidays apart. Some 'spouses' have children — others do not. It is this variation in the way human beings structure their relationships that make the determination of when a 'spousal relationship' exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of 'public' declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to 'be together'. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people 'ease into' situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist."

The point, I think, is that marriage-like relationships don't come in a single flavour. They are as varied and diverse as marriages are, and deciding whether a particular relationship is "marriage-like" requires a close look at the circumstances of the relationship and an assessment of its overall character.

Time limits

One thing that's really different between married relationships and unmarried relationships is that married relationships don't end without a divorce order, no matter how long the spouses have been separated from each other. Unmarried relationships end when people separate, and that can be critically important for people thinking about making claims for spousal support or the division of property and debt. Section 198 of the *Family Law Act* says this:

> (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 section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].
>
> (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.

The effect of time limits

All of that boils down to this. If you were an unmarried spouse (according to the *Family Law Act*), you have *two years* from the date you separated to:

1. make a claim for spousal support (that's the reference to Part 7 in section 198(3) above),
2. make a claim for the division of property, including pensions, and debt (that's the reference to Parts 5 and 6), and
3. ask for an order for the protection of property (which are made under Part 5).

(There are no time limits for claims about parenting children and the payment of child support in section 198. However, for claims about parenting, the child must be under the age of 19, and for claims about child support, the child must still be qualified to benefit from the payment support. See the Child Support chapter for more information.)

The date of separation is the date when one or both spouses realize that their relationship is over, says so, and ends the "marriage-like" quality of the relationship. As a result, the "marriage-like" quality of a relationship can terminate

before a couple physically separates, and the time limits will usually begin to run from that date rather than the date someone moves out.

Delaying the time limits

The two-year time limit is *suspended* — it stops running — while you are working with a qualified "family dispute resolution professional" in one of the "family dispute resolution" processes the *Family Law Act* names. Under section 1 of the act, "family dispute resolution professional" includes:

- family justice counsellors,
- parenting coordinators,
- lawyers,
- mediators mediating a family law dispute, and
- arbitrators arbitrating a family law dispute.

Under the same section, "family dispute resolution" processes include:

- getting help from a family justice counsellor,
- getting help from a parenting coordinator,
- mediation,
- arbitration, and
- collaborative negotiation.

There are three things to know about the suspension of time limits under section 198(5). First, the court won't let you get away with starting mediation, for example, and then walking away from the table for a couple of months or a couple of years. You can do that if you want, of course, but it's not going to suspend the running of the two-year time limit. You need to be *actively participating* in one of the identified family dispute resolution processes if you're going to count on the time limit being suspended.

Second, the "family dispute resolution professional" you're working with needs to be a *qualified* family dispute resolution professional. If your family dispute resolution professional doesn't meet the requirements, the time limit won't be suspended. Those requirements are set out in sections 4, 5 and 6 of the Family Law Act Regulation [11]. It is really important that you ask the family dispute resolution professional you are working with whether they meet the requirements of the Family Law Act Regulation! However, if your family dispute resolution professional is a lawyer, you can easily check their status through the Law Society of British Columbia's lawyer directory [12]. The lawyer directory shows you all kinds of information about a lawyer, including their discipline history as well as whether they are qualified as an arbitrator, mediator or parenting coordinator. Here's the entry for me in the directory:

Third, the Family Law Act Regulation says that a process of mediation or arbitration requires the execution of a mediation agreement or an arbitration agreement to count as mediation or arbitration under section 1 of the *Family Law Act*. You have to have a *signed agreement* for the time limit to be suspended.

The rights and responsibilities of unmarried spouses

Section 215(1) of the federal *Criminal Code* [11] requires each person to provide their "common-law partner" with the "necessaries of life." Apart from this one provision of the criminal law, there is no legislation that defines the duties unmarried spouses owe to each other during their relationship.

When unmarried spouses separate, however, each of them has certain entitlements under the provincial *Family Law Act*. A separated person who has lived with their unmarried spouse for *at least two years* can ask for:

- parental responsibilities for, and parenting time with, the children,
- child support for any children born during the relationship, and for any stepchildren brought into the relationship,
- spousal support,
- the division of the family property and any family debt,

- an order protecting persons, and
- an order protecting property.

A separated person who has lived with their unmarried spouse for *less than two years* can ask for:

- parental responsibilities for, and parenting time with, the children,
- child support for any children born during the relationship, and for any stepchildren brought into the relationship,
- spousal support, and
- an order protecting persons.

All these issues can be resolved by the spouses' agreement rather than be argued about in court.

Government benefits

The fact that a couple live together may entitle one or both of them to benefits from the federal or provincial government as long as they qualify as *spouses* or *common-law partners* under the the legislation and rules governing those benefits. It can also expose spouses to losing certain benefits, most importantly social assistance benefits.

Social assistance

The ministry that administers the *Employment and Assistance Act* [2] and is responsible for social assistance often treats people living together as a couple as being in a spousal relationship, whether they are or aren't in that kind of relationship. This may decrease, and sometimes terminate, your entitlement to benefits under what's known as the "spouse in the house" rule. As soon as you and your partner — or the person the ministry claims is your partner — stop living together, the ministry will usually revert to treating you as single.

Employment Insurance

EI applies the same standards to unmarried spouses as it does to married spouses.

Canada Pension Plan

Unmarried spouses may share in each other's accumulated CPP credits, however this sharing is not automatic. You have to apply to equalize your CPP credits and your spouse's CPP credits. This application must be made within 48 months of the date of separation unless both parties agree in writing to waive the 48-month time limit.

Unmarried spouses may also share any CPP pension benefits that are currently being paid out. (There may be good income tax consequences if doing this reduces your taxable income.) You should be eligible to share your pension payments if you have been living together for at least one year and you are both at least 60 years old.

Old Age Security Pension

The Old Age Security Pension is available to people who are at least 65 years old. You may be entitled to receive the amount for a couple, rather than the amount for two single people, as well as other benefits like the spouse allowance and survivor's benefits, if you have been living together for at least one year.

MSP rates, and medical and dental benefits

The Medical Services Plan will cover your partner on your plan without any minimum limit on the length of time you've been living together, although you must have signed your partner up on the plan and must agree to pay the family rate rather than the rate for single adults.

If you or your partner receive any workplace medical or dental insurance coverage, check with the plan administrator to see if unmarried spouses are eligible beneficiaries under your plan. Most of the time they are.

ICBC death benefits

A surviving unmarried spouse can apply to receive death benefits from ICBC when the other spouse is killed in a car accident, regardless of whose fault the accident was.

Resources and links

Legislation

- *Family Law Act* [6]
- Family Law Act Regulation [12]
- *Divorce Act* [7]
- *Income Tax Act* [13]
- *Wills, Estates and Succession Act* [3]
- *Adult Guardianship Act* [4]
- *Old Age Security Act* [5]
- *Employment and Assistance Act* [2]
- *Canada Pension Plan* [1]

Links

- Legal Aid BC's Family Law website's common questions on Finances & Support [14]
  - See "How is property divided when a common-law relationship ends?" under the heading "Common questions"
- Canada Pension Plan Survivor's Pension [15]
- Aid BC's Family Law website's information page "Going through separation" [16]
  - See "Proving you're separated if you and your spouse still live together"
- When Your Common-Law Spouse Dies [17] from Dial-a-Law by the People's Law School
- Marriage Agreements and Cohabitation Agreements [6] from Dial-a-Law by the People's Law School

Resources

- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, March 25, 2023.

References

[1] https://canlii.ca/t/7vfd
[2] https://canlii.ca/t/84l7
[3] https://canlii.ca/t/8mhj
[4] https://canlii.ca/t/84gj
[5] https://canlii.ca/t/7vjx
[6] https://canlii.ca/t/7vb7#sec248
[7] https://canlii.ca/t/846b
[8] https://canlii.ca/t/jx99d
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[10] https://canlii.ca/t/5bpc
[11] https://canlii.ca/t/7vf2
[12] https://canlii.ca/t/8rdx
[13] https://canlii.ca/t/7vb7
[14] https://clicklaw.bc.ca/resource/4646
[15] https://clicklaw.bc.ca/resource/2204
[16] https://clicklaw.bc.ca/resource/4648
[17] https://www.clicklaw.bc.ca/resource/1251

Parents

Your relationship may have been brief, but if you have had a child with someone, you are both responsible for meeting the child's financial needs and you may both be entitled to participate in raising the child. Although the duty to pay child support comes from the simple fact of being a parent, whether you wanted to be a parent or not, being a parent doesn't come with the right to be involved in parenting a child. It is the *child's* right to benefit from the payment of child support and the *child's* right to be parented properly, to be provided with food, shelter, healthcare and clothing, and to be nurtured toward adulthood in the best way possible.

Children have these rights whether their parents are married, living together in a marriage-like relationship or have no relationship with each other at all. This section is for unmarried parents who have had a child but never lived together, and, as result, don't qualify as "spouses" under the *Family Law Act*. It talks about the legal issues unmarried parents may have to deal with and those they don't, and discusses the two most common issues parents have to deal with, child support and parenting children.

Introduction

The provincial *Family Law Act* applies to anyone who is the parent of a child, regardless of the nature of their relationship with the other parent or parents of their child, and regardless of whether they are the parent of the child as a result of natural reproduction, adoption or assisted reproduction.

The act talks about how to identify who the parents of a child are when the child is born by natural reproduction or assisted reproduction. When a child is adopted, the *Family Law Act* says that the child's parents are determined by the provincial Adoption Act [1].

The *Family Law Act* also talks about how parents can:

- ask for declarations and orders about who the guardians of a child are,
- make agreements or ask for orders about parental responsibilities and parenting time with a child, if the parent is also a guardian of the child,
- make agreements or ask for orders about contact with a child, if the parent is not a guardian of the child,
- make agreements or ask for orders about the payment of child support, and
- ask for orders for the protection of people.

Parents who don't qualify as "spouses" under section 3 of the *Family Law Act* — see the first section in this chapter for more information about who qualifies as a spouse under the act — *cannot* use the act to ask for orders about:

- the payment of spousal support,
- the division of property and debt, or
- orders for the protection of property.

The federal *Divorce Act* only applies to people who are or were married to each other; it doesn't apply to people in unmarried relationships, including parents who aren't married to each other.

Who is a "child?"

For the parts of the *Family Law Act* that talk about guardianship and parenting, a "child" is a person under the age of 19, the age of majority in British Columbia. For the parts of the act that talk about child support, the definition is a bit broader. Section 146 says this:

> "child" includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of the person's parents or guardians

The most common "other reason" why an adult child cannot "obtain the necessaries of life or withdraw from the charge of his or her parents" is because the child is going to college or university.

Who is a "parent?"

People who are "parents" under the *Family Law Act*, including stepparents, are required to help their children by paying *child support*. People who are parents may also ask for orders about *parental responsibilities* and *parenting time*. People who aren't parents are usually limited to asking for orders giving them *contact* with a child.

Part 3 of the provincial *Family Law Act* provides a comprehensive scheme for determining the parentage of children that applies for all legal purposes in British Columbia, including for family law disputes and wills and estates matters, except when parentage is determined under the *Adoption Act* [1]. Section 23 says this:

> (1) For all purposes of the law of British Columbia,
>
> (a) a person is the child of the person's parents,
>
> (b) a child's parent is the person determined under this Part to be the child's parent, and
>
> (c) the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.
>
> (2) For the purposes of an instrument or enactment that refers to a person, described in terms of the person's relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

Section 26(1) says who a child's parents are presumed to be:

> On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

Sections 27, 28, 29 and 30 have other rules about who are the parents of children conceived by assisted reproduction. Under these rules people can agree that a child's parents are or aren't the birth mother and the child's biological

father, and that other people will or won't be parents, including someone who donates sperm or eggs and someone who is the spouse of a child's birth mother.

Natural reproduction

Under section 26(1) of the *Family Law Act*, a child's parents are presumed to be the child's *birth mother* and *biological father*. It's normally pretty easy to tell who the birth mother of a child is. It's not always so easy to tell if a man is the biological father of a child.

Only biological parents and people who are stepparents because they are the married or unmarried spouse of a parent are required to pay child support. When a man denies a responsibility to pay child support on the ground that he is not the child's father, the first thing the court will do is see whether he should be presumed to be the father because of the nature of his relationship with the child's mother.

The presumptions of paternity

Under section 26(2) of the *Family Law Act*, a man is presumed to be the biological father of a child in one of the following circumstances:

> (a) he was married to the child's birth mother on the day of the child's birth;
>
> (b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended
>
> (i) by his death,
>
> (ii) by a judgment of divorce, or
>
> (iii) as referred to in section 21;
>
> (c) he married the child's birth mother after the child's birth and acknowledges that he is the father;
>
> (d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;
>
> (e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the Vital Statistics Act;
>
> (f) he has acknowledged that he is the child's father by having signed an agreement under section 20 of the Child Paternity and Support Act, R.S.B.C. 1979, c. 49.

Presumptions like these were once very important when there was no reliable way to scientifically verify that a particular man was the father of a child. These days, however, we do have the technology and a man who disputes paternity despite these presumptions can ask for an order that a paternity test be conducted.

Paternity tests

Under section 33(2) of the *Family Law Act*, the court may

> order a person, including a child, to have a tissue sample or blood sample, or both, taken by a medical practitioner or other qualified person for the purpose of conducting parentage tests.

Under section 33(1), a "parentage test" can be a human leukocyte antigen test, a DNA test, or "any other test the court considers appropriate." These are your choices:

- **Human leukocyte antigen tests:** Human leukocyte antigen tests are a kind of advanced blood test that looks at the genetic markers on white blood cells to determine the likelihood that the child's antigens were inherited from a particular man. Their accuracy is northward of 96% but can be spoofed if the purported father has had a recent transfusion.
- **Deoxyribonucleic acid tests:** DNA tests look for overlaps in the child's unique genetic code with the genetic code from the purported father and the child's mother. Today's DNA tests deal with the probability of fatherhood in terms approaching absolute certainty; if a DNA test shows a man is probably the father, the odds that the test is wrong are about 0.0001%. Testing is performed on biological samples, most commonly from mouth swabs, which are painless to obtain.
- **Chorionic villi sampling:** This is a prenatal procedure that can be performed during the 10th to 13th week of pregnancy. It consists of a DNA test on a sample of the baby's placenta. It is an unpleasant procedure that must be conducted either through the mother's cervix or her abdominal wall.
- **Amniocentesis:** This is a prenatal procedure that can be performed during the 14th to 24th week of pregnancy. It consists of a DNA test on a sample of amniotic fluid drawn through the mother's abdominal wall.

The DNA of a child is a combination of the DNA of the child's mother and father. DNA tests compare the child's DNA to that of the father and mother, and provide a calculation of the odds that the man is the child's father. Because of the accuracy of DNA testing, a positive result will prove extremely convincing to a court. Unless you have a doctorate in genetics or convincing proof that a sample was tampered with, I don't recommend that you challenge the results of a DNA test. Save your money.

A number of companies serving British Columbia, such as Genetrack Biolabs [1], The DNALAB [2], and Orchid PRO-DNA [3], will perform legally admissible paternity tests at a cost of around $480 to $500, plus taxes, for one child and an alleged father, with additional costs for more children or alleged fathers. For tests usable in a legal proceeding, the labs will require each person contributing samples to attend in person at an authorized sample collection location.

Arranging for a paternity test

If the birth mother and the person might be the father agree to have a paternity test conducted, no court order is necessary. You simply contact the appropriate company and arrange to have blood or saliva samples taken and tested. The DNA tests are done with a mouth swab, generally, and legal paternity tests can be done with just samples from the child and the potential father. The results will be delivered to you directly. Some companies even offer home sampling kits that provide legally admissible test results, provided that the test is properly witnessed by someone else. Generally, however, legal paternity tests are conducted in an authorized collection centre where the identities of the sample providers and the integrity of the samples can be confirmed.

Where the parties don't agree to a test, one of them, usually the potential father, must apply to court for an order that samples be taken from the parties and the child and that a paternity test be conducted under section 33(2) of the *Family Law Act*. Under section 33(3), the court can also make an order about who must pay for the cost of the test.

Assisted reproduction

When one or two people need the help of others to have a child, some additional rules apply and some additional people can be a "parent" of a child. Under the rules described in sections 27 to 30 of the *Family Law Act*,

- one or two people who want to have the child, the *intended parents*, can be the parents of the child,
- the donor of sperm or an egg is not usually a parent of the child,
- a surrogate mother is usually a parent of the child, and
- the spouse of a surrogate mother is usually a parent of the child.

However, a written agreement made before the child is conceived can say that a donor of sperm or eggs *is* a parent, that a surrogate mother *is not* a parent, and that the spouse of a surrogate mother *is not* a parent. In theory, at least, a child born of assisted reproduction can have as many as six people who are their parents.

What's especially important about these rules is that a person who is a parent as a result of an assisted reproduction agreement is a parent for *all* purposes of the law in British Columbia, including family law and the law about wills and estates.

Adoption

People who adopt a child become the parents of that child when the court makes an adoption order under the provincial *Adoption Act* [1]. At the same time, the birth mother and biological father of the child cease to have any parental rights or obligations with respect to the child. Unless the birth mother or biological father are jointly adopting the child with someone else, they become legal strangers to the child. They lose not only their obligation to pay child support, but also their right to ask the court for parental responsibilities or parenting time with the child.

Unlike the parts of the *Family Law Act* that talk about assisted reproduction, section 5(1) of the *Adoption Act* limits the number of people who can adopt a child to a maximum of two.

The rights and responsibilities of parents

Parents who aren't married and haven't lived together can make agreements or ask for orders about parenting their child and paying child support. The provincial *Family Law Act* is the law that the court will apply when making orders about guardianship, parenting and child support.

Child support

Child support is payable by anyone who is the parent of a child, regardless of the nature — or brevity — of the relationship that produced the child. The *Family Law Act* says, at section 147, that "each parent" has a duty to provide support for their child. Under section 150(1) of the act, child support is to be paid in the amount determined under the Child Support Guidelines.

Nothing in the *Family Law Act* or the Child Support Guidelines allows a parent to escape paying support through some quirk in the circumstances under which the child was conceived, including whether the pregnancy was planned or not, whether it came about as result of a sexual assault, or whether it came about as a result of some deception on the part of the birth mother. The only question that might be left open is whether or not the person being asked to pay child support is the "parent" of the child for whom support is sought. If that's an issue, a paternity test can always be taken under section 33 of the act.

You can find additional information about child support and the Child Support Guidelines in the Child Support chapter of this resource.

Parenting children

Under section 40(1) of the *Family Law Act*, only people who are the "guardians" of a child have *parental responsibilities* and *parenting time* with that child. People who are not the guardians of a child may have *contact* with the child, but they do not have the right to participate in making decisions about the raising of the child or the right to get information from the important people involved in the child's life, such as doctors, teachers, counsellors, and coaches.

Under section 39, the people who are presumed to be the *guardians* of a child are:

- the child's parents, as long as they lived together,
- a person who is a parent of a child under an assisted reproduction agreement, and
- a parent who "regularly cares" for the child.

In other words, if a couple has had a child but never lived together, the parent who does not live with the child is not presumed to be a guardian of the child unless they *regularly care* for the child. (The curious thing about the way section 39 is written, is that *neither* parent is presumed to be a guardian if the parents didn't live together! This is not what the BC government meant in drafting that part of the *Family Law Act*, of course, and so far I'm not aware of any court decisions that have addressed the problem.)

A parent who isn't a guardian can become a guardian if the child's other guardians agree that the parent should be a guardian. If the parents can't agree on this, then the parent who isn't a guardian has three choices. They can:

1. settle for having contact with the child and not being able to participate in parenting the child,
2. try to prove that they *regularly care* for the child, in order to be recognized by the court as a guardian of the child who is entitled to participate in parenting the child, or
3. apply to be appointed as the guardian of a child under section 51 of the *Family Law Act*.

Applications for appointment as a guardian can be a bit difficult, as the applicant — the person who is making the application — must provide a special kind of affidavit that talks about all of the children who are and have been in their care, any civil or criminal court proceedings involving them that might impact on the safety of a child, and any involvement they might have had with the Ministry for Children and Family Development. The applicant must also provide recent Ministry and police records checks.

Applications for appointment as a guardian are discussed in more detail in the Guardianship, Parenting Arrangements and Contact section of the Children and Parenting after Separation chapter, under the heading "Being a guardian and becoming a guardian."

Government benefits

The most important thing to know about government benefits is that most federal legislation defines a *spouse* as someone who has been in a cohabiting relationship for at least one year, as opposed to British Columbia's legislation which generally requires a two-year cohabiting relationship to qualify. As a result, someone in a relationship of at least one year may qualify for any federal benefits that depend on a spousal relationship, although they probably won't qualify for provincial benefits. People in a relationship of less than one year won't usually qualify for any spousal benefits at all.

Benefits and tax credits relating to children are available to anyone who is a parent, regardless of the nature of that person's relationship with the other parent. The websites of the Canada Revenue Agency [4] and the government of British Columbia [5] have a lot of information about federal and provincial benefits.

The federal government has a helpful online child benefits calculator [10] that estimates the amount of benefits available from the different federal and provincial programs.

Resources and links

Legislation

- *Family Law Act* [6]
- *Income Tax Act* [6] (provincial)
- *Universal Child Care Benefit Act* [7]
- *Income Tax Act* [8] (federal)
- *Adoption Act* [9]

Links

- Canada child benefits calculator [10]
- Overview of child and family benefits [10] from the Canada Revenue Agency
- Family Benefits [5] from the Government of British Columbia
- Introduction to Family Law [3] from Dial-a-Law by the People's Law School
- Single Parent Employment Initiative [11] from the BC Ministry of Social Development & Poverty Reduction
- My Support Calculator [12]
- Extended Family Program [13] from the BC Ministry of Children and Family Development
- Extended Family Program [14] from Legal Aid BC
- Children Born Outside Marriage [15] from Dial-a-Law by the People's Law School
- Child and Spousal Support [16] from Legal Aid BC
- Appointing a Guardian [17] from the British Columbia Law Institute
- Parenting and Guardianship [18] from Legal Aid BC
- Family Cases [19] from the Provincial Court of British Columbia
- Review of Parentage under Part 3 of the Family Law Act Project [20] from the British Columbia Law Institute (BCLI)

Resources

- "Living Together or Living Apart" [14] from Legal Aid BC
- "Options for Parents and Families: Collaborative Planning and Decision-Making in Child Welfare" [21] from the BC Ministry of Children and Family Development
- "Successfully Parenting Apart" [22] from The Canadian Bar Association
- "Parents Legal Centre Brochure" [23] from Legal Aid BC

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[20] https://www.clicklaw.bc.ca/resource/4788
[21] https://www.clicklaw.bc.ca/resource/4231
[22] https://www.clicklaw.bc.ca/resource/4402
[23] https://www.clicklaw.bc.ca/resource/4795

Polyamorous Relationships

Polyamorous relationships are relationships involving more than two adults; someone who identifies as *polyamorous* is or prefers to be in a relationship with more than one other person at a time. (The "poly" part of polyamorous comes from the Greek word for *many*, while the "amorous" part comes from the Latin word for *love*.) Polyamorous relationships are tremendously diverse. They may include adults who are married to each other and adults who have had children together. They may include people who live together and some who don't. The people in a polyamorous relationship may or may not identify as a "family," they may or may not share the same home, and they may or may not own property together. Not only are polyamorous relationships varied and diverse, they can be *complicated*.

This section provides an introduction to polyamorous relationships and how polyamorous relationships work in the context of family law. Because each province and territory has its own laws about who is entitled to parent children, ask for child support, ask for spousal support, and ask to divide property, the information in this page only applies to people who live in British Columbia. If you live outside of British Columbia and are entering or leaving a polyamorous relationship, you really must speak to a family law lawyer in your area for accurate information about how family law may impact you and your relationship.

Introduction

The social expectations associated with marriage are rather predictable. Although some people have open marriages, where each spouse is free to have relationships with other people, most of the time — the vast majority of the time — married spouses are expected to be emotionally and sexually faithful to each other. This expectation is so common that many married couples don't even talk about it. It's *assumed* that they'll be faithful to each other. We also expect that they'll provide emotional support for each other — "in good times and in bad, in sickness and in health," as the vow says — and work together as true partners, each making sacrifices for the benefit of the family as a whole.

While the people involved in a polyamorous relationship may share these expectations of their partners, they also may not. Polyamorous relationships vary in terms of the degree of mutual commitment, interdependence, and sexual and emotional fidelity people expect of each other. A polyamorous individual may be simultaneously involved in two or more romantic relationships, without those people being in a relationship with each other, or significant, committed relationships may exist among everyone involved. An individual may be involved in a core relationship with a number of other people that is committed and enduring, while one or more people in that core relationship are involved in peripheral sexual relationships with others. Or, an individual may be involved in a number of concurrent relationships that are more sexual than romantic in nature and involve a lesser sense of interdependence. It's safe to say that no two polyamorous relationships are exactly alike.

Polyamorous relationships have probably existed from the dawn of human history. Even though pair relationships have dominated Western culture since the days of the Ancient Greeks, polygamous marriages are permitted by law, and remain important parts of the cultural fabric, in many countries — particularly in western Africa and in nations governed by sharia law — and are socially accepted but neither legalized nor criminalized in still other countries. Polyamorous relationships, the unmarried cousin of polygamous relationships, are growing in popularity in North America and in Europe, and it appears that more Canadians identify as polyamorous today than ever before.

That being said, the exact number of Canadians who consider themselves to be polyamorous or are engaged in polyamorous relationships is unknown; Statistics Canada doesn't track polyamorous relationships in its population surveys. The limited information available from the United States suggests that in 2009, one in 614 Americans lived in openly polyamorous relationships while in 2010, one in 500 Americans identified as polyamorous. Research conducted by the Canadian Research Institute for Law and the Family [1] in 2016 found that 82.4% of the 547 respondents to a national survey agreed that the number of people who identify as polyamorous in Canada is increasing, and 80.9% agreed that the number of people involved in polyamorous relationships is increasing.

Family law is relevant to people in polyamorous relationships just as it's relevant to people in other kinds of family relationship. If there are children, parenting and child support may be an issue. If an adult is dependent on others, spousal support may be an issue. If property has been purchased or debt incurred, the property interests may be an issue. However, you'll remember the discussion earlier in this chapter about how the rights and responsibilities family law talks about depend on how people fit into terms like *spouse*, *common-law partner*, *parent*, *guardian* and *child*. That's where things get difficult for people in polyamorous relationships. British Columbia's *Family Law Act*, the federal *Divorce Act*, and the family law legislation of the other provinces and territories are all written on the assumption that adult relationships only come in pairs, and figuring out how the square peg of polyamorous relationships fits into the round hole of pair relationships can be tricky.

Bigamous and polygamous relationships

"Bigamy" means being married to more than one person at the same time, and is a criminal offence under section 290 of the *Criminal Code* [3]. "Polygamy" means being married to more than two other people at the same time, and is an offence under section 293 of the *Code*. (*Polyandry*, incidentally, means a marriage involving more than one man, while *polygyny* means a marriage involving more than one woman. The relationships you see on television in shows like *Big Love* and *Sister Wives* are polygynous marriages.)

Polyamorous relationships don't involve the marriage of the people involved, and aren't captured by either section 290 or 293 of the *Criminal Code*. While pairs of adults in a polyamorous relationship may be married to each other, no one person is married to more than one other person at a time.

The other distinguishing characteristic of polyamorous relationships is that while polygamous marriages tend to be motivated by religious beliefs and revolve around men — *Sister Wives* is a very good example of these attitudes, and in fact polygamy was originally criminalized as a response to the historical spread of the fundamentalist Church of Jesus Christ of Latter-day Saints to which Kody Brown and his family are adherents — polyamorous relationships tend to be motivated by beliefs in the importance of freedom of choice, equality among the members of a

relationship, and honesty.

Applying family law terminology

The federal legislation on marriage and divorce is a good place to start for understanding how family law terms like *spouse* and *parent* apply to people in polyamorous relationships. Section 2 of the *Civil Marriage Act* [10] defines *marriage* as "the lawful union of two persons to the exclusion of all others." If that wasn't plain enough, section 2(1) of the *Divorce Act* defines *spouse* as "either of two persons who are married to each other."

Legislation like this clearly says that marriages involve two people, and two people only. On the other hand, let's look more carefully at the definition of *spouse* at section 3 of the *Family Law Act*:

> (1) A person is a spouse for the purposes of this Act if the person
>
> (a) is married to another person, or
>
> (b) has lived with another person in a marriage-like relationship, and
>
> (i) has done so for a continuous period of at least 2 years, or
>
> (ii) except in Parts 5 and 6, has a child with the other person.

We know that "marriage" is out for people in polyamorous relationships because of the definition in the *Civil Marriage Act*, but you'll see that the definition of unmarried spouse in section 3(1)(b) of the *Family Law Act* doesn't have a number limit attached to it. In Alberta, on the other hand, section 3(1) of the *Adult Interdependent Relationships Act* says that an adult interdependent partner includes someone who has lived with someone else in a *relationship of interdependence*. Section 1(1) of that act offers a definition of that awkward term and says this:

> "relationship of interdependence" means a relationship outside marriage in which any 2 persons
>
> (i) share one another's lives,
>
> (ii) are emotionally committed to one another, and
>
> (iii) function as an economic and domestic unit.

And there's that number limit again, "2 persons." But that's missing from the definition of "spouse" in section 3(1)(b) of British Columbia's *Family Law Act*. To "live with another person in a marriage-like relationship" doesn't mean to live with *just one other person*. The British Columbia definition means that a person can be in a spousal relationship with one person while being in a spousal relationship with someone else, and while being in a spousal relationship with someone else as well.

That's really important, because under the *Family Law Act*, someone who is a "spouse" has the right to ask anyone else who qualifies as that person's "spouse" for spousal support and for the division of property and debt. On top of that, someone who is a *stepparent* — defined as the "spouse" of a parent — is a "parent" potentially obliged to pay child support for the benefit of the parent's child.

The definition of "parent" is still restricted. The parents of a child conceived by natural reproduction are limited to the birth mother and the biological father under section 26 of the *Family Law Act*. However, for a child conceived by assisted reproduction, the people who sign an assisted reproduction agreement can agree that the child's parents will include:

- one or two people who intend to have the child,
- a donor of sperm,
- a donor of eggs,
- a surrogate mother, and
- the "spouse" of a surrogate mother,

for a total of six people who can be the "parents" of a child for all purposes of the law of British Columbia. These limits are important, as it is a child's *parents* who are presumed, in most cases, to be the child's *guardians*, and it is only *guardians* who have parenting responsibilities for, and parenting time with, a child.

However, there's a workaround. While parents cannot make an agreement appointing someone who isn't a parent as a guardian of their child, the court can make orders appointing other people as a guardian of a child under section 51 of the *Family Law Act*, and there is no limit to the number of people who can be appointed as the guardians of a child.

What have the courts got to say about all this?

Not much, to be honest. At least not yet. There have been a few cases — one in British Columbia and one in Nova Scotia — involving people in polyamorous relationships, but the judges hearing those cases didn't have much at all to say about the unusual nature of the relationship between the adults involved.

From the point of view of people in polyamorous relationships in British Columbia, we need to get decisions from the court confirming that:

1. a child can have as many as six parents when the child has been conceived by assisted reproduction, and
2. a person can have more than one spouse at the same time.

We do have government policy that expects a child to have as many as three parents, because that's how Vital Statistics updated their forms when the *Family Law Act* became law. We also have cases where married spouses delayed getting divorced for long enough that they qualified as the unmarried spouse of the person they moved in with after separating from their married spouse — *Austin v Goerz* [2], a 2006 decision of our Supreme Court, is a good example of cases like this — but we don't have cases saying that people can have more than one spouse in other circumstances. Now, the plain language of the *Family Law Act* says quite clearly that a child can have up to six parents and that a person can have more than one spouse at the same time, but we haven't had a *judge* say that this is what the *Family Law Act* says.

Family law agreements

Even though the *Family Law Act* seems to be pretty flexible as far as people in polyamorous relationships are concerned, there are still problems that need to be worked out. We haven't yet had a court decide how child support should work when there's more than one parent or stepparent from the same relationship who's liable to pay child support. We haven't had a court decide how to apply the Spousal Support Advisory Guidelines when there's more than one spouse from the same relationship who's liable to pay spousal support, or when there's more than one spouse who's entitled to receive it. And we haven't had a court decide how to divide property when there's more than two spouses who're entitled to share the family property.

Even though there are a handful of court decisions involving polyamorous families, the number of those decisions is surprisingly small given what we know about the prevalence of polyamorous relationships in Canada. There are likely three reasons for this.

Firstly, the laws of the other provinces and territories are nowhere near as adaptable to polyamorous relationships as British Columbia's *Family Law Act*. It may be that when push comes to shove, people simple don't pursue claims in court if they're not going to obviously qualify as *spouses*, *partners*, *parents* and so on under the local legislation. Challenging legislation under the equality provisions of the Canadian Constitution is expensive and time-consuming.

Secondly, it's also possible — in fact, it's quite likely — that people in polyamorous relationships intentionally avoid going to court when their relationships come to an end and resolve their differences in other ways. Polyamorous relationships tend to be very complex in terms of the expectations of family members, their arrangements for covering household bills, assigning responsibility for repairs and maintenance, their living arrangements, and their arrangements for the ownership of property. Dragging these issues through court, even in a province with laws

friendly to polyamorous relationships, would be an arduous, costly and protracted affair. Especially if the question of how the law — on basic issues like child support, spousal support, and the division of property — applies to polyamorous families isn't resolved. It makes perfect sense that you'd choose to avoid court and head to mediation, collaborative negotiation or arbitration as infinitely preferable alternatives!

Mediation, collaborative negotiation and arbitration are all private processes. There's no laundry to air on the public record, and no obligation to find a resolution by applying the strict letter of the law. Whether you live in British Columbia or not, these are all better processes than litigation. If mediation or collaborative negotiation are successful, the result will be a *separation agreement* that everyone will sign; if arbitration is successful, the result will be an *award* prepared by the arbitrator.

Finally, it also seems likely that people entering polyamorous relationships, especially relationships that involve people living together, buying property together or having children together, would make plans for the management and termination of their relationship well ahead of time. A lot of the contact I've had with people in polyamorous relationships involves helping people plan and sign *cohabitation agreements*. These agreements aren't particularly common, or particularly useful, for people in pair relationships, but they're indispensable for people in polyamorous relationships.

In my experience, polyamorous relationships rarely "just happen." They tend to be the product of a huge amount of discussion and negotiation — about easy financial and mathematical issues as well as super hard emotional and psychological issues — long before more than two people start seeing each other, never mind start living together. Since people are already spending so much time planning what their relationship will look like, it's easy to turn some of that effort into preparing a cohabitation agreement.

Subject matter of cohabitation agreements

For people in pair relationships, cohabitation agreements usually talk about *spousal support* and the *division of property and debt* in the event their relationship ends. They don't talk about *parenting children* or *child support* because it's impossible to make decisions about these issues so far in advance. They sometimes talk about how the relationship itself will be managed, but agreements like this are the exception rather than the rule. The social expectations we have about how pair relationships work cover the management of most people's relationships really well.

While cohabitation agreements for people in polyamorous relationships can still talk about spousal support and the division of property and debt, and have the same problems talking about parenting children and child support, their real benefit usually lies in talking about how the relationship will work. Common issues that cohabitation agreements can talk about include:

- Will people have children? If so, will the children be conceived naturally or through assisted reproduction? Will anyone else have parenting responsibilities for the children?
- Will the family live together in one home or in more than one home? How will the family home be bought or rented? How will the mortgage or lease be paid?
- How will the decision to make large repairs be made? How will those repairs be paid for?
- How will the decision to buy appliances and furniture be made? How will those things be paid for and who will own them?
- How will household chores be managed?
- How will household expenses be paid? Will everyone contribute to a joint bank account and, if so, in what amount? Equally or in proportion to people's incomes?
- If someone takes time off work for parental leave or because of illness, what happens to their financial obligations to the household?
- What will the rules be about seeing people outside the relationship? When can someone else spend the night, and does anyone have to agree before someone can spend the night?

- Can new people be added to the relationship? If so, how? Who needs to agree? If a new person is added, how will everyone's financial obligations change?
- Can someone be asked to leave the relationship? How? What sort of notice should they be entitled to? What can they take with them when they leave?
- What should happen when someone decides to leave the relationship? Should they have to give notice? If so, what sort of notice should they have to give? What can they take with them? What can't they take with them?
- What will happen if someone gets sick? Who should be able to make medical decisions if they can't make them for themselves? What will happen if people can't agree on those medical decisions?
- What will happen if someone dies? What will happen to their financial obligations, the property they own and any interests in common property that everyone owns?

What's really important here is to anticipate every kind of problem that might arise during a relationship, talk about those problems ahead of time, and try to make an agreement about how those problems will be handled before moving in together.

Managing negotiations with lawyers

When people in a pair relationship want to sign a cohabitation agreement or a marriage agreement, one of them will usually hire a lawyer to write it up. The draft agreement goes to the other person, who reviews it with their lawyer and gets some advice about whether it's a good agreement or a bad agreement. Quite often the second lawyer has a number of changes to make, and proposes these to the drafting lawyer. After a bit of back-and-forthing, a final draft is ready to sign. Most family law agreements that are written by lawyers include "certificates of independent legal advice." These get signed by the lawyers and the parties, and indicate that each person saw a lawyer about the agreement, and that the lawyer explained to them how the agreement affects their rights and obligations as well as the alternatives to signing an agreement.

The Family Law Agreements chapter talks about this process in a lot more detail, but this is the bare bones of it. No matter whose lawyer drafts the agreement, the other person always has the chance to comment and make changes to the agreement, and both people get legal advice about the meaning and impact of the agreement.

In polyamorous relationships, things are a little more complicated. This is mainly because there are more than two lawyers involved, and each of the lawyers has an obligation to discuss a proposed cohabitation agreement with their clients and suggest changes that make the agreement more fair... or at least more fair from their client's perspective. That's an awful lot of cooks in the kitchen to mess things up, especially when you consider how much more complicated cohabitation agreements for people in polyamorous relationships are compared to cohabitation agreements for people in pair relationships.

Sometimes the best solution is to hire a lawyer whose only job is to take care of the writing part, and doesn't represent any of the parties. This makes the drafting lawyer a lot more neutral. Their job is to talk with the people entering the relationship about the sort of things the agreement can talk about and the things it can't, and then write out the agreement that the people entering the relationship want.

The draft agreement then goes to the lawyers for each of the people entering the relationship. Each lawyer talks to their client about the law, how the proposed agreement would affect their rights and responsibilities, and whether the agreement is fair or not. Based on that discussion, each lawyer then talks to the drafting lawyer about the changes they think are needed to better protect the interests of their client, make the agreement more understandable or make the agreement easier to use. The drafting lawyer then takes everyone's comments and tries to edit the agreement to reflect the changes people want, and lets everyone know if there are any comments that are contradictory. The revised agreement then goes back to each lawyer-client pair for more legal advice and possibly more changes. Those changes go back to the drafting lawyer for further revisions, which hopefully results in a final agreement that everyone is as happy with as possible.

This process is a little complicated and requires that an awful lot of lawyers be hired. However, cohabitation agreements for people in polyamorous relationships are far more detailed than cohabitation agreements for people in pair relationships, they involve more people, they tend to cover many more issues, and the law that needs to be addressed is a lot more difficult to navigate. As a result, it is even more important that everyone has their own lawyer to advise them on how the agreement affects their interests, and this means that there's a lot more lawyers to argue about the details. Getting a neutral lawyer to take care of the writing part and reconciling everyone's comments is often the most efficient way to go, even though it means hiring yet another lawyer.

Choosing a lawyer

If you are entering or leaving a polyamorous relationship, it's critically important that you get legal advice about your situation. You can't assume that the law will apply to you the way it did to friends and family who entered or left pair relationships. The trick, of course, is finding the right lawyer to give you that advice.

The section on You and Your Lawyer in the chapter on Understanding the Legal System has information about how to find and hire a lawyer. However, people involved in polyamorous relationships need to make an extra effort to find family law lawyers who are familiar with this kind of relationship. A lot of lawyers who deal with problems involving these relationships will say so on their website. If you can't find someone who says explicitly that they handle polyamorous family law problems, then call a lawyer outside your hometown, or even outside of British Columbia, who deals with polyamorous families and see if they can refer you to someone. Or, you could also try contacting a family law lawyer whose website says they deal with LGBTQ issues. LGBTQ issues are *not* polyamorous issues, but lawyers who routinely manage LGBTQ issues in the family law context are more likely to have an idea about how family law works in the context of polyamory.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Criminal Code* [2]
- *Civil Marriage Act* [24]

Links

- Spousal Support Advisory Guidelines [9]
- Legal Aid BC's Family Law website's common questions on Finances & Support [3]
  - See "How is property divided when a common-law relationship ends?" under the heading "Common questions"
- Legal Aid BC's Family Law website's information page "Going through separation" [4]
  - See "Proving you're separated if you and your spouse still live together"

Resources

- "Polyamorous Relationships and Family Law in Canada" [5] from Canadian Legal Information Institute (CanLII)

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Grandparents and Extended Family Members

People other than a child's parents can have relationships with a child that fall under the family law umbrella. Typically, these people are a child's extended family members — grandparents, aunts, uncles, and so forth — although there's no reason why someone else, like an unrelated long-term caregiver, a family friend, or a neighbour, couldn't also have an important interest in parenting a child or in having time with a child on a regular basis.

This section talks about the claims a child's grandparents, extended family members and other adults can make about the guardianship of a child, parenting a child, having time with a child, and child support.

Introduction

Grandparents, extended family members and other adults who are not parents normally get involved in legal disputes about children in only a few situations, usually where:

- one or all of the guardians of a child have died,
- one or all of a child's guardians have abandoned a child,
- there are serious concerns about the ability of guardians to care for their child, or
- they are being refused time with a child, or involvement in the child's life.

Their concerns are about either supervising or managing the parenting of a child, or setting up a schedule that will let them see a child on a regular basis.

Two laws might apply to grandparents, extended family members and others who aren't parents and who want to be involved in parenting a child or getting time with a child.

- **The federal *Divorce Act*:** This law applies if the child's parents are married and are already involved in a court proceeding under the *Divorce Act*. However, to make an application under the *Divorce Act*, you have to get the court's permission first.
- **The provincial *Family Law Act*:** This applies whether the child's parents are married to each other or not. It also applies whether or not the parents are already involved in a court proceeding under the *Family Law Act*. You do not need the court's permission to make an application under the *Family Law Act*.

Each law has different rules about how and when people other than parents can apply for orders about children, and it's important to understand which law applies to your situation.

The *Divorce Act*

Under section 16.1(1)(b) of the *Divorce Act*, someone who isn't a *spouse* may ask the court for a *parenting order*. A "parenting order" is an order about *parenting time* or *decision-making responsibility* in respect of a child. "Parenting time" usually means how the child's time is divided between their parents, but in this context includes time with someone who isn't a parent. "Decision-making responsibility" means the responsibility for making decisions on behalf of a child about important things like the child's healthcare or education. (Parenting time and decision-making responsibility are discussed in a lot more detail in the section *Divorce Act* Basics and in the chapter Children and Parenting after Separation.)

Under section 16.5(1) of the *Divorce Act*, someone who isn't a *spouse* may also ask the court for a *contact order*. A "contact order" is an order about the time that someone who isn't a parent has with a child. This sounds the same as an order for "parenting time," but there are some big differences. Someone with parenting time with a child has the right to make day-to-day decisions about the child, including emergency decisions, and the right to get information about the child's wellbeing, including about their health and education. Someone with contact, on the other hand, has none of these rights. Contact is just about spending time with the child and nothing else. (Contact is also discussed in the chapter Children and Parenting after Separation.)

Because we're talking about the *Divorce Act*, a court proceeding must have already started between married spouses, or formerly married spouses, before someone who isn't a spouse can step in and ask for, or ask to change, a parenting order or a contact order. There must be an existing proceeding between spouses in which the person's application can be made.

The *Family Law Act*

The *Family Law Act* talks about *guardians* who have *parental responsibilities* and *parenting time* with children, and about people who are not guardians and may have *contact* with a child.

In most cases, a child's parents are the child's guardians, which means that normally only a child's parents are entitled to have parental responsibilities and parenting time with the child. However, someone who isn't a parent can ask the court to be appointed as a guardian of a child under section 51 of the *Family Law Act*. Someone who is a guardian of a child may ask the court for an order about the child's *parenting arrangements* under section 45(1) of the act. An order about a child's "parenting arrangements" is an order about *parenting time* or *parental responsibilities* in respect of a child. "Parenting time" usually means how the child's time is divided between their parents, but in this context includes time with someone who isn't a parent. "Parental responsibilities" means the responsibility for making decisions on behalf of a child about important things like the child's healthcare or education. (Parenting time and parental responsibilities are discussed in a lot more detail in the section *Family Law Act* Basics and in the chapter Children and Parenting after Separation.)

Under section 59 of the *Family Law Act*, someone who isn't a *guardian* may ask the court for a *contact order*. A "contact order" is an order about the time that someone who isn't a guardian has with a child. This sounds just like an order for "parenting time," but there are some big differences. Someone with parenting time with a child has the right to make day-to-day decisions about the child, including emergency decisions. Someone with contact, on the other hand, does not have this right. Contact is just about spending time with the child and nothing else. (Contact is also discussed in the chapter Children and Parenting after Separation.)

Under section 149(1) and 149(2)(b) of the act, any person may ask the court for an order that a child's parent, stepparent or guardian pay *child support* for the benefit of a child to a "designated person," normally the person the child lives with the most. (Child support is discussed in a lot more detail in the Child Support chapter.)

If the child's guardians are already in court, a child's grandparents, extended family members and others who aren't parents can start a court proceeding and ask that the new proceeding be *joined* to the court proceeding between the guardians. They can then ask for orders about guardianship of the child, the child's parenting arrangements, contact

with the child or child support for the child.

If the guardians are not already in court, a child's grandparents, extended family members and others can start a court proceeding against the child's parents or guardians and ask for orders about guardianship, parenting arrangements, contact with the child or child support.

Orders and agreements

This section talks about the orders available to children's grandparents, extended family members and others who aren't parents, and is written on the assumption that someone who is interested in securing a right to some sort of involvement in a child's life will be going to court. After all, if the child's parents or guardians were okay with the kind of involvement the person is looking for, there'd be no need to secure an order as they'd likely just give their permission. In cases like that, there's no reason at all why the child's parents or guardians and the grandparent, extended family member or other person couldn't just make a written agreement resolving the issue instead of going to court.

A family law agreement is a contract between two or more people. Agreements on family law issues are enforceable by the courts, just like any other kind of contract. The sort of agreement a child's grandparent, extended family member or other person who isn't a parent would want to sign might:

- authorize the grandparent, extended family member or other person to exercise certain parental responsibilities in relation to the child, under section 43(2) of the *Family Law Act*,
- provide the grandparent, extended family member or other person with specific rights of contact with the child, under section 58(1) of the act, or
- require one or more parents or guardians to provide child support to the grandparent, extended family member or other person, under section 147(1) of the *Act*, if the child is living with the grandparent, extended family member or other person.

It's important to know that a child's guardians cannot make an agreement appointing anyone other than a parent as a guardian of the child. Only the court can make someone other than a parent a guardian, and that requires an application to court and a court order under section 51 of the *Family Law Act*. You'll find details about this further on in this section.

Rights and responsibilities of grandparents and others

A child's grandparents, extended family members and other people who aren't the child's parents can ask for orders about parenting a child and time with a child under the provincial *Family Law Act*. If the child's parents are married and have an order under the federal *Divorce Act*, the child's grandparents, extended family members and others *must* make any applications about parenting the child or time with the child under that legislation, and they must get the court's permission first.

Where a child winds up living mostly with a grandparent, extended family member or another person, they can ask for an order that the child's parents, stepparents or guardians pay child support to them under the *Family Law Act*.

A child's grandparents, extended family members and other people do not have the right to ask a child's parents or guardians to pay spousal support to them. They also don't have the right to ask for orders about the division of property or debt with a child's parents or guardians.

Parenting children

Orders about parenting a child can be made under either the *Divorce Act* or the *Family Law Act*. The *Divorce Act* only applies when the child's parents are married and are divorced or in the process of divorcing. The *Family Law Act* applies regardless of the relationship between the child's parents.

The *Divorce Act*

Under section 16.1(1) of the *Divorce Act*, the court may make orders about *parenting time* and *decision-making responsibility* with respect to a child. Under section 16.5(1), the court may make orders that a person have *contact* with a child.

When a grandparent, extended family member or another person who is not a parent asks the court for an order about a child, they must show why it is in the best interests of the child for the court to make that order. The court will usually extend a great deal of respect to the wishes of the child's parents in considering applications like these, and often, depending on the child's age and maturity, to the wishes of the child. These issues are discussed in more detail in the chapter on Children and Parenting After Separation.

Parenting orders and "standing in the place of a parent"

Section 16.1 of the *Divorce Act* says this:

> (1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by
>
> (a) either or both spouses; or
>
> (b) 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

The key here is that a person who isn't a spouse must *stand in the place of a parent*, or *intend* to stand in the place of a parent, to a child before they can ask for a parenting order. (That phrase, "standing in the place of a parent," comes from a Latin legal term you've probably heard before, standing *in loco parentis*. They mean the same thing.) If the person who wants the parenting order doesn't stand in the place of a parent, or intend to stand in the place of a parent, to the child who would be the subject of the parenting order, they can't ask for the order.

"Standing in the place of a parent" means that a person has assumed the responsibilities of a parent to a child. They live with the child, they provide emotional and financial support for the child, they make important decisions for the child, and they mentor and discipline the child. In short, they have taken responsibility for raising a child. Under the old law, whether someone stood in the place of a parent was really important because it meant that they had all of the rights and responsibilities a parent would have, as well as the obligation to pay child support for the benefit of the child. That's still important under today's *Divorce Act*, as someone who marries a parent can be required to pay child support if they "stand in the place of a parent" to their stepchild.

The big case on whether someone stands in the place of a parent is a 1999 decision of the Supreme Court of Canada called *Chartier v Chartier* [1]. In this case, the court said that:

> "The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent."

This is important to know because section 16.1(3) of the *Divorce Act* says that:

> (3) A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court.

In other words, a person who isn't a spouse but stands in the place of a parent must get permission from the court under section 16.1(3) before they can ask for a parenting order under section 16.1(1)(b), and an important step in getting permission will be proving that the person stands in the place of a parent to the child or intends to stand in the place of a parent.

When a parenting order already exists, someone who isn't a spouse but stands in the place of a parent can also ask the court to change, or *vary*, the parenting order under section 17(1)(b)(ii) of the *Divorce Act*. However, just like applications for new parenting orders, someone who isn't a spouse and wants to apply to vary a parenting order must first get permission from the court under section 17(2).

Finally, remember that because we're talking about the *Divorce Act*, a court proceeding must have already started between married spouses, or formerly married spouses, before someone who isn't a spouse can step in and ask for, or ask to change, a parenting order. There must be an existing proceeding between spouses in which the person's application can be made.

Contact orders

Someone who isn't a "spouse" may ask the court for an order that they have contact with a child under section 16.5(1) of the *Divorce Act*. While the person who wants the order doesn't need to pass that threshold test of "standing in the place of a parent" or "intending to stand in the place of a parent" that applications about parenting orders require, the person who wants the contact order still needs to first get permission from the court under section 16.5(3) of the act before applying for contact.

And just like applications about parenting orders, there must be an existing court proceeding between married spouses, or formerly married spouses, before someone who isn't a spouse can ask for a contact order. There must be an existing proceeding between spouses in which the person's application can be made.

The *Family Law Act*

Under section 45(1) of the *Family Law Act*, the court may make orders about *parenting time* and *parental responsibilities* with respect to a child. Under section 59, the court may make orders that a person have *contact* with a child.

When a grandparent, extended family member or another person who is not a parent asks the court for an order about a child, they must show why it is in the best interests of the child for the court to make that order. The court will usually extend a great deal of respect to the wishes of the child's parents and guardians in considering applications like these, and often, depending on the child's age and maturity, to the wishes of the child. These issues are discussed in more detail in the chapter on Children and Parenting After Separation.

Guardianship, parental responsibilities and parenting time

Under section 40(1) of the *Family Law Act*, only people who are the guardians of a child have *parental responsibilities* and *parenting time* with respect to that child. People who are not the guardians of a child may have *contact* with the child but do not have the right to participate in making decisions about parenting the child or the right to get information about the child's wellbeing from the important people involved in the child's life, such as doctors, teachers, counsellors, and so on.

Under section 39 of the act, the people who are presumed to be the guardians of a child are:

- the child's parents, as long as they lived together after the child was born,
- a person who is a parent of a child under an assisted reproduction agreement, and
- a parent who "regularly cares" for the child.

A child's grandparents, extended family members and other people who are not parents are not presumed to be the guardian of a child. A grandparent, extended family member or another person may become the guardian of a child by:

- applying for an order appointing them as a guardian of the child under section 51 of the act,
- being appointed by a guardian as the *standby guardian* of the child under section 55, or
- being appointed a guardian of the child upon the death of a guardian, as a *testamentary guardian* of the child, under section 53.

Since an appointment making a person a standby guardian or a testamentary guardian of a child can take some time to come into effect, a grandparent, extended family member or another person who feels the need to step in sooner rather than later will need to apply to be appointed as a guardian of the child under section 51 of the *Family Law Act*.

Applications for appointment as a guardian can be difficult and time-consuming, and the court must be satisfied that the appointment is in the best interests of the child. The person who is applying to become the guardian of a child, the *applicant*, must fill out a special affidavit required by the Provincial Court Family Rules [1] and the Supreme Court Family Rules [3] that talks about:

- the applicant's relationship to the child,
- the other children currently in the care of the applicant,
- any history of family violence that might affect the child, and
- any previous civil or criminal court proceedings related to the best interests of the child.

Applicants must also get, and attach to their affidavit, the following other documents:

- a criminal records check,
- a child protection records check from the Ministry for Children and Family Development, and
- a check of provincial registry records for any family law protection orders about them.

Someone who is applying to be appointed as the guardian of a child may ask for orders about parental responsibilities and parenting time in the same application.

Temporary authorizations

Under section 43(2) of the *Family Law Act*, a guardian who is temporarily unable to exercise certain parental responsibilities may authorize someone to exercise those responsibilities on their behalf, including a child's grandparent, extended family member or another person who is not a parent of the child. These authorizations must be made in writing, and should say exactly what it is that the authorized person can do on behalf of the child and which parental responsibilities they may exercise.

The parental responsibilities that someone can exercise under a written authorization are:

- making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child,
- making decisions about whom the child will live with and associate with,
- making decisions about the child's education and participation in extracurricular activities,
- giving, refusing, or withdrawing consent to medical, dental, and other health-related treatments for the child,
- applying for a passport, licence, or permit for the child,
- giving, refusing, or withdrawing consent for the child, if consent is required,
- receiving and responding to any notice that a parent or guardian is entitled or required by law to receive, and
- requesting and receiving from third parties health, education, or other information respecting the child.

Authorizations like these are mostly used when: a child needs to go somewhere else to attend school; a guardian will not be able to look after a child during a period of illness; and, a guardian will not be able to look after a child while recovering from a surgery or another difficult treatment.

Contact orders

Any person can apply for contact with a child under section 59 of the *Family Law Act*. The court must be satisfied that the contact sought is in the best interests of the child. People who are applying for contact don't need to get a criminal records check, a child protection records check or a check of provincial registry records for family law protection orders.

Child Support

The *Divorce Act*

Under section 15.1(1) of the *Divorce Act*, only married spouses may apply for child support orders under the act. As a result, a child's grandparent, extended family member or another person who is not a parent of the child yet has parenting time with a child under a *Divorce Act* order must pursue child support under the *Family Law Act* if child support is needed. You can't apply for child support under the *Divorce Act*.

The *Family Law Act*

The *Family Law Act* says, at sections 146 and 147(1), that every parent, stepparent and guardian has a duty to provide support for their child, as long as the child:

- is a "child" as defined by section 146 of the act,
- hasn't become a "spouse," and
- hasn't withdrawn from the care of their parents or guardians under section 147(1).

Under section 149 of the act, the court can make an order requiring a parent to pay child support to "a designated person" on the application of a person "acting on behalf of the child:"

> (1) ... on application by a person referred to in subsection (2), a court may make an order requiring a child's parent or guardian to pay child support to a designated person.
>
> (2) An application may be made by
>
> (a) a child's parent or guardian,
>
> (b) the child or a person acting on behalf of the child ...

As long as the child lives mostly with their grandparent, extended family member or another person who is not a parent of the child, the grandparent, extended family member or other person can ask for an order for child support against one, two, or more of the child's parents and guardians.

According to section 150(1) of the *Family Law Act*, when an order for child support is made, the amount of the support order is to be determined under the Child Support Guidelines. As a result, the whole of the Guidelines apply when a child's grandparent, extended family member or other person is asking for child support, just as they apply when a parent or a guardian is asking for child support, including:

- the tables that are used to calculate the amount of child support payable,
- the exceptions that allow child support to be paid in an amount different than the usual table amount, and
- the rules about the payment of children's special or extraordinary expenses.

Child support is discussed in a lot more detail in the Child Support chapter.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- Provincial Court Family Rules [2]
- Supreme Court Family Rules [9]
- Child Support Guidelines [2]

Links

- Grandparents raising grandchildren helpline [3] from the Parent Support Services Society of BC
- Benefits for grandparents raising grandchildren [4] from Clicklaw common questions
- Benefits for raising a relative's child [5] from Clicklaw common questions
- Child Support Calculator [6] from the Department of Justice
- Extended Family Program [13] from the BC Ministry of Children and Family Development
- Extended Family Program [14] from Legal Aid BC
- Parenting and Guardianship [18] from Legal Aid BC
  - see section on "Contact with a Child"
- Guardianship, Parenting Arrangements, and Contact [7]from Dial-a-Law by the People's Law School
- Appointing a Guardian and Standby Guardianship [17] from British Columbia Law Institute (BCLI)

Resources

- "Grandparents Raising Grandchildren: A Legal Guide" [8] from Parent Support Services Society of BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, March 25, 2021.

References

[1] http://canlii.ca/t/1fqmm
[2] https://canlii.ca/t/80mh
[3] http://clicklaw.bc.ca/helpmap/service/1133
[4] http://clicklaw.bc.ca/question/commonquestion/1118
[5] https://www.clicklaw.bc.ca/question/commonquestion/1022
[6] http://www.justice.gc.ca/eng/fl-df/child-enfant/look-rech.asp
[7] https://www.clicklaw.bc.ca/resource/1246
[8] https://www.clicklaw.bc.ca/resource/2235

Adopting Children

Adoption is the creation of a brand new parent-child relationship where there wasn't one before. When an adoption order is made, the adoptive parents take on all of the rights, duties, obligations, and liabilities any parent of the child would have. At the same time, one or both of the child's natural parents are stripped of those rights, duties, obligations, and liabilities, as if they are, and always had been, legal strangers to the child.

This section provides an overview of adoption, and talks about the private adoption process and the process for adopting through the Ministry for Children and Family Development [18]. It also has contact information for the four adoption agencies licensed in British Columbia.

Introduction

There are two basic kinds of adoption: adoption within a family by a relative or stepparent, with the consent of the natural parent; and, adoption by a stranger through an agency. The first kind can be handled privately through court. The second kind requires the involvement of the provincial Ministry for Children and Family Development for children in the care of the government, or the involvement of the Adoptive Families Association of British Columbia [1], a contractor of the provincial Ministry for Children and Family Development for children in the care of the government, or the use of a licensed adoption agency for children not in government care. A list of the four adoption agencies licensed in British Columbia is provided at the end of this section.

The rules that guide parents and the courts through the adoption process are in the provincial *Adoption Act* [1]. As in all legal issues involving children, the courts are primarily concerned with the best interests of the child, and section 3 of the *Adoption Act* describes a number of the things the court will think about when deciding what is in a child's best interests:

> (1) All relevant factors must be considered in determining the child's best interests, including for example:
>
> (a) the child's safety;
>
> (b) the child's physical and emotional needs and level of development;
>
> (c) the importance of continuity in the child's care;
>
> (d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;
>
> (e) the quality of the relationship the child has with a birth parent or other individual and the effect of maintaining that relationship;
>
> (f) the child's cultural, racial, linguistic and religious heritage;
>
> (g) the child's views;
>
> (h) the effect on the child if there is delay in making a decision.
>
> (2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

The *Adoption Act* [1] talks about four specific types of adoption:

1. *relative adoptions*, where a child is adopted by a relative or stepparent;
2. the placement of a child by the child's natural parent or guardian with adoptive parent or parents who aren't relatives, called a *direct placement*;

3. the *placement of a child by the Ministry for Children and Family Development*; and,
4. the *placement of a child by an adoption agency* licensed by the Ministry, often including children from outside Canada.

The effect of adoption

Section 37 of the *Adoption Act* [1] talks about the consequences and meaning of adoption, and says that:

> (1) When an adoption order is made,
>
> (a) the child becomes the child of the adoptive parent,
>
> (b) the adoptive parent becomes the parent of the child, and
>
> (c) the birth parents cease to have any parental rights or obligations with respect to the child, except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.
>
> (2) If the application for the adoption order was made by an adult to become a parent jointly with a birth parent of the child, then, for all purposes when the adoption order is made,
>
> (a) the adult joins the birth parent as parent of the child, and
>
> (b) the child's other birth parent ceases to have any parental rights or obligations with respect to the child.

In other words, an adopted child's new parents become that child's parents for all purposes of the law — the adoptive parents take on all the rights and obligations the birth parents had, which are exactly the rights and obligations that the birth parent or parents lose. Among other things, the birth parent will lose rights like the right to know what's going on with the child's health and schooling, as well as obligations like the duty to pay child support. In a 2003 case of the Supreme Court, *L.A.W.Z. v C.D.W.* [2], the court talked about this section of the *Adoption Act* and held that the adoption of a child by the mother's new partner stripped the natural father of his obligation to pay support, effective from the moment the adoption order was made. The Supreme Court noted, at paragraphs 20–23:

> "In *Clayton v Markolefas* [3], an intestate succession case, the Court of Appeal held that a child adopted ceased to have any succession rights against her birth parents.
>
> "The Court held:
>
> The clear effect of s.37(1) is that the adoptive child becomes the child of the adoptive parent. From that it follows that all parental obligations fall upon the adoptive parents.
>
> [...]
>
> "On a plain reading of subsections (1) and (2), [the father] ceased to have any responsibility for [the child] once the adoption went through and I so hold."

In a nutshell, a birth parent stops having any legal interest in the adopted child from the moment the adoption order is made, including with respect to how the child is raised, where the child lives, where the child goes to school, what sort of medical treatment they receive, or how the child is disciplined. In the eyes of the law, the adoptive parents have become the only parents the child has.

Who can place a child for adoption

Section 4 of the *Adoption Act* [1] says that:

> The following may place a child for adoption:
>
> (a) the director;
>
> (b) an adoption agency;
>
> (c) a birth parent or other guardian of the child, by direct placement in accordance with this Part;
>
> (d) a birth parent or other guardian related to the child, if the child is placed with a relative of the child.

Who can receive a child for adoption

Section 5 of the *Adoption Act* says that a child can be *placed for adoption* with any one or two people.

Section 29 of the act says that any one or two people can *make an application to adopt* a child, as long as they live in the province:

> (1) One adult alone or 2 adults jointly may apply to the court to adopt a child in accordance with this Act.
>
> (2) One adult may apply to the court to become a parent of a child jointly with another parent.
>
> (3) Each applicant must be a resident of British Columbia.

The *Adoption Act* doesn't say anything about the required gender or sexual orientation of adopting parents. The adoption of children by same-sex couples is common in British Columbia.

Who must consent to the adoption

According to section 13 of the *Adoption Act* [1], all of the following people, if they exist, must provide their consent to a proposed adoption:

- the birth mother of the child,
- the natural father of the child,
- the child's guardian, if someone has been appointed as a guardian of the child,
- the child, if the child is 12 years of age or older, and
- the Director under the *Child, Family and Community Service Act* [17], but only if the child is in the custody of the government.

The act also says that a birth mother's consent to the adoption is only valid if she gives her consent ten or more days after the child's birth. The act also says that a parent under the age of 19 may give valid consent to the adoption of their child.

Withdrawing consent

The people who must give their consent can, if they choose, change their mind and revoke their consent, but only if they do so within certain time periods or before certain events happen.

- A birth mother may revoke her consent at any time before the child is 30 days old, or, afterwards, at any time until the child is placed with the adoptive parents.
- A child whose consent is required can revoke their consent at any time until the adoption order is made.

After a child is placed, a person's consent can only be revoked by an order of the court, as long as the application for the order is made before the adoption order. Once the adoption order is made, that's it!

The private adoption process

The two kinds of private adoption process, the type that don't go through the Ministry or an adoption agency, are the *direct placement process* and the *relative adoption process*.

Direct placement by a birth parent

To begin this process, the adoptive parent or parents must notify the Director of the Ministry for Children and Family Development's Adoption Division [4] of their intent to adopt a child by filing Form 1 from the Adoption Act Regulation [5] with the Ministry. This form requires you to state: the name of the birth mother; the name of the natural father, if known; an explanation of the circumstances leading to the proposed adoption; and, the names of the adoptive parent or parents.

The Director then contacts the adoptive parent or parents and the child's natural parents to describe the legal consequences of adoption, provide the adoptive parent or parents with information about the child's natural parents, including their medical history, and begin preparing a *pre-placement assessment* of the adoptive parents. The pre-placement assessment includes:

- a criminal records check of the adoptive parent or parents,
- a check for the parents' past involvement with the Ministry,
- an assessment of the birth mother and natural father, and
- an assessment of the suitability of the adoptive parent or parents and their home to receive a new child.

The adoptive parents must obtain the consent of the following people to the adoption:

- the child, if the child is 12 years of age or older,
- the birth mother,
- the natural father, if known, and
- the child's guardians, if anyone has been appointed as a guardian of the child.

The *Adoption Act* [1] requires adoptive parents to make "reasonable efforts" to notify the natural father of the intended adoption. If the father's location is known, the adoptive parents should send a Notice of Proposed Adoption to the father by registered mail. The court may require that an ad be placed in the Legal Notices section of the local newspaper's classified ads section to ensure that every effort has been made to find the father and alert him to the proposed adoption. Under certain circumstances, it is possible to obtain an order that the father not be given notice of the adoption.

Once the consent of the child's birth parents and guardians has been obtained, the adoptive parents and the birth parent or guardian become joint guardians of the child. This joint guardianship will last until:

- the court makes an adoption order,
- any of the consents to the adoption are revoked, or
- the court terminates the joint guardianship for another reason.

When these conditions have been met, the birth parents or guardians of the child will transfer custody of the child to the adoptive parents in writing, and the child can go to live with their adoptive parent or parents. The adoptive parents must notify the Director that they have received the adoptive child into their home within 14 days. The Director must prepare a "post-placement report" within six months of the placement of the child in the new home.

Finally, the adoptive parent or parents must prepare and file a Petition for the adoption of the child in the British Columbia Supreme Court, under the Supreme Court Family Rules [3], once the child has spent six months in their home. The filed Petition and supporting documents must be served on the Director. Part 3 of the *Adoption Act* [1] provides the details of the court process that will occur after this point, including: the documents that must be filed in court; who must be notified of the proceeding; and, whether the application will require an oral hearing before a judge.

Relative adoption

The process for relative adoptions is a lot easier, mostly because the *Adoption Act* [1] exempts this sort of adoption from the notice requirements for direct placement adoptions. This means that the portion of the adoption process involving the Ministry and the Director of the Adoptions Division can be bypassed, and no assessments or reports are required from the Director.

Stepparents may apply under this process for an order that they become "jointly" a parent of the child with another parent of the child, usually the stepparent's spouse and the natural parent of the child. This is another form of relative adoption. It has the same effect as a normal adoption, meaning that the child's other natural parent — the parent who isn't married to the adopting stepparent — loses all of their rights and obligations as a parent of the child.

Adoption through the Ministry

People who want to adopt a child through the Ministry for Children and Family Development usually do so because they want to adopt a child but don't have any particular child in mind, as is the case with direct placement and relative adoptions.

The first step in this process is to contact the Adoptive Families Association of British Columbia and speak with an adoption worker. The worker will arrange a meeting with the adopting parent or parents, who will have to fill out an adoption application and an adoption questionnaire. The questionnaire asks the adopting parent or parents about the sorts of children they are prepared to adopt, including their racial characteristics, illnesses, mental and physical disabilities, and so forth. The application asks for the following information:

- the name, address, education, and present employment of each applicant,
- the work history of each applicant,
- the cultural and racial background, and religious or belief system, of each applicant,
- the applicants' interests and hobbies,
- the names of other children and other members of the applicants' household, including boarders,
- a statement of the family finances, and
- the names and addresses of four personal references.

You can access a summary of this process on the Ministry of Children and Family Development [6] website. A more succinct summary is available at the Adoptive Families Association of BC [1] website.

The Ministry will also conduct a criminal records check and check for any past contact with the Ministry involving child- and family-related problems.

The worker will then begin a *homestudy*. A homestudy is an assessment of the applicant or applicants completed over several months through visits to their home. It includes an educational component that prepares the adopting parent or parents to meet the needs of the adopted child.

Once the homestudy is complete, the adoption worker begins the process of matching any available children to the adopting parent or parents. When a match is found and the adopting parent or parents accept the child, they begin pre-placement visits with the child. (If the child lives in a different community, the adopting parents will be asked to visit the child in their home community.) A worker will be present for the first visits. Over time, the adopting parent or parents will begin to spend more time alone with the child and have visits with the child at their own home. If things go well, the adoption worker will make a decision about the suitability of the proposed placement based on what the worker considers to be in the child's best interests.

The steps between the initial application and the match are not particularly quick, and, as a result, that first homestudy may get stale and need to be updated. Be prepared for homestudies to be repeated every 12 months! Criminal records checks and checks for previous Ministry involvement are conducted every two years.

Finally, if all parties, including the Ministry, are satisfied, the child will be placed in the home of the adopting parent or parents. At this point the adopting parent or parents will fill out the Notice of Placement described above. After six months of the child living in the home of the adopting parents, the parents can begin the process of applying to the British Columbia Supreme Court for an adoption order. You should be aware that during the whole of this period, and until an adoption order is made, the Director remains the legal guardian of the child.

Note that if the child is between the ages of seven and twelve, an independent worker will meet with the child to do a report on their views of the proposed adoption. This report will form part of the materials that the court will consider in hearing the adoption application. A child over the age of 12 must consent to their adoption.

Adoption agencies

The following organizations are licensed by the provincial government under the *Adoption Act* to operate as adoption agencies. The list of licensed agencies in British Columbia is limited.

Sunrise Adoption Centre [7]
102-171 West Esplanade
North Vancouver, British Columbia, V7M 3J9
Phone: 604-984-2488
Fax: 604-984-2498
Toll Free: 1-888-984-2488

The Adoption Centre of British Columbia [8]
620 Leon Avenue
Kelowna, British Columbia, V1Y 9T2
Phone: 250-763-8002
Fax: 250-763-6282
Text: 250-212-8366
Toll Free: 1-800-935-4237

Resources and links

Legislation

- *Adoption Act* [1]
- Adoption Act Regulation [5]
- *Child, Family and Community Service Act* [17]
- Supreme Court Family Rules [3]

Links

- Ministry of Children and Family Development website [9]
- Adoptive Families Association of British Columbia [10]
- Ministry of Children and Family Development Adoption Division [11]
- Sunrise Adoption Centre [7]
- The Adoption Centre of British Columbia [8]

Resources

- "We're thinking about adopting" [12] from Clicklaw's Common Questions
- "We're a gay couple thinking about adopting" [13] from Clicklaw's Common Questions
- Adoption of a Child [14] from Dial-a-Law by the People's Law School
- Adoption Registries [15] from Dial-a-Law by the People's Law School
- Adoption [16] from Legal Aid BC
- Extended Family Program [14] from Legal Aid BC
- Grandparents raising grandchildren: A legal guide [8] from Parent Support Services Society of BC
- Permanent Transfer of Custody of a Child to Someone Familiar in BC [17] from the BC Ministry of Children and Family Development
- Intercountry Adoption and the Immigration Process [18] from Citizenship and Immigration Canada

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 29 July 2023.

References

[1] http://www.bcadoption.com
[2] http://canlii.ca/t/1pt0x
[3] http://canlii.ca/t/5kw7
[4] http://redbookonline.bc211.ca/service/9493227_9493227/adoption_services
[5] http://canlii.ca/t/859w
[6] https://www2.gov.bc.ca/gov/content/life-events/birth-adoption/adoptions/how-to-adopt-a-child
[7] http://www.sunriseadoption.com/
[8] https://adoption-bc.com/
[9] http://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/children-and-family-development
[10] http://www.bcadoption.com/
[11] https://www2.gov.bc.ca/gov/content/life-events/birth-adoption/adoptions
[12] https://www.clicklaw.bc.ca/question/commonquestion/1142
[13] https://www.clicklaw.bc.ca/question/commonquestion/1057
[14] https://www.clicklaw.bc.ca/resource/1247
[15] https://www.clicklaw.bc.ca/resource/1248
[16] https://www.clicklaw.bc.ca/resource/1609

[17] https://www.clicklaw.bc.ca/resource/4232
[18] https://www.clicklaw.bc.ca/resource/2066

Having Children with Assisted Reproduction

Once upon a time, not all that long ago in fact, sex was the only way to have a child, and if people couldn't have a child for some reason, they either went without or looked at adoption. These days, with the help of technology, it's possible to have that child using donated eggs or sperm, or with the help of a surrogate mother.

This section talks about assisted reproduction, the federal *Assisted Human Reproduction Act* [1] and the rules in the provincial *Family Law Act* about determining who is a parent when a child has been conceived through assisted reproduction.

Introduction

Assisted reproduction relies on the help of other people to conceive a child. It is necessary when:

- a person wants to have a child without someone else also being a parent of that child,
- the people involved in an opposite-sex relationship are infertile or a woman can't carry a baby to term,
- the people involved in a same-sex relationship want to have a child, and they want the child to share the genetic heritage of at least one of them, or
- a couple wish to include one or more other people as the parents of their child.

Whatever the circumstances might be, having a child through assisted reproduction often involves one or more of:

- the use of donated eggs,
- the use of donated sperm, and
- the cooperation of a woman who will carry the baby to term as a surrogate mother.

The federal *Assisted Human Reproduction Act* [2] regulates the scientific and commercial aspects of assisted reproduction. From a family law perspective, the important parts of this act make it illegal to sell eggs or sperm, and say that a surrogate mother can't be given money for her services apart from compensation for her expenses.

The provincial *Family Law Act* lets people who are having a child by assisted reproduction decide who will and won't be a legal parent of their child, by making an agreement in writing before the child is conceived. (This part of the act is awesome because it lets people decide who the parents of a child will be, for *all* purposes of the law of British Columbia, without having to go to court to get an order saying who the parents of a child are.) Under the *Family Law Act*, a child can have up to six legal parents if everyone agrees:

- up to two people who intend to have the child,
- a donor of eggs,
- a donor of sperm,
- a surrogate mother, and
- the spouse of a surrogate mother.

Assisted reproduction processes

Assisted reproduction refers to the use of different kinds of strategies or technologies to help people conceive and carry a child to term when they can't or would rather not do so through natural reproduction. ("Natural reproduction," of course, is a fancy way of saying *sex*.) Assisted reproduction may be necessary when a person wants to have a child on their own, when the people involved in a family relationship are of the same sex, when the people in an opposite-sex relationship can't have a child on their own for some reason, or if there are more than two people who want to be the parents of a child, which might be the case for people involved in a polyamorous relationship.

Problems involving sterility and infertility may be addressed through the use of sperm or eggs donated by someone else, while problems involving carrying a pregnancy to term may be addressed by having another woman carry the pregnancy as a surrogate mother.

Sometimes "assisted reproduction" refers to medications or medical procedures intended to help a woman ovulate and release an egg that can be fertilized by a man's sperm. Most of the time assisted reproduction refers to fertilization of eggs outside the body in a laboratory setting, called "in vitro fertilization." In cases like this, eggs are removed from a woman's ovaries and fertilized with a man's sperm in a petri dish. If the fertilization is successful, the fertilized egg — called a *zygote* — is surgically implanted in a woman's uterus, and it is expected that the zygote will develop into a fetus, be carried to term, and be delivered.

There are also cases where people attempt to fertilize an egg at home, outside a laboratory, using something like a poultry baster to introduce sperm directly into a woman's vagina, and from there into her uterus and into her fallopian tubes where fertilization occurs.

Laboratory processes can be extremely expensive and time-consuming, taking tens of thousands of dollars and many months to fertilize and implant a zygote and bear the fetus to term. Home-based processes, while perhaps less likely to result in a viable pregnancy, at least have the benefit of being cheap and possibly more fun.

The legislation about assisted reproduction

The two laws that provide the rules about assisted reproduction are the federal *Assisted Human Reproduction Act* [1] and the provincial *Family Law Act*. The *Assisted Human Reproduction Act* regulates scientific research using sperm, eggs and zygotes, the commercial uses of sperm, eggs and zygotes, and how people arrange to have a child through assisted reproduction. The *Family Law Act* talks about who are the parents of children conceived by assisted reproduction and how people make agreements determining who the parents of such children will be.

The *Assisted Human Reproduction Act*

The highlights of the *Assisted Human Reproduction Act*, for people wanting to have a child by assisted reproduction, are these.

Under section 6, women cannot be paid for acting as a surrogate mother, and it is illegal to be paid to connect people who need a surrogate mother with women willing to be a surrogate mother. Under section 7, it is illegal to sell sperm, eggs and embryos. However, section 12 says that people who donate sperm or eggs and women who are surrogate mothers can be reimbursed for their expenses. Section 2 of the regulation [3] that talks about reimbursement says this about people who are donating sperm or eggs:

> The following expenditures incurred by a donor in the course of donating sperm or ova may be reimbursed under subsection 12(1) of the Act:
>
> (a) travel expenditures, including expenditures for transportation, parking, meals and accommodation;
>
> (b) expenditures for the care of dependants or pets;
>
> (c) expenditures for counselling services;
>
> (d) expenditures for legal services and disbursements;
>
> (e) expenditures for obtaining any drug or device as defined in section 2 of the Food and Drugs Act;
>
> (f) expenditures for obtaining products or services that are provided or recommended in writing by a person authorized under the laws of a province to practise medicine in that province;

> (g) expenditures for obtaining a written recommendation referred to in paragraph (f);
>
> (h) expenditures for health, disability, travel or life insurance coverage; and
>
> (i) expenditures for obtaining or confirming medical or other records.

Section 9 of the regulation says this about surrogate mothers:

> The following expenditures incurred by a surrogate mother in relation to her surrogacy may be reimbursed under subsection 12(1) of the Act:
>
> (a) travel expenditures, including expenditures for transportation, parking, meals and accommodation;
>
> (b) expenditures for the care of dependants or pets;
>
> (c) expenditures for counselling services;
>
> (d) expenditures for legal services and disbursements;
>
> (e) expenditures for obtaining any drug or device as defined in section 2 of the Food and Drugs Act;
>
> (f) expenditures for obtaining products or services that are provided or recommended in writing by a person authorized under the laws of a province to assess, monitor and provide health care to a woman during her pregnancy, delivery or the postpartum period;
>
> (g) expenditures for obtaining a written recommendation referred to in paragraph (f);
>
> (h) expenditures for the services of a midwife or doula;
>
> (i) expenditures for groceries, excluding non-food items;
>
> (j) expenditures for maternity clothes;
>
> (k) expenditures for telecommunications;
>
> (l) expenditures for prenatal exercise classes;
>
> (m) expenditures related to the delivery;
>
> (n) expenditures for health, disability, travel or life insurance coverage; and
>
> (o) expenditures for obtaining or confirming medical or other records.

Sections 6, 7, 8, 9 and 11 of the regulation describe the conditions that have to be met before the expenses of someone donating sperm or eggs or a surrogate mother can be reimbursed.

Under section 8 of the legislation, the *Assisted Human Reproduction Act*, someone who donates sperm or eggs must consent, in writing, to the use of their sperm or eggs to make an embryo. The regulation [4] that says how consent under section 8 is to be given describes the information a donor has to be given about the intended use of their sperm or eggs, and the things that have to be in the written consent. The regulation also says that a donor who wants to withdraw their consent has to give notice of the withdrawal of their consent in writing.

The *Assisted Human Reproduction Act* and its regulations are highly technical and can be difficult to get through. If you are planning on having a child by assisted reproduction, it's important to speak to a lawyer who specializes in assisted reproduction. They'll be able to tell you what you can and can't do, and what the rules are.

The *Family Law Act*

Section 26(1) of the *Family Law Act* says that the "parents" of a child are usually the child's birth mother and biological father. However, sections 24, 27, 29 and 30 have different rules when a child is conceived using artificial reproduction, and other rules which allow people to make an agreement that specifies who the parents of a child will be when the child is conceived using artificial reproduction.

People who donate sperm or eggs

Under section 24 of the *Family Law Act*, the donor of sperm or eggs is *not* the parent of a child conceived by artificial reproduction merely because of the donation, and may not be declared to be a parent of a child. This section is very important. It means that a person can donate sperm or eggs without worrying that they will be a legal parent of any resulting child, and potentially be liable to support that child at some point in the future.

A donor *can* be a parent, on the other hand, if the intended parents and the donor sign a written assisted reproduction agreement before the child is conceived that says that the donor will be a parent. Donors who are parents under an assisted reproduction agreement are parents for all purposes of the law in British Columbia under the *Family Law Act*; they are presumed to be the guardians of a child, they are entitled to ask for parenting time with their child and decision-making responsibilities for their child, and they may be required to support their child.

Surrogate mothers

A surrogate mother qualifies as a "birth mother" under the act. As a result, surrogate mothers *are* presumed to be the parents of their children under sections 26 and 27 of the *Family Law Act*, the opposite of the presumption that applies to people who donate sperm or eggs. However, a surrogate mother will *not* be a parent if the intended parents and the surrogate mother sign a written assisted reproduction agreement before the child is conceived that says that the surrogate mother will not be a parent.

Without an assisted reproduction agreement, the child's parents will be presumed to be the surrogate mother and the biological father, and the surrogate mother will be a parent for all purposes under the *Family Law Act*, including the parts of the act that talk about guardianship, parenting after separation, and child support.

Spouses of surrogate mothers

Under section 27 of the act, a person who is the married spouse of a surrogate mother, or living in a "marriage-like relationship" with a surrogate mother, is presumed to be a parent of the child, unless there is proof that, before the child was conceived, the person:

- did not consent to be the child's parent, or
- withdrew their consent to be the child's parent.

Under section 30, a person who is the married spouse of a surrogate mother, or living in a marriage-like relationship with a surrogate mother, can also be a parent if everyone involved signs written assisted reproduction agreement, before the child is conceived, that says the person will be a parent.

People who are the married spouse of a surrogate mother, or living in a marriage-like relationship with a surrogate mother, and are a parent of the child the surrogate mother gave birth to, are parents for all purposes under the *Family Law Act*, including the parts of the act that talk about guardianship, parenting after separation, and child support.

Assisted reproduction after death

When people try to have a child through assisted reproduction, including through in vitro fertilization when no one other than the intended parents are involved, the laboratory will commonly store a lot more sperm, eggs and sometimes zygotes than are needed right away. This is especially common where multiple attempts may be needed to have a successful pregnancy. Sometimes, however, someone who has donated sperm or eggs dies before the child is conceived.

Section 28 of the *Family Law Act* says what happens if a donor dies before the child is conceived. As long as there is proof that the donor consented to the use of their sperm or eggs to conceive a child, consented to being a parent of a child conceived after their death, and did not withdraw their consent before they died, the parents of a child conceived with the genetic material or embryo are the deceased donor and the donor's married spouse or the person who lived in a marriage-like relationship with the donor.

Section 29 says that if an intended parent dies, they will still be a parent of the child as long as the child was conceived before their death.

As long as a child was conceived before an intended parent dies, section 29 of the *Family Law Act* says that the intended parent will still be the parent of the child, providing that:

- the surrogate mother gives her written consent to surrender the child to the executor or other person acting in the place of the deceased intended parent or intended parents, and
- the executor, or other person acting in the intended parent's or intended parents' place, takes the child into their care.

Resources and links

Legislation

- *Law Act* [5]
- *Adoption Act* [1]
- *Assisted Human Reproduction Act* [2]
- *Vital Statistics Act* [4]
- Reimbursement Related to Assisted Human Reproduction Regulations [6]
- Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations [7]

Links

- In Vitro Fertilization for Infertility [8] from HealthLink BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, April 8, 2021.

References

[1] https://canlii.ca/t/7vzj
[2] http://canlii.ca/t/7vzj
[3] https://canlii.ca/t/9858
[4] https://canlii.ca/t/7z6h
[5] https://canlii.ca/t/54wtdFamily
[6] https://canlii.ca/t/53p8s
[7] https://canlii.ca/t/544xn
[8] https://bit.ly/3T6Oc1h

Separation & Divorce

Separating and Getting Divorced

Adults separate when they decide that their romantic relationship is over and then take steps to act on that decision. When people in an unmarried relationship separate, their relationship is over and there are no other steps that must be taken to legally end things. When people are married, on the other hand, their relationship isn't legally over until they are divorced, one of them dies, or their marriage is annulled... whichever comes first.

This chapter starts by taking a quick look at separation, annulment and divorce, and talks about a few urban myths about separation and divorce. The following sections look in more detail at the legal aspects of separation and divorce, the emotional dimensions of separation, and issues about privacy and good behaviour after separation. The do-it-yourself divorce process is reviewed in a fair amount of detail in the Divorce and the Law on Getting Divorced section at the end of this chapter.

All of the information in this chapter applies just as much to people in same-sex relationships as it does to people in opposite-sex relationships. There is no difference between how the law treats people in same- and opposite-sex relationships in Canada.

Introduction

The rules about separation and divorce are fairly straightforward, despite some common misunderstandings. Separation simply means making the decision that a relationship has broken down and then acting on that decision. You don't have to move out to separate. You just have to tell your spouse that things have come to an end, that you're ending the relationship, and then behave as if the relationship is over.

Divorce is the legal termination of a married relationship. A divorce is a court order, which means that to get divorced you have to start a court proceeding in which you sue your spouse for a divorce order. Married spouses who have been separated for a dozen years without getting divorced are still married, and they'll remain married until they get a court order for their divorce. (Unmarried spouses don't need to get divorced, no matter how long they've lived together; their relationships are over when they separate.)

Annulment is another way of ending a marriage. Technically speaking, it's not so much the *ending* of a marriage, but a declaration of a judge that there was something wrong with how the marriage was entered into that makes the marriage *void*. A marriage that is void never happened; there's no ending since the marriage wasn't properly started in the first place.

Separation

Separation is simple. All the people involved have to do is start living "separate and apart" from one another, whether under the same roof or in separate homes. While you don't always have to move into separate homes to separate, you do have to behave as if your relationship is over, and that means that you've: stopped going out together; stopped doing chores and household tasks for each other; stopped sleeping together; stopped eating together; stopped hanging out together; and, started untangling your finances and financial responsibilities.

Contrary to popular opinion, you don't need to see a lawyer or a judge, or file some sort of court document to obtain a separation. You just need to call it quits, tell the other spouse that it's over, and start acting like it's over.

For married couples, separation signals the breakdown of their relationship but doesn't end their marriage. A divorce order under the *Divorce Act* is required to end their marriage.

For unmarried people, including unmarried people who qualify as "spouses" under the *Family Law Act*, separation is all that's required to end the relationship.

While separation itself is pretty simple, the date a family separates can be very, very important. The date of separation is a very important element in determining how much child support should be paid, how much spousal support should be paid, and how property and debt are divided, and in determining when claims for spousal support and the division of property and debt must be brought. Section 198 of the *Family Law Act* says this:

> (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.
>
> (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.

In other words, married people have two years to start a court proceeding for spousal support or the division of property and debt, beginning on the day they are divorced or their marriage is annulled. Unmarried people, on the other hand, have two years to start a court proceeding for spousal support or the division of property and debt, beginning on the day they *separate*. In both cases, this time limit can be extended when the people involved are trying to resolve their differences out of court.

Annulment

If one or more of the requirements of a valid marriage are lacking, the marriage may be cancelled, or *annulled*. To obtain an annulment, one of the parties must apply to court for a declaration that the marriage is void. A marriage may be annulled if:

- a female spouse was under the age of 12 or a male spouse was under the age of 14 (the common law ages of puberty),
- one or both of the spouses did not consent to the marriage,
- a male spouse is impotent or a female spouse is sterile going into the marriage,
- the marriage cannot be consummated,
- the marriage was a sham, or
- one or both of the spouses agreed to marry as a result of fraud or misrepresentation.

You can get more information about void marriages, voidable marriages, and annulment in the Family Relationships chapter, in the section Married Spouses and the Law on Marriage.

Divorce

Divorce is the legal end of a valid marriage. To obtain a divorce, one spouse has to sue the other for a divorce order in the Supreme Court [1], and, in general, at least one of the spouses must have been "habitually resident" in British Columbia for the preceding twelve months.

There is only one reason why the court will make a divorce order: it is satisfied that the marriage has broken down. Under section 8(2) of the *Divorce Act*, there are three reasons why a marriage may have broken down:

- the spouses have been separated for at least one year,
- a spouse has committed adultery, or
- one spouse has treated the other with such mental or physical cruelty that the spouses cannot continue to live together.

It is possible to oppose an application for a divorce order, although this rarely happens. In general, once the breakdown of the marriage has been established, the court will allow the divorce application, despite the objections of the other spouse.

A few surprisingly common misunderstandings

A lot of people seem to labour under certain misconceptions about what marriage, separation, and divorce actually involve. Part of these misunderstandings, I'm sure, come from television and movies; others are urban myths that get spread over a few pints at the pub and are perpetuated by the internet.

Separation and the "legal separation"

There is no such thing as a "legal separation" in British Columbia, nor is it possible to be "legally separated." Whether you're in an unmarried relationship or a formal marriage, you are separated the moment you decide that the relationship is over. That's it, there's no magic to it. When you or your partner announce that the relationship is over and there's no chance of getting back together, boom: you're separated.

To be crystal clear:

- you do not need to "file for separation" to be separated (in fact, there's no such thing in British Columbia as "filing for separation," despite what you might see on the websites of the people who sell do-it-yourself legal kits),
- there are no court documents or other papers you have to sign to be separated, and
- you don't need to appear before a judge, a lawyer, a state official, or anyone else to be separated.

To be separated, you just need to decide that your relationship is over, say so, and then live your life like you are in fact separated.

Separation and remarriage

The fact that a married couple is separated isn't enough to let either of the spouses remarry, however. You must be formally divorced by an order of the court in order to remarry. If you do remarry without being divorced from the first marriage, the new marriage won't be valid and you might be looking at criminal charges for bigamy under section 290 of the Criminal Code [2]!

Separation and new spousal relationships

On the other hand, the fact that a married couple has separated won't prevent you from having new relationships, including new sexual relationships and new cohabiting relationships. Technically, this sort of thing — being in a sexual relationship with anyone other than your spouse — is adultery, but no one is likely to care. The Separation and the Law section in this chapter has a lot of information about new relationships after separation.

Divorce and the "automatic divorce"

As far as divorce is concerned, a court must make an order for your divorce or you'll never be divorced. You can be separated from your spouse for twenty years, but unless a court has actually made an order for your divorce, you're still married. It'd be nice, and a lot cheaper, if the passage of time made you automatically divorced, but it doesn't work that way.

Divorce and separation agreements

It is not true that you need to have a separation agreement to get a divorce. Separation agreements are helpful to record a settlement of the legal issues arising when a family separates, like the division of property or the payment of support and so forth, but they're not a requirement of the divorce process. You especially don't need a separation agreement if the only issue is whether you'll get a divorce order or not.

Divorce after death

It is not true that you're married after your spouse dies. Once that happens, your marriage is at an end. You don't need to get a divorce 'cause you're already single again. Congratulations.

Divorce for want of sex

It is also not true that a lack of sex in your relationship automatically ends your marriage, allows the marriage to be annulled, or is otherwise a ground of divorce. Sex has very little to do with divorce, just as it often has little to do with marriage. A lack of sex may spell the end of a relationship and spur a separation, but at law, whether you and your spouse are having sex or not is irrelevant.

The one exception to this general rule has to do with the *consummation* of the marriage, and this exception doesn't mean what most people think it means. A marriage doesn't need to be consummated to be a valid, binding marriage. In order to escape a marriage on this ground, you or your partner must, I kid you not, have either some sort of physical condition that makes sex impossible or an "invincible repugnance" to the act of sexual intercourse.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Criminal Code* [2]

Links

- BC Supreme Court website [1]
- Families Change [2] website from the Justice Education Society of BC and BC Ministry of Attorney General
- Divorce Fact Sheet [10] website from the Department of Justice
- Support and Resources for Dealing with Separation and Divorce [3] website from the BC Ministry of Attorney General
- Legal Services Society's Family Law website's information page on Separation & Divorce [13]
  - Under the section "Going through separation" see "Proving you're separated if you and your spouse still live together"
- Separation and Separation Agreements [4] from Dial-a-Law by the People's Law School
- Deciding Who Will Move Out When You Separate [5] from Dial-a-Law by the People's Law School
- Going Through Separation [6] from Legal Aid BC

Resources

- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- "Separated with Children - Dealing with the Finances: Parent Workbook" [7] from the Justice Education Society of BC
- "Coping with Separation Handbook" [15] from Legal Aid BC
- "Separation Agreements: Your Rights and Options" [13] from Legal Aid BC and West Coast LEAF
- Parent Guide to Separation and Divorce [14] from the Justice Education Society of BC
- "Legal Health Checks: Breaking Up - Without Court" [8] from the Canadian Bar Association
- "How to Separate" online course [9] from the Justice Education Society of BC
- "Ending Relationships" video [17] from John-Paul Boyd, QC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 12 March 2023.

References

[1] https://www.bccourts.ca/supreme_court/
[2] https://www.familieschange.ca/
[3] https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help
[4] https://www.clicklaw.bc.ca/resource/1126
[5] https://www.clicklaw.bc.ca/resource/1127
[6] https://www.clicklaw.bc.ca/resource/4648
[7] https://www.clicklaw.bc.ca/resource/1529
[8] https://www.clicklaw.bc.ca/resource/4242
[9] https://www.clicklaw.bc.ca/resource/4494

Separating Emotionally

This section talks about the emotional dimensions of separation. Although the section Separation and the Law goes into the legal dimensions of separation in a lot of detail, the law and the courts only deal with a narrow slice of all the things that go on when a relationship ends and often ignore, because they must, many of the larger emotional and psychological issues. Even though the law doesn't talk about them, these issues sometimes have a huge influence on people's ability to work together after separation and often play an important role in determining how separating adults will go about resolving their legal problem, the length of time it takes to find that resolution, and whether they will be able to work together to solve future problems after that resolution. An understanding of the emotions involved in separation can help to reduce conflict and the cost of resolving the legal issues arising from separation.

This section applies to people in both married and unmarried relationships. It provides an introduction to the emotional aspects of separation, looks at the grieving process that accompanies the end of a long-term relationship, and discusses how the emotions involved in separation can impact on wrapping up the legal issues you may need to deal with.

Introduction

Ending a long-term relationship, whether married or unmarried, is not just a matter of packing your bags and walking out the front door. Separation stirs up incredibly powerful emotions that can take a surprisingly long time to work through; many counsellors liken these emotions to the grieving process that follows the death of a loved one. Chief among these emotions are love, anger, remorse, and sadness, and separating couples often find themselves experiencing these emotions in a very intense manner and cycling through them over and over.

These emotions often wind up clouding a person's judgment. You can find yourself doing things and saying things you never thought you would, or doing things you promised you'd never do again. (In fact, there's a rather cynical saying that you never really know someone until you break up with them.) You can find yourself looking at your partner and wondering who the hell this person really is, and how can they possibly be so different from the person you were with for so long. Unrecognized and unmanaged emotions can take over the emotional and legal processes of separation like a runaway train and take you down tracks you never anticipated.

The turbulent stew of emotions involved in separation are normal. Everyone experiences these emotions, although we each process them in our own way. From a lawyer's perspective, the key problems that need to be sorted out in the midst of these distorted and confused feelings include:

- settling the legal issues that crop up at the end of a relationship, about things like parenting, paying support and dividing property,
- getting sensible, reasonable and rational instructions from the client,
- separating anger from the negotiation or mediation process,
- separating anger from the arbitration or litigation process, and
- making sure that as little conflict as possible spills onto the children.

The vast majority of people can resolve their issues through negotiation or mediation, no matter how angry they are with one another. When people simply cannot separate the emotional baggage of separation from the resolution of the legal issues that come at the end of their relationship, arbitration or litigation may be inevitable.

A number of studies have shown that mediation and collaborative negotiation processes produce agreements that are better for both parties and better for their children, and last longer than the results of litigation. Parents tend to deal with each other, and with their children, with a lot less rancour following a mediated or collaborative resolution of their problems rather than a litigated resolution.

Litigation is sometimes necessary, even when people are capable of engaging in a less antagonistic dispute resolution process, including when:

- someone threatens to flee with a child,
- there's a history of family violence, or where family violence seems imminent, and
- someone is threatening to do something rash with family property.

However, when litigation is provoked by the emotions arising from the end of the relationship and isn't necessary to resolve an urgent issue, you can run into some serious and expensive problems you may not expect:

- One or both people may adopt entrenched and unreasonable positions about things like parenting after separation or support. It's never good when people adopt positions out of spite or vindictiveness.
- Emotional tensions will escalate, particularly when you see things you thought were buried in the past put into an affidavit. There will be backstabbing, accusations, recriminations, and a whole pile of wounded feelings.
- There is an increased chance that the children will be used to goad the other parent, although this can happen unintentionally.
- There is an increased risk that the children will become alienated or estranged from a parent, potentially with a permanent impact on the quality of the child's relationship with that parent.
- There will likely be an unusually large number of applications brought before and after trial. In cases like this, the litigation may not end until the children are independent adults.
- The litigation will cost an enormous amount of money. Some people have lost all they own paying for court fees, experts' fees and lawyers' fees.
- At the end of the day, the parties risk losing their ability to effectively communicate with each other. This can be a serious problem when there are children and the parties need to maintain a functioning relationship with each other as parents.

As a result of all of this, it can be critical to get a grip on your emotions — or to at least *start* getting a grip on your emotions — right out of the starting gate. While all of these feelings are common, natural, and entirely understandable, failing to recognize and manage them can lead to disastrous short- and long-term consequences to your emotional wellbeing, your relationships with your children, your children's emotional wellbeing, and your financial situation. If you are having trouble managing your feelings, see a counsellor as soon as possible... especially if you have children.

Parenting after separation

When people have children, they must accept that they'll remain a part of each other's lives until their children predecease them, whether they like it or not. They may no longer be partners, but they will always be parents. Parental relationships don't end along with romantic relationships.

It's impossible to emphasize enough how important it is to always put the children first. This may sound a bit trite, but putting the children ahead of yourself can be an extremely challenging task when you are also trying to cope with the intense emotions involved in separation. It can be tremendously difficult to refrain from badmouthing your former partner to the children, "forgetting" to drop them off on time, or using them as a weapon in your dispute.

The Parenting After Separation Program [1] is available throughout British Columbia. In my view, all couples with children can benefit from this program, no matter how well or poorly you think you and your former partner get along. The program is free and available online. It offers important advice about talking to your children about the separation, talking about your ex with the children, and talking with your ex in ways that avoid hurting and wounding each other and are focused on the children.

Information about parenting after separation, including contact information for the different agencies that offer the Parenting After Separation Program, is available in the Children and Parenting after Separation chapter, in the section Basic Principles of Parenting after Separation. As well, some very good studies about parenting after separation, the cost of high-conflict family law disputes, and other topics relating to children's wellbeing and outcomes after separation can be found on the website of the Department of Justice [2]. These papers are of a uniformly high quality and are well worth the read.

A few notes from John-Paul Boyd

I am not a psychologist, a psychiatrist, or a counsellor, nor are the other lawyers who help maintain this resource. As a result, this section should be read with a grain of salt as it's largely based on my observations of my clients' experiences, my understanding of the social science on separation, divorce and parenting, and a healthy dose of common sense.

There are a ton of resources available to help you cope with the separation process and keep the emotionally harmful aspects of that process away from your children. In addition to public programs, many private counsellors specialize in helping people work through the emotional turmoil that follows the end of a long-term relationship. Since counsellors are unregulated, anyone can hang out a shingle saying that they offer counselling services. What you should be looking for are people with the designations *Registered Clinical Counsellor* (RCC), *Certified Canadian Counsellor* (CCC) or *Registered Psychologist* (RPsych). Make sure that the person you're talking to is properly trained and licensed to provide quality help.

- The website counsellingbc.com [3] offers a list of subscribing counsellors by area of practice.
- The BC Association of Clinical Counsellors [4] also maintains a referral list of its members.
- The BC Association for Marriage and Family Therapy [5] has a referral list and helpful information about how to choose a counsellor.

Separation and the grieving process

Many counsellors liken the process of emotionally separating from a long-term relationship to the grieving process that happens when a loved one dies. In general, this process can be expected to take one to two years to complete. Dr. Elizabeth Kübler-Ross, in her book *On Death and Dying* [6], describes a five-stage model of grief, and how grief affects our ability to make decisions in each stage.

- **Shock and denial:** "This isn't happening to me!" An initial paralysis at hearing the bad news; trying to avoid the inevitable. People usually avoid making decisions or taking action at this point.
- **Anger:** "Why is this happening to me?" A frustrated outpouring of bottled-up emotions. Making decisions at this point is difficult because all of one's energy gets put into emotions rather than problem-solving, and the other partner is usually and often unfairly demonized.
- **Dialogue and bargaining:** "I promise I'll be a better person if..." Seeking in vain for a way out; seeking paths that might offer a solution and go back to the way things were. People at this stage are generally more willing to explore alternatives and discuss compromise.
- **Depression and detachment:** "I just don't care anymore." A final realization of the inevitable. It's hard to make reasonable decisions at this stage because of an overwhelming, fatalistic sense of resignation.
- **Acceptance:** "I'm ready for whatever comes." Finally finding the way forward. Decisions are much easier to make because people have often found new purpose, finally having begun to accept their loss.

Dr. Robert Emery agrees that the Kübler-Ross model applies to the end of long-term relationships, but he looks at grief in a slightly different way. In his book *Renegotiating Family Relationships* [7], Dr. Emery describes the grieving process as a cycle of love, anger, and sadness, which gets repeated in varying degrees of intensity as a person works their way through the Kübler-Ross stages, from shock and denial at the end of the relationship through to acceptance of the end of the relationship.

In his excellent book *The Truth about Children and Divorce* [8], Dr. Emery says this:

> "Over time the intensity of the emotions diminishes and people usually find that the feelings begin to blend. Early on, the grief of divorce is experienced as an intense period of feeling nothing but love, followed by an equally intense period of feeling nothing but anger, followed by an equally intense period of feeling nothing but sadness. ... Over time, however, the intensity of the feelings begins to wane, and the cycles of each emotion begin to blur and run into the other two. This overlapping of

> emotion results in a realistic, less emotionally painful view of the divorce.
>
> "When the blending does not occur, people get stuck in one emotional cycle or another. Someone who gets stuck on love may deny the reality of the breakup and pine for reconciliation; someone caught up in anger will act out of vindictiveness and a need for revenge; those mired in sadness will assume an exaggerated and unrealistic sense of responsibility for what has occurred."

For most people, the difficult thing is that knowing about the stages of divorce and the grief cycle does precious little to actually solve the problem. You can intellectually know what's going on, but knowing what's going on doesn't mean that the emotions go away; there's no magic light switch that you can flip to turn your emotions off. Knowing about the emotional roller coaster can, however, keep you aware of what may be motivating your reactions to your former partner and help you contain your emotions while you are negotiating the fallout from the end of that relationship.

It's important to remember that you and your former partner are probably not going to be at the same stage of the grieving process at the same time. One person can come to the conclusion the relationship is over long before separation and reach acceptance, while the other person is still in shock and denial that the relationship has ended at all. This is another factor that can aggravate feelings between you and your former partner.

Each person's goal at the end of the day is to find acceptance and be at peace with the fact that the relationship has ended. As Dr. Emery has observed, the opposite of love isn't hate; it's *indifference*.

A warning about allies

All of us seek allies as we cope with the end of a relationship. It's human nature. Allies can be found in family members, friends, co-workers, or a new boyfriend or girlfriend. While we all appreciate the support that allies offer, allies also tend to polarize your feelings about your former partner, and sometimes encourage you to adopt an unreasonable and entrenched position when what you really need is more flexiblity.

Allies take sides. That's just what they do. Imagine going to your mom or dad in tears, complaining about your former partner. Your parent's job isn't to say "Well, really, Bob is a fine person and a great father, you really should lighten up a little and remember his good qualities." Their job is to comfort you, and that usually means saying something like "Yeah, you're right, I can't believe what a complete asshole Bob is being! Whatever did you see in him anyway?"

You shouldn't stop seeking reassurance and comfort from your allies, but you should try to be alert to the influence allies can have, even though they're not intentionally trying to worsen the problems you and your former partner are dealing with.

A warning about parenting

Some people best manage a breakup by walking out the door and never looking back, and doing their grieving alone. This just isn't possible where there is property to manage and divide, and it's especially not possible when people have children. You can't change your phone number, you can't stop answering the phone or replying to texts, and you can't refuse to see your former partner if you have children. You are still mom or dad, and you'll always be mom or dad and have a relationship with the other parent .

As a result, it's even more important that you properly manage your emotions after separation when you have children. You may be caught up in a whirlwind of anger and remorse at the present, but you have to think of the long-term effect of any rash behaviour. Do you want to be able to attend your child's graduation ceremony? Do you want to go to your child's wedding, or be there when their own child is born? How do you want your child to think of you in five years, or look back on your separation when they're young adults?

It is enormously difficult, but you simply must keep a lid on your emotions while you grieve. Dr. Emery offers these suggestions in *The Truth about Children and Divorce*:

1. First, draw clear boundaries around your relationship with your former partner. Let your partner know what you're prepared to talk to them about, what information you're prepared to share, and what if anything you're prepared to do with the children together.
2. Second, use those boundaries to form a more business-like relationship with your former partner. The two of you may not be friends, but together you are engaged in the "business" of parenting your children. Keep your emotional distance from your former partner and focus on the work you must do together.
3. Third, respect these new rules. Don't intrude past those boundaries; keep your discussions focused on parenting. It may be hard not to react when your former partner pushes your buttons, but you're best off following this old saying: if you don't have anything nice to say, don't say anything at all.

A warning about children

It can be extremely tempting to rely on your children for support and comfort as you go through the grieving process, especially children in their teens. One word: *don't*. Whatever else you may do, *don't do this*.

Children will be well aware when something's wrong. They will know when you're upset, when you're withdrawn, and when you're crying. Younger children will react with confusion and possibly fear. Older children who are more emotionally sophisticated will want to comfort you. There's nothing wrong with this either, but you do need to control your emotions.

When a child becomes too involved in soothing a parent, there are two main risks: you may develop an overly adult relationship with the child and burden the child with too much information about what's going on, information that is usually age-inappropriate; or, the child may turn into a caretaker, handling your emotions, picking up the housework that's falling behind, and assuming a parenting role towards any younger children.

According to Dr. Emery, "extreme emotional care taking is developmentally inappropriate and can have long-term consequences on children's mental health;" this view is shared by other researchers as well. Children who grow up too soon are robbed of their right to be children. In the long-term they may have trouble forming meaningful relationships, they may be emotionally distant, and they may be compulsively over-responsible.

Resolving the issues

There are lots of ways to resolve the issues that arise when a relationship ends, the most common of which are negotiation, mediation, arbitration, and litigation. Collaborative negotiation, which this resource also talks about, blends negotiation with a lot of the skills that are usually used in mediation. It's like negotiation on steriods.

Litigation is a contest between two parties, at the end of which there will be one winner and one loser. That's a gloss on how it all works, of course, but litigation is a fundamentally adversarial process, pitting one litigant against the other in a battle about credibility, reliability, and history. If the parties can't come to an agreement between themselves, a trial will eventually be held and a judge will impose a resolution on the parties. Arbitration is like litigation, except that it has fewer rules, it's faster, and you get to pick the person who will decide the legal issues. Arbitration is also an adversarial process.

With mediation and negotiation, it's the people at the centre of the dispute who come up with the resolution of their legal issues. Both processes are cooperative since settlement is only possible with everyone's agreement. The parties must commit themselves to calmly discussing their issues in the hopes of reaching a compromise that settles those issues, knowing that neither of them will get everything they want. There is no winner and no loser.

Unless there is a pressing and desperate urgency, in my opinion, negotiation, mediation, and arbitration are generally to be preferred over litigation. Curiously, this view is shared by a lot of other family law lawyers. The Canadian Research Institute for Law and the Family published a study [9] in 2017 examining the views of 166 lawyers from across Canada on the use of mediation, collaborative negotiation, arbitration, and litigation in family law disputes. These lawyers said that mediation, collaborative negotiation, and arbitration were all faster, more efficient and

cheaper than litigation, and that mediation, collaborative negotiation, and arbitration were all more likely to produce results that were in the interests of their clients, and in the interests of their clients' children, than litigation.

Emotions and dispute resolution alternatives

In *The Truth about Children and Divorce*, Dr. Emery describes three general categories of divorcing couples: the *angry divorce*, the *distant divorce*, and the *cooperative divorce*. While these categories aren't exactly exhaustive and are drawn from an American legal context, they are useful in discussing the impact of a highly emotional separation on the usefulness of negotiation, mediation, collaborative negotiation, arbitration and litigation.

The "cooperative separation"

People engaged in a cooperative separation have usually worked out a lot of their emotions and resolved much of their grief. They recognize their emotions for what they are, and avoid acting out of spite or tearfully reminiscing about the lost relationship. These people attempt to work things out between themselves, with or without help from lawyers, mediators and arbitrators.

For people involved in this sort of separation, negotiation may be all that's required to resolve their legal disputes. Mediation or collaborative negotiation may be necessary when there's a genuine difference of opinion. Cooperative separations usually result in a separation agreement or an order that they agree the court should make, called a *consent order*. Often, whatever litigation occurs is limited to the court processes that are required to get a divorce order.

The "distant separation"

People involved in a distant separation are able to keep their conflict from their children, but are still dealing with feelings of hurt, resentment, anger, and pain. While there is plenty of intense anger, this emotion usually fades over time to dislike or simple indifference. These people have done a lot less work on their feelings, and their recollections of the relationship are characterized by bitterness rather than sadness.

These people are not friends with each other but know better than to become enemies, perhaps because of the children or past experiences with the court system. They deal with each other minimally, without a great deal of either warmth or demonstrated anger.

For people involved in this sort of separation, collaborative negotiation may be the best option. First, the process requires a fair bit of commitment, and that commitment can help encourage people to continue trying to find compromise even when emotions run high. Second, the process allows other people to be brought in to help, including counsellors who work with each party to process the difficult emotions resulting from the end of the relationship and from the dispute resolution process itself. However, when one or more issues simply cannot be resolved despite everyone's best efforts, arbitration can be used as a less-adversarial alternative to litigation.

The "angry separation"

This, of course, is the type of separation to be wary of. Separations like this involve an enormous amount of conflict. People in elevated levels of conflict are estimated to make up between 5 and 20% of people going to court to resolve family law problems, depending on which study you read. People in an angry separation have trouble letting go of their relationship, and feel intense pain and anger about both the relationship itself and its end. Their emotions are usually quite raw, as neither person will usually have done a great deal to manage their feelings.

These people have the hardest time dealing with each other and the legal issues they have to resolve, as they tend to focus on *fault* and *blame*, and are often unable to stop themselves from lashing out hurtfully. Resolving the issues arising from the end of a long-term relationship is most difficult for these individuals, and they are the most likely to get involved in protracted, ugly litigation.

People in an angry separation, particularly those with children, generally need help dealing with the emotional fallout from the end of their relationship if they are to avoid court and learn to cope with each other and their feelings in the months and years to come.

Angry separations are the sort that lawyers most often wind up dealing with. The epic nature of the battles between people engaged in angry separation can barely be described. They usually and involve repeated trips to court, hiring expensive experts, and trials that often take longer than ten days to wrap up. The legal issues arising from separations like this are rarely concluded in less than three years, and, when there are children, can run for much, much longer. Making things worse, trials rarely provide a meaningful conclusion to the hostilities, as high-conflict people often find themselves back in court over and over again afterward.

Arbitration and litigation are the dispute resolution processes most likely to be used by people engaged in an angry separation. While the highly structured, adversarial nature of litigation will be most appealing to people who are more interested in vengeance and vindication, there are a number of reasons why arbitration is also well-suited to high-conflict disputes. First, arbitrators usually adopt a strong case management role and are heavily involved in processes before the hearing to keep everything on track and limit disputes. Second, the flexibility of arbitration allows creative procedures to be developed to handle evidence, hear from experts, and manage multiple expert opinions. Third, people can agree to hire their arbitrator for a term that extends beyond the end of the hearing, so that the same decision-maker will resolve new disagreements between the same parties on the same issues.

Anger and its consequences

By now, you will have guessed that the irrational thinking anger triggers can be the most significant roadblock to resolving family law issues in a reasonable, cooperative manner. Anger is an incredibly powerful emotion, characterized by Dr. Emery as "the toxic residue of unresolved grief."

Anger also does a lot of very odd things that not many people are aware of. If you're not careful, anger can slow the grieving process, entrench extreme and unreasonable positions, and delay the resolution of the legal issues following the end of a relationship.

- **Anger avoids other emotions:** Anger can be used to divert blame from yourself and avoid feelings of guilt. Anger is easily used as a shield to avoid accepting responsibility for, perhaps, an affair, being the one who announced the end of the relationship, not being an involved parent, or not being a particularly caring partner. It can also stop you from experiencing the other primary emotions involved in the grieving process, *sadness* and *love*.
- **Anger prolongs the relationship:** Intense anger can also signal that you are not yet done with the relationship. Conflict can be a way of drawing a former partner closer, or maintaining a relationship with a former partner, by getting their attention and maintaining the emotional relationship. Underneath this kind of anger remains love and a continuing attachment to a former partner, as illogical as this sounds. Affection and anger are both very intense emotions, and are about as far away from the *detachment* and *disinterest* promised by the end of the grieving process as you can get.
- **Anger hides fear:** The end of a long-term relationship is difficult for everyone. The emotions involved in separation often include a lot of fear and anxiety about the future, usually fears that go right to the heart of our financial and emotional wellbeing. A lot of my clients worried about things like whether they'd be able to keep a roof over their heads, keep the kids enrolled in the same school, stay living in the same neighbourhood, or continue to be actively involved in their children's lives. Fears like these can trigger a fight-or-flight response, and anger is often evidence that you're more on the fight side of things than the flight side. The problem with anger is that fears and anxieties about issues like these are fundamentally reasonable. These issues need to be put on the table and talked about if they are to be resolved, not hidden behind anger's righteous bluster. They are the non-legal "interests" that mediators are trained to identify and address.

- **Anger blinds:** Anger can stop you from recognizing the positive steps your former partner is taking for what they are. It can lead you to assume that your partner is acting on false pretenses or pursuing a hidden agenda. This kind of anger breeds suspicion that is often unwarranted, often along the lines of "she wants to get a counsellor to help the kids through our separation; she must be trying to gather evidence against me!" Anger can also stop you from acknowledging your former partner's good qualities, especially around parenting issues, making it easier to hold onto an objectively unreasonable position.
- **Anger is easy:** For people who are emotionally bottled up, the emotions involved in the grieving process can be extremely challenging to process. Both sadness and love can be difficult to acknowledge and deal with, particularly when feeling those emotions is associated with a sense of vulnerability or a loss of face. As a result, anger can be the easiest emotion to deal with. It's certainly a lot less painful to experience.

Apart from slowing down the grieving process, anger inevitably delays the resolution of the legal issues that come from the end of a relationship. An enraged person isn't going to be able to negotiate since negotiation involves making concessions; an enraged person is mostly going to want to litigate. People in this state of mind make threats like "I'm going to take you for everything you've got," or "you'll never see the children again." They'll also tell their lawyers that "it doesn't matter what it costs or whether I'm likely to lose, it's the principle of the thing!"

Sometimes these threats come true, and the consequences to both parties can be enormous.

- Someone who takes an unreasonable position out of anger will almost certainly lose, but in carrying out their crusade they risk draining all of the family's assets to fund the litigation.
- Rage can permanently impair a couple's relationship with one another. Where there are no children, this may not be a problem, but where there are children this can be disastrous. If you are both going to remain meaningfully involved in your children's lives, you *must* be able to develop a civil relationship with each other!
- People can jump to ridiculous conclusions by expecting the worst from their former partner, leading to conflict after conflict, and court application after court application. Redness on the buttocks of a toddler becomes evidence of molestation, rather than simple diaper rash.
- Rage can trigger "affidavit wars," in which each person makes overly-inflated claims about the purported evils of the other. Minor events are exaggerated beyond all proportion. The costly "war" is triggered because the other party is put to the burden of addressing each bizarre claim. Making things worse, people are rarely able to refrain from making reciprocal claims about the misconduct of the other in retaliation. "You said I drink all the time? Actually, I only drink socially, but you smoked pot when you were pregnant." What's a judge to make of claims like these?
- Anger can strip you of your ability to see common sense and lead you to adopt positions that are objectively unreasonable and doomed to fail. In the process of failing, however, you can expect to spend a lot of money and further worsen your relationship with your former partner.

Rage, as Dr. Emery and others observe, is a symptom of unresolved grief. Whatever the cause, failing to move beyond anger can be poisonous to you, to your former partner, to your children, and to your relationship with your children. Some counselling, whether by yourself or with your former partner, can be critical in moving forward and out of anger.

Choosing your lawyer

Your choice of lawyer can play an important part in determining how your separation unfolds. Most lawyers are quite open to negotiation, mediation, collaborative negotiation and arbitration, and see them as the preferred ways of resolving family law problems. A few others see litigation as the only sensible means of resolving a dispute, particularly lawyers who have a reputation as being "bulldogs" or "sharks." Other lawyers tend not to take their duty to respond promptly to correspondence particularly seriously, which will delay things and may result in an unnecessarily large number of interim applications in the absence of responses. Still other lawyers see their duty in family law cases as militantly carrying out their clients' instructions, without supplying much in the way of options

or sensible advice about the likely effect of those instructions.

The best family law lawyers give their clients a common-sense analysis of their situation, based on their expert knowledge of the law and the outcomes that are probable outcomes in the client's circumstances, and encourage their clients to take positions that are objectively reasonable. These lawyers will usually pursue settlement, both before and after litigation has started, and often see litigation as a last resort or as a way of dragging the other side to the settlement table. They are open to negotiation and mediation and other out-of-court processes, although they may prefer a results-oriented, evaluative mediation process rather than one in which the mediator is strictly neutral and expresses no opinion on the strengths and weaknesses of the parties' positions.

While some people, particularly those in angry separations, feel an almost irresistible urge to go out and hire the toughest lawyer around to exact revenge from their former partner, bulldog lawyers usually see only two options for resolving a legal dispute: a settlement on exactly the unreasonable, extortionate terms their client demands; or, a knock-down, drag-'em-out fight over the course of a twenty-day trial. These lawyers cost the most, and you can expect the litigation process to drag out for an ungodly amount of time, with absolutely no guarantee of a better result than what you would have had if you'd taken a different, less antagonistic approach.

Even if you are in an angry separation, step back and take a deep breath. Take several breaths. Remember that even though you may hate your former partner at present, you'll have to live with the consequences of a hasty decision to litigate, and the unreasonable positions you take now may haunt you well into the future. You might also lose your house to pay your lawyer's fees.

How do you find a reasonable lawyer? By reputation. Ask around; talk to friends who have had to deal with family lawyers before; ask for referrals from the other professionals in your life. You can also window-shop. You don't have to hire the first lawyer you have a consultation with; go ahead and set up meetings with a bunch of different lawyers until you find one you like, but remember that the best advice isn't necessarily the advice you like. You can find additional information about hiring a lawyer in the Understanding the Legal System for Family Law Matters chapter, in the section You and Your Lawyer.

You should also know that many lawyers who litigate are also accredited family law mediators and arbitrators. If the lawyer you're speaking to is also a family law mediator or a family law arbitrator, you may want to enquire about the possibility of using their services to resolve your dispute before you say much more about your case. If you give the lawyer too much information about your situation, they may not be able to assume the impartial role demanded of mediators and arbitrators.

Required reading

- *Renegotiating Family Relationships* [7], by R.E. Emery
- *The Truth about Children and Divorce* [8], by R.E. Emery (Read this book!)
- *Rebuilding: When Your Relationship Ends* [10], by B. Fisher and R.E. Alberti
- *Healing Hearts: Helping Children and Adults Recover from Divorce* [11], by E. Hickey and E. Dalton
- *Helping your Kids Cope with Divorce the Sandcastles Way* [12], by M.G. Neuman
- *Joint Custody with a Jerk: Raising your Child with an Uncooperative Ex* [13], by J.A. Ross

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce act* [7]

Links

- "Divorce and Separation" [14] from the Department of Justice
- BC Counsellors by Practice Area [15]
- BC Association of Clinical Counsellors [16]
- Association for Marriage and Family Therapy [17]
- Families Change [2] website from the Justice Education Society of BC
- Family Mediation [18] from the website of the BC Ministry of Attorney General
- Parenting Apart [11] from the website of the BC Ministry of Attorney General
- Parenting Arrangements After Separation or Divorce [19] from the website of the Department of Justice

Resources

- Separation & Divorce [13] from Legal Aid BC
- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- Guardianship, Parenting Arrangements, and Contact [7] from Dial-a-Law by the People's Law School
- About Mediation [20] from Mediate BC Society
- Mediation and Collaborative Practice [21] from Dial-a-Law by the People's Law School
- "Coping with Separation" handbook [15] from Legal Aid BC
- "Successfully Parenting Apart: A Toolkit" [22] from the Canadian Bar Association
- Settling out of Court [22] from the Justice Education Society of BC
- "An Inside Look at Family Mediation" [23] video from Legal Aid BC
- "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" [24] from the Canadian Research Institute for Law and the Family
- "Alternatives to Going to Court" [25] from the Justice Education Society of BC
- Parenting After Separation [26] course from the BC Ministry of Attorney General

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, April 7, 2021.

References

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Behaviour, Boundaries and Privacy after Separation

The previous section in this chapter talked about the emotional aspects of separation, and how they can affect the choices we make to deal with the legal consequences of separation. The next section, Separation and the Law, talks about those legal consequences in a lot more detail, but this section is first going to talk about the importance of boundaries and good behaviour after separation.

Introduction

We have all sorts of social scripts about how people meet, fall in love, marry and start having children. You can't watch a Hugh Grant rom-com, walk past the supermarket greeting card aisle, or read one of the very fine novels published by Harlequin Enterprises ULC without have those scripts reinforced. What we don't have are scripts about how people separate. Yes, Hollywood has dabbled its toes in this plotline — *Marriage Story* and *War of the Roses* spring to mind — but these are fairly awful stories. What we don't have scripts about are how people separate *well*.

In 1967, two psychologists, Thomas Holmes and Richard Rahe, published a study [1] showing that the end of a long-term relationship is one of the most traumatic events people will endure, second only to the death of a spouse or a child. That seems about right to me. This trauma leads people to do and say things that they'd never do under other circumstances. I've seen people behave far more cruelly toward family members in family law and wills and estates cases than they would ever behave to anyone else, including an enemy.

Perhaps this odd and unpleasant phenomenon is where the saying "familiarity breeds contempt" comes from. But maybe there's another cause than simple familiarity. When spouses separate, particularly when they separate suddenly, they go through an awful transition — from loving partners who would trust each other with their lives to adversaries pitted against each other — in the blink of an eye. That's hard. Understandably, this transition can encourage significant mistrust, ill-will and suspicion among everyone involved.

It takes a big person to accomplish the transition from companions to coworkers with care and grace. Those of us who don't have the luxury of undertaking the "conscious uncoupling" Gwyneth Paltrow recommends have to come up with an awful lot of patience, respect, and tolerance. (And maturity. Maturity was a common characteristic among the majority of my clients who were able to rise above the emotional battlefield.) On top of that, you also need to be fairly compassionate and develop some pretty top-drawer communication skills.

This section provides some observations, tips and suggestions for those of us who lack the patience of Mother Theresa, the forbearance of Mahatma Gandhi or the wisdom of Siddhartha Gautama. While a lot of these comments are just common sense, you may discover one or two suggestions that help.

Good behaviour, bad behaviour

It is so very, very tempting to lash out at your ex when a relationship ends, especially if you didn't see it coming or there was something embarrassing about your separation, like an affair. You shouldn't. Let me tell you why.

First, by cranking up the emotional temperature, you increase the likelihood that your family law problems will be resolved in court. While there's nothing necessarily wrong with that, resolving problems in court takes longer and costs more money than resolving family law problems any other way.

Secondly, I'm sure you want to move past your separation and on with your life. I know that's a tall order, especially when the relationship you've left was a long one, but the more you remain stuck in the indignant and vengeful phase, the longer it'll take you to reach that happy place where you merely regret your relationship, or its end, or both.

Thirdly, arbitration and litigation are based on *evidence*, and evidence comes in many forms. It comes as email print-outs, screen-shots of text messages, downloads of social media accounts, photocopies of notes and letters, and all of the wonderful things that forensic technicians can pull out of computers and smartphones. Do you want your arbitrator or judge reading through this sort of stuff? Your anger might be wholly justified, but I don't think you want someone in a position to decide your case reading through all of the things you said when you were angry.

Fourthly and most importantly, the two key predictors of children's adaptation to their parents' separation are the quality and strength of their relationships with each parent and the nature and duration of the conflict between their parents. This is tremendously important because parental conflict has a number of short- and long-term negative impacts on children's wellbeing. The longer you and your ex jab at each other, the longer it'll take you to move out of conflict and the more damage you'll do to your kids.

The problem, of course, is resisting that temptation. I can't tell you how to do that; it's different for everyone. All I can do is emphasize how important it is to separate with as much dignity and grace as you can muster.

Managing online life

Don't air the details of your relationship and your separation, or trash your ex, on the internet. You can try to delete your comments later, when you've come to regret them, but the internet never forgets. It's almost a certainty that there's a record of your comment somewhere in cyberspace. The behaviour you need to avoid includes:

- slagging your ex on Facebook, Instagram and other kinds of social media,
- leaving negative reviews on professional or commercial rating websites, like Yelp, Angie's List, LawyerRatingz, or Rate my Professors,
- publishing copies of letters, photos and personal notes online,
- publishing copies of affidavits and other court documents, and
- posting links to court decisions involving you, your ex or your children.

It's worth remembering how tech-savvy your kids are — or will be. Have you ever googled yourself? Most people have. Ask yourself what your kids are going to find when they google *you*.

It's also worth remembering that if something can be printed, it can be attached as an exhibit to an affidavit. That includes your Facebook posts, your text messages, and your emails. Before you hit that send or post button, stop and spend a little bit of time thinking about what a stranger would think of you after reading your post, text message or email.

Managing real life

You also need to resist the urge to lash out in your offline life. Cry on the shoulders of your friends and family; use them to vent your frustrations, but leave it there. Remember that if things get ugly and you wind up going to court, everything that you say or do can be introduced into evidence. Remember also that when the court is required to consider the best interests of the children, section 37(2) of the *Family Law Act* says that the court must think about:

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

while section 16(3) of the *Divorce Act* says that the court must think about:

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

The part about *the appropriateness of an arrangement that would require the child's guardians to cooperate* is really important. Think about it.

Among other things, you will want to avoid:

- making complaints about your ex in their professional capacity to any regulatory bodies, like the College of Physicians and Surgeons, the Association of Clinical Counsellors, the College of Social Workers or the Law Society,
- making bogus complaints about your ex to child protection services or the police,
- reporting your ex to the Canada Revenue Agency, financial institutions or credit rating agencies,
- making complaints about your ex to their employer,
- badmouthing your ex in social, recreational or cultural clubs, and
- contacting the media about your ex, your relationship, your separation or events following your separation.

Here's a helpful suggestion. Act as if everything you write, say or do will find its way into an affidavit.

The behaviour we've just talked about is the sort of behaviour that will make any court proceedings you're involved in worse, or increase the likelihood that you'll be going to court if court proceedings haven't yet started. A lot of these behaviours have the potential to get you into trouble with the police as well. The *Criminal Code* [3] has provisions that make all sorts of misbehaviour potential criminal offences, including assault, battery, unlawful confinement, intimidation, threatening, criminal harassment and trespass.

Respecting boundaries, respecting privacy

Part of what's going on when a long-term romantic relationship ends is the redefinition of the personal relationship between the people involved in the romantic relationship. People who were once lovers and confidants must, especially if they have children, find a way to work together in a more business-like relationship with no presumptions of intimacy, trust or altruistic sacrifice. The differences in these two types of relationships are largely about real boundaries and anticipated boundaries.

Of course, problems can come up when our expectations of each other's boundaries don't quite match, and it's sometimes really important to talk about boundaries as a result. Setting and respecting each other's boundaries can be the key to making a difficult parenting relationship work. Here are some of the boundaries I've seen people use:

- requiring communication by text and email rather than by telephone, or communication by telephone rather than by text or email,
- setting limits on the length of emails and letters,
- setting limits on the volume of communication in a given period, or the hours within which communication will be replied to,
- restricting the subjects that can be discussed,
- restricting the family members and friends who can be communicated with,
- fixing the time and place where the children will be exchanged, and
- setting consequences for failing to honour boundaries.

Privacy expectations, and the boundaries they imply, are a source of frequent conflict when relationships end. Since it can be hard to respect a former partner's privacy when your relationship has become adversarial, let's spell out some of the more basic rules.

> **It is not okay to open mail addressed only to your ex. Even when it gets delivered to your home.**
>
> **It is not okay to hack into your ex's smartphone or your ex's email and social media accounts. Even if you know the password or even if it's easy to guess.**
>
> **It is not okay to access your ex's voice mail or change or delete messages on your ex's voice mail.**
>
> **It is not okay to access your ex's financial accounts. Even if your ex gave you permission to do that while you were together.**
>
> **It is not okay to secretly record your ex's telephone calls. Even if your ex is talking to your children.**
>
> **It is not okay to make secret video recordings or otherwise surveil your ex. Even if you're trying to gather evidence for court.**
>
> **It is not okay to steal or make a copy of your ex's diary or personal journal.**

Hopefully these rules make obvious sense. However, I include them because they are so often overlooked in the heat of battle. Remember that if you are involved in a court proceeding you have the right to get copies of anything, including any document, that is important to the legal issues in your court proceeding. If there's something important on your ex's phone, for example, you are entitled to ask for a copy of that thing — or apply for a court order that you be given a copy. You don't need to take a self-serve approach. Do it the right way.

Protect yourself from bad behaviour

Just as you can reduce the chances of your car getting stolen by locking its doors when you get out, there are a number of proactive things you can do to protect yourself from your ex's misbehaviour. Once it's clear to you that your relationship is coming to an end, you need to start protecting your privacy. This means taking additional steps to protect your physical privacy — changing the locks for your home, for example, even though your ex has given you your keys back — as well as your electronic privacy. You may need to change the passwords or access privileges for your:

- smartphone, smartwatch, tablets, computers and other devices,
- home wifi router and personal hotspots,
- home security and surveillance systems, especially security cameras, electronic doorbells and electronic locks,
- wifi-enabled appliances, fixtures and outlets,
- internet, cable and telecommunication service providers,
- email accounts, social media accounts and gaming accounts,
- subscription-based accounts, like Netflix, Spotify and Crave, and
- business accounts and services, including electronic banking, credit card and money transfer services, accounting and bookkeeping software, and communication and conferencing services.

You'll also want to disable any location-sharing options or services that may be available for your smartphone, smartwatch and car, or be built-in to your social media accounts. It's hard to remember in this electronic age just how many password-protected accounts and services we have, how many of the devices in our home are connected to the internet, and how many personal accounts our friends and family may have access to. You know how Facebook sometimes sends out reminders to check your privacy settings? You need to do that yourself when your relationship is coming to an end. Take a fresh look at *everything*.

The consequences of bad behaviour

I've already mentioned how the *Family Law Act* and the *Divorce Act* require the court to consider "the appropriateness of an arrangement that would require the child's guardians to cooperate" when making decisions about the parenting arrangements that are in the best interests of a child, and how many kinds of misbehaviour are offences under the *Criminal Code* [3]. There are other potential consequences as well.

Costs

The Supreme Court has the ability to make "costs orders" under Rule 16-1 [2] of the rules of court [3] used in family law disputes. An award of *costs* is a requirement that one side to a court proceeding pay to the other side a sum of money that compensates the other side for the time and money they had to put into the court proceeding. In general, the successful side is entitled to have their costs paid by the other side, and an award of *ordinary costs* usually works out to somewhere between a third and half of the money the successful side spent defending or prosecuting their case. An award of *special costs*, however, is a lot closer to the total amount the successful side spent on their case.

Special costs awards are made to punish a party for how they managed their case. When assessing special costs under Rule 16-1(2)(b), the court is required to consider "the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the family law case."

Misuse of court process

Under section 221(1) of the *Family Law Act*, the court may make an order stopping someone from making further applications or continuing a court proceeding without first getting permission from a judge if that person:

> (a) has made an application that is trivial,
>
> (b) is conducting a proceeding in a manner that is a misuse of the court process, or
>
> (c) is otherwise acting in a manner that frustrates or misuses the court process.

If the court makes this order, it can also make the person:

- pay the fees and expenses incurred by the other side,
- pay up to $5,000 to, or for the benefit of, the other side or someone affected by the person's actions, or
- pay a fine of up to $5,000.

Conduct orders

Under section 222 of the *Family Law Act*, the court can make *conduct orders* if necessary to "manage behaviours that might frustrate the resolution of a family law dispute" or to "misuse of the court process." The conduct orders that are available to the court are listed in sections 223 to 227, and include orders:

- striking all or part of a claim or an application,
- requiring someone to attend counselling,
- restrictring communication between the people involved in a court proceeding, and
- requring someone to pay *security* into court, a cash deposit made to guarantee the person's good behaviour.

Damages

Claims in *tort* can be made in a court proceeding dealing with family law issues or in a separate proceeding. A "tort" is a kind of claim made when the actions or omissions of one person cause harm to another person. A lot of criminal offences are also torts, like assault and battery. If the tort is proven, the person who was sued may have to pay *damages* to the person who started the court proceedings. "Damages" are cash awards intended to compensate for pain and suffering, lost wages, medical expenses, and so on. *Punitive damages* or *aggravated damages* are cash awards that have the extra purpose of punishing a party for their behaviour.

The sort of torts someone could sue for in the context of the breakdown of a relationship include:

- assault, battery, and sexual assault,
- nervous shock and intentional infliction of mental distress,
- trespass,
- invasion of privacy and breach of confidence, and
- defamation.

Someone might sue for damages for defamation, for example, if the other side posted false information about them on Facebook or a website. Someone might sue for invasion of privacy, breach of confidence or the intentional infliction of mental distress if the other side posted embarrassing photos of them, like revenge porn, for example, on Instagram, a pornography provider or another website.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce act* [7]
- *Criminal Code* [11]
- Supreme Court Family Rules [9]

Links

- Divorce and Separation [14] from the website of the Department of Justice
- BC Counsellors by Practice Area [15]
- BC Association of Clinical Counsellors [16]
- Association for Marriage and Family Therapy [17]
- Families Change [2] website from the Justice Education Society of BC
- Family Mediation [18] from the website of the BC Ministry of Attorney General
- Parenting Apart [11] from the website of the BC Ministry of Attorney General
- Parenting Arrangements After Separation or Divorce [19] from the website of the Department of Justice

Resources

- Separation & Divorce [13] from Legal Aid BC
- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- About Mediation [20] from Mediate BC Society
- Mediation and Collaborative Practice [21] from Dial-a-Law by the People's Law School
- "Coping with Separation" handbook [15] from Legal Aid BC
- "Successfully Parenting Apart: A Toolkit" [22] from the Canadian Bar Association
- "An Inside Look at Family Mediation" [23] video from Legal Aid BC
- Parenting After Separation [26] course from the BC Ministry of Attorney General

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 March 2020.

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Separation and the Law

Separation usually signals the breakdown of a serious relationship. It can be one of the most traumatic stages in the conclusion of a relationship, but a brief period of separation can also lead to reconciliation and the resumption of life.

This section discusses the legal aspects of separation, the rules about reconciliation, and some of the other things you may want to think about once you have separated or have decided to separate. The information in this section applies to *married spouses* and *unmarried spouses* — people who are legally married to each other, people who have lived together for two years or more in a "marriage-like relationship," and people who have lived together for less than two years and have had a child together.

This section also addresses some common questions about sex and new relationships after separation. The first section in this chapter, Separating Emotionally, talks about the emotional dimensions of separation and how those emotional issues can influence the resolution of the legal issues.

Introduction

Separation is a turning point in a relationship in more ways than one. Apart from the obvious change to what was once a romantic relationship, separation also triggers a number of important legal consequences.

- Guardians must have separated before they can ask for an order about parenting children under section 45 of the *Family Law Act*. Also, an agreement between guardians about parenting children is only binding if the agreement is made after they have separated, under section 44 of the act.
- The date of separation is the date when each spouse gets a one-half interest in all family property and becomes responsible for one-half of all family debt, under section 81 of the *Family Law Act*.
- The date of separation marks the end of the period during which family property and family debt accumulates, under sections 84(1) and 86.

- An agreement about child support is only binding if the agreement is made after the date of separation, under section 148(1) of the *Family Law Act*.
- The date of separation marks the beginning of the two-year period during which unmarried spouses must begin a claim for the division of property and debt or for spousal support, under section 198(2) of the act.
- The date of separation marks the beginning of the one-year period during which married spouses must live "separate and apart" to ask for a divorce on the basis of separation, under section 8(2)(a) of the *Divorce Act*.

Because so many legal issues hinge on the date of separation, it won't be a surprise that people sometimes wind up arguing about when separation occurred. As a result, there's a good bit of case law about what constitutes "separation" and how to figure out what date is the date of separation. Making things a bit more complicated, while the decision to separate is often made by everyone involved in a relationship, it only takes one person to decide to end a relationship, and a decision to end a relationship doesn't require the consent or agreement of anyone else.

Getting a "legal separation"

Some people go to family law lawyers to get a "legal separation." Separation is accomplished, in most cases, by simply leaving the family home with the intention of living separate lives, although technically speaking it isn't necessary to move out at all. Once you or your spouse has announced that the relationship is at an end, boom: you're separated. That's it. There are no special legal documents to sign or file in court to become separated, and there is no such thing as a legal separation in British Columbia.

Now, to be fair, what people often mean by "legal separation" is a *separation agreement*. That's something else altogether. A separation agreement is a contract that people use to record their agreement about things like how the children will be cared for, how their property will be shared, and how child support and spousal support will be paid. Separation agreements aren't always useful, they're not required by the law, and you can't be forced to sign a separation agreement.

You can find more information about separation agreements in the chapter Family Law Agreements, in the section Agreements after Separation. You can find out more about preparing to separate in How Do I Prepare for Separation?, located in the Helpful Guides & Common Questions part of this resource.

The date of separation

Under the old *Family Relations Act*, married people rarely argued about when they separated. The issue was sometimes important for unmarried spouses because their ability to ask for spousal support depended on whether they started a court proceeding within one year of the date of separation. Under the new *Family Law Act*, however, the date of separation has become very important for both kinds of spouses.

In general, the date of separation has the following effects:

- each spouse becomes entitled to a half-interest in all family property, whether that property is owned jointly or in the name of the other spouse only,
- the spouses each become responsible for one-half of family debts,
- any property a spouse gets after the date of separation is their own separate property, not family property,
- any debt a spouse incurs after the date of separation is that spouse's sole responsibility, and
- unmarried spouses have two years from the date of separation to start a claim in court for the division of family property, the sharing of family debt, or the payment of spousal support.

Spouses do not need to move out in order to be separated. All that's needed is for at least one spouse to reach the conclusion that the relationship is over, say so, and then begin behaving as if the relationship really is over. That usually means stopping sleeping together, stopping doing chores for each other, stopping going out together and so on. Section 3(4) of the *Family Law Act* talks about separating while continuing to live together:

> For the purposes of this Act,

> (a) spouses may be separated despite continuing to live in the same residence, and
>
> (b) the court may consider, as evidence of separation,
>
> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

This is helpful, because the old *Family Relations Act* didn't talk about separation in any detail. However, the phrase in section 3(4)(b), "the court may consider," suggests that this section isn't a complete list of things the court should consider when deciding when separation happened, and the cases about separation are still very helpful. Here are some of the highlights:

> *Herman v Herman* [1], Nova Scotia Supreme Court, 1969:
>
> "[A]s long as the spouses treat the parting or absence, be it long or short, as temporary and not permanent, the couple is not living separately even though physically it is living apart. In order to come within the clear meaning of the words 'separate and apart' in the statute, there must need be not only a physical absence one from the other, but also a destruction of the consortium vitae or as the act terms it, marriage breakdown."
>
> *Rowland v Rowland* [2], Ontario Supreme Court, 1969:
>
> "[T]he words 'living separate' connote an attitude of mind in the spouses in which they regard themselves as withdrawn from each other."
>
> *McDorman v McDorman* [3], New Brunswick Supreme Court, 1972:
>
> "While the mere living separate and apart of the spouses may not be conclusive of the fact that there has been a permanent breakdown of the marriage, especially in cases where the separation may have been brought about ... by enforced hospitalization ... all of the circumstances accompanying such separation must be considered in determining whether or not it has in fact led to a permanent marriage breakdown."
>
> *Lachman v Lachman* [4], Ontario Court of Appeal, 1970:
>
> "A marital relationship is broken down when one only of the spouses is without the intent for it to subsist."

It's important to know that the Canada Revenue Agency has its own definition of separation, and requires people to have lived separate and apart for 90 days before it considers them to be separated. Once that 90-day period is over, the date of separation is the date the couple first began to live separate and apart.

Separation and divorce

Under section 8(1) of the *Divorce Act*, there is only one reason, or *ground*, why the court can make a divorce order: marriage breakdown. Under section 8(2), there are three ways to prove that a marriage has in fact broken down:

- the spouses have "lived separate and apart for at least one year,"
- one of the spouses has committed adultery, and
- one of the spouses has treated the other with such mental or physical cruelty that the spouses can't continue to live together.

Almost all claims for divorce in Canada are based on separation. It doesn't imply that one spouse did anything bad or was more responsible for the end of the relationship than the other spouse. Claims for divorce based on adultery or cruelty, on the other hand, do exactly that. As a result, if it winds up taking a year or more from the date of separation for the court to hear and decide a claim for divorce based on adultery or cruelty, the court will often grant the divorce on the basis of separation instead.

Separation and children

Under section 39(1) of the *Family Law Act*, a parent is a guardian of their child while the parents live together, and the parents remain guardians after separation.

Separation can be extraordinarily difficult for children. In most registries of the Provincial Court, parents are required to attend the Parenting After Separation Course [5]. This program, which is brief and free, teaches parents how to communicate with one another after separation and how to talk to their children about separation. It is an extremely useful course, and one that I think all separating parents should take. You can find more information about this program and other issues relating to children and separation in the chapter entitled Children and Parenting after Separation, in the section Parenting after Separation.

Separation is, of course, also difficult for the adults who are separating. You can find more information about the emotional dimensions of separation in the Separating Emotionally section of this chapter.

Reconciliation

For some people, separation is it. Their relationship is irrevocably over. For others, a period of separation is a time for renewing trust and rebuilding intimacy, and can be a healthy break that rejuvenates and revitalizes a relationship.

The *Divorce Act*

The *Divorce Act* actually tries to discourage divorce, believe it or not. There are a few parts of the act that promote reconciliation to help married spouses stay together. Section 7.7 requires lawyers to talk to their clients about getting back together and says this:

> (1) Unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, it is the duty of every legal adviser who undertakes to act on a spouse's behalf in a divorce proceeding
>
> (a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and
>
> (b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to the legal adviser that might be able to assist the spouses to achieve a reconciliation.

Under section 10, the court is required to pump the brakes on a divorce claim if it thinks reconciliation is a possibility:

> (2) Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, the court shall
>
> (a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and
>
> (b) with the consent of the spouses or in the discretion of the court, nominate
>
> (i) a person with experience or training in marriage counselling or guidance, or
>
> (ii) in special circumstances, some other suitable person,
>
> to assist the spouses to achieve a reconciliation.

Other parts of the *Divorce Act* talk about the effect of trying to reconcile on the calculation of the one-year period that spouses must live apart to get a divorce on the basis of separation. Section 8(3) says that:

> (b) A period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
>
> (i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or
>
> (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

In other words, a married couple may attempt to reconcile and can resume a cohabiting relationship for a maximum of 90 days without stopping the clock on separation as a reason for a divorce order. If a couple have lived together for more than 90 days since the first separation, the one-year clock will start again at the end of the last period in which they lived together as married spouses.

The 90 days needn't be consecutive in order to stop the clock. If you are claiming separation as the reason for your divorce, you cannot have resumed your relationship with your spouse for a *total* of 90 days within the one-year period of separation.

The *Family Law Act*

Because the *Family Law Act* doesn't talk about divorce, it also doesn't talk about separation and attempts to reconcile. The one exception to this general rule has to do with the division of property and debt under Part 5 of the act. Section 83 says this:

> (1) For the purposes of this Part, spouses are not considered to have separated if, within one year after separation,
>
> (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
>
> (b) they continue to live together for one or more periods, totalling at least 90 days.
>
> (2) Nothing in this Part affects a division of property under an agreement or order in a circumstance where, after the agreement or order was made, spouses live together and then separate again.

These provisions are important because the date of separation is the date when new property and new debt stop being shared family property and family debt and start being each spouse's separate property and debt. The general effect of this section is to reset the date of separation when spouses have resumed living together, so that the date that family property and family debt stop accumulating is moved to the next time the spouses separate. However, if the spouses have made an agreement or got an order about the division of property between the date they first separated and the date they reconciled, that agreement or order is still good.

Things to think about after separation

Once you've separated, there a number of things you may want to do, change, or adjust to reflect your new relationship with your spouse. In general, you need to protect your privacy and safeguard your financial interests.

Bank accounts and credit cards

You should remove your name from any joint bank accounts or credit cards. If your spouse has signing authority or debiting authority on any of your accounts or credit cards, you should consider cancelling their authority.

Credit cards, loans, and lines of credit can often be capped by telling the bank to make the accounts *deposit only*. This will mean that no more withdrawals can be made and the only transactions that can take place are deposits. You could also tell the bank to reduce the credit limit on any joint debts to the current balance on those accounts.

Insurance policies, pensions and RRSPs

You may wish to change the beneficiary of your insurance policies, pensions, and RRSP accounts if your spouse is the present beneficiary. If your spouse is the irrevocable beneficiary on such an account, your bank or insurance company may require your spouse's consent to remove their name as a beneficiary.

Jointly-owned real estate

Most spouses own real estate as “joint tenants." The really important aspect of this type of joint ownership is that if one of the joint owners dies, the surviving owners continue to own the entire property. This is different from the other type of joint ownership, a "tenancy in common." When a joint owner who is a tenant in common dies, their share of the property goes to their estate to be distributed according to their Will.

The *Family Law Act* says that on the date of separation each spouse is entitled to their share of the family property and responsible for their share of the family debt, and that the spouses take their the shares of the family property as *tenants in common*. Of course, the Land Title and Survey Authority doesn't know you've separated. How your title is legally registered will not automatically change because of your separation.

There are reasons both for and against keeping the ownership of any jointly-owned property registered as joint tenants. You should get advice from a family law lawyer if you have jointly-owned property. You should see a real estate lawyer for help in changing the way that you own the real estate.

Wills

Spouses have certain rights under the *Wills, Estates and Succession Act* [24] that change following separation. Among other things, they stop being "spouses" for the parts of the act that talk about how someone's property is distributed if they die without a will and any gifts that are made to a spouse in a will are cancelled.

If you want to make a claim to property owned by your spouse's estate, or ask for child support or spousal support from your spouse's estate, you'll have to sue your spouse's estate under the *Family Law Act*.

If you've separated but you still want your spouse to receive a gift in your Will, you must update your Will and specify that the gift or appointment should be made even though you've separated. You should see a wills and estates lawyer for help in making or changing a Will.

Powers of attorney and other authorizations

Unless a power of attorney was written to say otherwise, under the *Power of Attorney Act* [6], any power of attorney made by you and your spouse terminates on the date of your separation. However, if you want to be sure that your power of attorney has been terminated, you should:

1. revoke the power of attorney in writing;
2. deliver a copy of the revocation to all financial institutions where you have an account, and
3. deliver a copy of the revocation to your spouse and to anybody else you have appointed as your attorney.

(Always keep records of your revocation, and how and when you delivered the revocation!) If you still want your spouse to act as your attorney after you separate, however, you must prepare a new power of attorney.

You should speak with a wills and estates lawyer if you wish to revoke an existing power of attorney or create a new one.

Medical and dental insurance

Normally, spouses and children are still covered by the other spouse's health insurance for a period of time after separation. Coverage for children usually ends once the children turn 19; coverage for married spouses almost always ends on divorce, but coverage for unmarried spouses may end when the parties stop living together. You should contact the people who administer your insurance plan for more information, as different plans have different rules about the eligibility of spouses as beneficiaries following separation.

For most people, maintaining spousal benefits costs little or nothing. If that's the case, consider leaving your spouse's coverage in place for as long as your plan allows; it'll appear rather mean-spirited if you cancel your spouse's benefits. Whatever you do, don't cancel the children's benefits!

Finances and assets

When you separate, make sure you take or make copies of the following items:

- your financial information, including your credit card statements, bank statements, RRSP and investment account statements, and so forth,
- your MSP card and your private medical insurance card, if you have one,
- your immigration or citizenship documents, if you are new to Canada, and
- your passport.

If you have children, consider taking or making copies of their birth certificates and passports too.

You may also wish to take a fair share — half or less than half — of common household property such as the children's clothing, the furniture, and your personal effects. However, it's really important that you proceed with caution. Yes, the odds are quite good that half the household property is yours, but the last thing you want to do after separation is to ramp up the tension with your ex any further. If you absolutely cannot live without the dish set, then take the dish set, but otherwise it may be best to leave the dish set at home. Nothing looks worse than the spouse who takes half the glasses, half the cutlery, half of a dining room suite, and half of the living room furniture.

Now, the following may seem a bit pessimistic, but you should also make a list of all of the property your spouse owns in their own name and of all the things you own jointly. A detailed list, including balances and account numbers and serial numbers, would be ideal, but even something as simple as a list of the financial and other institutions you and your spouse deal with will do. You can collect that information by writing down the names and addresses of the people who are sending your spouse statements; you don't even have to open the envelopes, which is something you should probably avoid in any event. This information could prove invaluable if you wind up in an argument about who owns what or about the extent of the family property and family debt.

Personal privacy

You should also change the passwords or access privileges for your:

- smartphone, smartwatch, tablets, computers and other devices,
- home wifi router and personal hotspots,
- home security and surveillance systems, especially security cameras, electronic doorbells and electronic locks,
- wifi-enabled appliances, fixtures and outlets,
- internet, cable and telecommunication service providers,
- email accounts, social media accounts and gaming accounts,
- subscription-based accounts, like Netflix, Spotify and Crave, and
- business accounts and services, including electronic banking, credit card and money transfer services, accounting and bookkeeping software, and communication and conferencing services.

You may also want to disable any location-sharing options or services that may be available for your smartphone, smartwatch and car, or be built-in to your social media accounts.

Sex and new relationships after separation

A lot of people have questions about the consequences of sex after separation. The discussion that follows is about sex with spouses, sex with people other than spouses, new relationships, and how a married person can find themself in an unmarried spousal relationship while still being married.

Sex with spouses

There are, generally speaking, no legal consequences to having sex with your spouse after you've separated. While it might cause some emotional difficulties — such as prolonging the amount of time it takes to recover from a relationship that's broken down — there's nothing legally wrong with having sex with your spouse. Most people would say that there's nothing morally wrong with it either.

Having sex with your spouse after separation will not have an impact on how the care of the children is managed, the amount of child support that is paid, whether spousal support should be paid, or how your property and debt should be divided. The court does not look into this sort of conduct in determining these issues.

However, two things that married spouses probably need to think about are these:

- **Reconciliation:** While simply having sex with your spouse won't count toward the 90-day period of reconciliation described above, it may if you begin to live with each other while you're doing it.
- **Divorces based on adultery:** If you are making a claim for a divorce based on your spouse's adultery, and you have sex with your spouse after you start the claim, you could be considered to have forgiven your spouse for the adulterous conduct. If you have forgiven your spouse, you will not be able to obtain a divorce based on their adultery. The same principle would probably also apply to divorce claims based on cruelty.

Sex with other people

Just like having sex with your spouse after you've separated, there's nothing wrong with having sex with someone *else* after you've separated. (In fact, that may be a much better idea than having sex with your ex.) Separation is partly defined as leaving a spouse with the intention of ending the relationship. Once you've separated, the court will consider the romantic, marriage-like aspect of the relationship to have concluded, and your obligation to remain faithful along with it. Married spouses aren't divorced until they get a court order, of course, but, after separation, the marital aspects of their relationships, and the attendant expectations of monogamy, will be considered to be at an end.

Having sex with someone else will not have an impact on how the care of the children should be managed, the amount of child support that is paid, whether spousal support should be paid, or how your property and debt should

be divided. The court does not consider this sort of conduct in determining these issues.

Is it adultery?

Adultery is a problem only for married spouses. Technically speaking, it is in fact adultery to have sex with anyone other than your spouse for so long as you are married, even if you're separated, and you'll remain married until you have obtained an order for your divorce.

However, while having sex with someone else might constitute adultery, the court won't care whether you've committed adultery after you've separated or not. As far as the courts are concerned, if your relationship is over, go ahead and do what you like. No one apart from your ex or your in-laws is likely to criticize you for it.

Can it be a ground of divorce?

You cannot sue for divorce based on your own adultery. Now, if it's *your spouse* who has had sex with someone other than you following separation, you can use their adultery to ask for a divorce order as long as you haven't already claimed for divorce for another reason like separation.

New relationships

New romantic relationships are treated in exactly the same way as new sexual relationships: the courts will not normally be concerned with a new relationship unless your new partner is somehow a risk to the children.

Entering into a new relationship will not usually have an impact on how the care of the children should be managed or on how much child support should be paid, it may or may not have an impact on whether spousal support should be paid, and it will never change how your property and debt should be divided. The court does not look at this sort of conduct in determining these issues. Besides, most separated spouses find themselves in new relationships before they are legally divorced.

What about the kids?

As a general rule, you should be a bit careful about exposing the children to new relationships. It can be very confusing for kids to deal with the idea of their parents separating and then see a parent involved with some stranger who appears to be stepping into the shoes of the other parent.

You should take a lot of care in deciding how and when the children are introduced to your new relationships. In general, older children are more likely to understand new relationships, while younger children are more apt to be confused by the new relationship, especially when the new person tries to "parent" the children themselves. Whether we like it or not, society teaches children a very stereotypical view of family life: there are two parents, those parents love each other very much, and those parents are supposed to be together always. You should ask any new partner to be sensitive to these issues and to avoid presenting themselves to the children as an alternate parent.

What if there are a lot of new relationships?

Sometimes a newly separated spouse feels the need to go out and explore their options, so to speak, and will engage in a series of short-term relationships. This will be very difficult for children of all ages to deal with, if they're aware it's going on. It's one thing to have your parents' relationship break up, which is difficult enough to manage, but it's something else entirely to then be introduced to a parade of new people that a parent appears to be romantically involved with. This can lead to resentment and can encourage the children to align with the other parent.

In general, you shouldn't introduce your children to a new partner unless you are sure of the new relationship and expect to be in it for a good long while. If you're not sure about the longevity of the new relationship, be safe rather than sorry and don't introduce your children to your new partner until you're positive that the relationship will last.

If you're on the other side of the table and are worried about your ex's dating habits, you may want to ask for an order or an agreement requiring your ex to be involved in any new relationship for a minimum period of time — say

five or six months — before they introduce the children to the new person. That being said, while it is entirely reasonable to be concerned about the impact of the new relationship on the children, some caution is warranted. Before you interfere with things, make sure that your concerns about the children are well-founded and are based on their interests rather than on your own emotional reaction to your ex's new relationship.

New spousal relationships

It's possible that a married person who is separated but still married can become someone else's spouse in an unmarried relationship. Not everyone is in a rush to get divorced once a marriage breaks down, and some people don't get around to getting a divorce until many years after separation.

If you are separated from your married spouse, you are still married and will continue to be married to that person until you get divorced. If you start a new romantic relationship while separated from your married spouse, your new partner can become your *unmarried* spouse if:

- you live with the new person in a "marriage-like relationship" for at least two years, or
- you live with the new person for less than two years but have a child with the person.

This carries some important consequences. If you find that you're married but in a new relationship that qualifies as a spousal relationship:

- you may have an obligation to pay child support for your new partner's children as a stepparent,
- you will have an obligation to support any children you and your new partner have together,
- you may have an obligation to pay spousal support to your new partner, should you separate, and
- you will have to share family property and family debt with your new partner, should you separate.

These obligations are, of course, in addition to whatever obligations you have to your married spouse and any children from your marriage.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Estate Administration Act* [7]
- *Wills Variation Act* [8]
- *Wills, Estates and Succession Act* [3]
- *Power of Attorney Act* [9]

Links

- Separation & Divorce [13] from the Legal Aid BC's Family Law website
- Parenting After Separation course [5] from the BC Ministry of Attorney General
- Families Change [2] website from the Justice Education Society of BC and BC Ministry of Attorney General
- Support and Resources for Dealing with Separation and Divorce [3] website from the BC Ministry of Attorney General

Resources

- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- Separation and Separation Agreements [4] from Dial-a-Law by the People's Law School
- Deciding Who Will Move Out When You Separate [5] from Dial-a-Law by the People's Law School
- "Separated with Children - Dealing with the Finances: Parent Workbook" [7] from the Justice Education Society of BC
- "Coping with Separation Handbook" [15] from Legal Aid BC
- MyLaw BC Make a Separation Plan Pathway [9] from Legal Aid BC
- "Separation Agreements: Your Rights and Options" [13] from Legal Aid BC and West Coast LEAF
- Parent Guide to Separation and Divorce [14] from the Justice Education Society of BC
- "Legal Health Checks: Breaking Up - Without Court" [8] from the Canadian Bar Association
- Going Through Separation [6] from Legal Aid BC
- "How to Separate" online course [9] from the Justice Education Society of BC
- "Ending Relationships" video [17] from John-Paul Boyd, KC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 26 March 2020.

References

[1] http://canlii.ca/t/gwfq9
[2] http://canlii.ca/t/g1493
[3] https://canlii.ca/t/j7cf0
[4] http://canlii.ca/t/g161p
[5] https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/pas
[6] http://canlii.ca/t/849l
[7] http://canlii.ca/t/840g
[8] http://canlii.ca/t/84g0
[9] https://canlii.ca/t/849l

Divorce and the Law on Getting Divorced

Divorce is the legal termination of a marriage by an order of the court. Without a divorce order, a couple will remain married to each other, no matter how long they've been separated from one another, until one of the spouses dies.

Although a divorce order represents the formal conclusion of a marriage, the legal consequences of the marriage will continue where children are involved or one spouse is financially dependent on the other. The fact that a couple are divorced doesn't wrap up issues about how children are cared for, or about the payment of child support or spousal support.

This section provides an overview of the reasons why the court will make a divorce order, and discusses the nature of divorce orders and the effect of foreign divorce orders in Canada. It also talks about the do-it-yourself divorce process and the court forms used in that process, in enough detail that you can get your own divorce without having to hire a lawyer.

The criteria that must be met to obtain an annulment — which is different than a divorce order, and isn't nearly as simple and straightforward as most people think — are discussed in the chapter Family Relationships in the section Married Spouses and the Law on Marriage.

Introduction

Valid marriages end in only two ways, death or divorce. In fact, for thousands of years, marriages in Western society could only end by death. Marriage was considered to be an irreversible, life-long commitment, whether your spouse cheated on you, beat you or gambled away your inheritance. Although the first law allowing English courts to make divorce orders was passed in 1857 — followed by Canada's first *Divorce Act* more than a century later, in 1968 — it took an awfully long time for Western society to shake the view that the end of a marriage was sinful and something to be ashamed of. However, the 50-year divorce rate in Canada is presently about 40% and has hovered around that mark for the last 10 or 15 years. Plainly, divorce is something we've gotten used to.

Today, most Canadians see divorce as a normal life event, an event that most but not all people go through and an event that prudent people even anticipate and plan for. More Canadians are married and divorced now than ever before in Canadian history, and, likewise, more Canadians have divorced and remarried now than ever before. Once upon a time, blended families were bizarre and unusual — and wasn't that the whole premise of *The Brady Bunch*? — but today, blended families are commonplace.

To get divorced, one spouse has to sue the other for a divorce order. You can't just agree to it. And to get a court order, you must start a court proceeding, just as if you were suing someone after a car crash, suing your employer for firing you, or suing your neighbour for building a fence on your side of the property line. The court you must start your proceeding in is the Supreme Court [1], as the Provincial Court [1] doesn't have the jurisdiction to make orders under the *Divorce Act*.

Basic requirements to get divorced

If you want to get divorced in British Columbia, you must be able to satisfy three conditions.

- **You must be legally married.** To prove you were legally married, you'll need to provide a marriage certificate issued in the country where you were married. (If your marriage was valid in the place you got married, it counts as a legal marriage in British Columbia.) If you can't get a marriage certificate, you'll need to find witnesses who saw you get married. These witnesses will need to say that they saw you get married.
- **You or your spouse must live in British Columbia, and have lived here for at least a year.** The one exception to this rule is if you were married in British Columbia but you live somewhere that won't let you get divorced, which might be the case if you married someone of the same gender but live in a country that doesn't recognize same-sex marriage.

- **You must prove that your marriage has broken down.** You can prove this by showing that you have been separated from your spouse for a year, that your spouse abused you, or that your spouse had sex with someone else.

Marriage breakdown

Under the federal *Divorce Act*, there is only one reason why you can apply for a divorce order: your marriage has broken down. Under section 8(2) of the act, there are three ways to prove that your marriage has broken down:

1. you and your spouse have lived separate and apart for at least one year,
2. your spouse has committed adultery, or
3. your spouse has treated you with such physical or mental cruelty that you cannot continue to live together.

In Canada, all divorces proceed on a "no-fault" basis, regardless of the ground of marriage breakdown relied upon. *No-fault*, in this context, means that the reasons for marriage breakdown have nothing at all to do with how the court deals with issues like parenting children and paying support. No matter how upset you are by your spouse's behaviour, their behaviour will have no impact on how the court resolves the legal issues resulting from your separation.

Most divorces — almost all of them, in fact — are based on separation. The only "advantage" of claiming a divorce based on cruelty or adultery is that your divorce order is available relatively quickly — you needn't wait to be separated for a full year before you can ask for the order. However, the downside of divorces based on cruelty or adultery is that you have to prove that the cruelty or adultery occurred. As you can imagine, not all that many people are prepared to admit that they committed adultery or abused their spouse, and, as a result, divorces based on cruelty or adultery rarely proceed smoothly. In fact, where a court proceeding has dragged on long enough that a year or more has passed before the case finally comes to court, many judges will refuse to hear evidence of cruelty or adultery and will grant the divorce instead on the basis of separation.

Separation

To obtain a divorce based on separation for a period of at least one year, you and your spouse must have lived separate and apart for that year. The period of separation can pass while you are both living under the same roof; however, you must behave as if your marriage has come to an end. That usually means stopping sleeping together, stopping doing chores for each other, stopping going out together and so on.

The *Divorce Act* says that separated spouses can attempt to reconcile and resume living together for up to 90 days without stopping the clock on separation as a reason for a divorce order. If they have lived together for more than 90 days since the first separation, the one-year clock will start again at the end of the last period in which they lived together as married spouses.

Adultery

A spouse who is claiming that the other spouse is guilty of adultery must prove that the adultery occurred. The court must also be satisfied that the person asking for the divorce order hasn't *condoned* the adultery or *connived* to cause the adultery. If the court is not satisfied, it will not make the divorce order.

Proof of adultery normally consists of an affidavit from either your spouse or the person with whom your spouse had sex, admitting to the adultery. You cannot ask for a divorce based on your own adultery!

Many people will have seen the movie *Intolerable Cruelty*, which puts a lot of emphasis on the punitive consequences of adultery, and suggests that spouses caught with their pants down are going to lose everything they have. That might be true in the United States, but it isn't true in Canada. In Canada, there are no consequences for marital offences of that nature: you won't lose your house, you won't lose the children, and you won't find yourself living out of a cardboard box. Adultery, while relevant as a reason for marriage breakdown, has no role in the court's determination of those other issues.

Cruelty

A spouse who claims that the other spouse is guilty of cruelty must prove that the cruelty occurred. Cruelty can consist of physical abuse or mental abuse, and may also give rise to a claim for an award of damages as a result of the cruelty. The court must also be satisfied that the person asking for the divorce order hasn't *condoned* the cruelty. If the court is not satisfied, it will not make the divorce order

Proof of cruelty normally consists of a medical, psychological, or psychiatric report, or, in some circumstances, a simple letter from a treating professional describing the abuse.

Bars to divorce

Sections 10 and 11 of the *Divorce Act* describe the circumstances when the court may not make a divorce order. Under section 10(1) and (2), the court must be satisfied that there is no possibility that the spouses can reconcile and continue their marriage. Under section 11(1), the court must be satisfied that:

- the spouses have not colluded to get a divorce,
- there has been no connivance and condonation where marriage breakdown is claimed as a result of cruelty or adultery, and
- adequate support is being paid for any children.

Reconciliation

Under section 10(1) of the *Divorce Act*, the court must be satisfied that "there is no possibility of the reconciliation of the spouses" before it hears any evidence in support of a divorce claim. Under section 10(2), if the court thinks that reconciliation is a possibility, it must "adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation."

Collusion, connivance and condonation

Under section 11 of the *Divorce Act*, if the court finds that there has been *collusion*, *connivance* or *condonation* in an application for a divorce order, the court must not make the order.

"Condonation" means *forgiveness*. If a spouse's adultery or cruelty has been *condoned* by the spouse asking for the divorce, the bad behaviour has been forgiven. If the bad behaviour has been forgiven, then the marriage hasn't broken down. If the marriage hasn't broken down, there's no ground on which the court can make a divorce order.

"Collusion" and "connivance" are both attempts to cheat the court. *Collusion* means that the spouses have worked together to fabricate the reason for marriage breakdown. This might mean, for example, that the spouses agreed that one of them would have sex with someone else in order to claim adultery as the reason for marriage breakdown, or that the spouses agreed to lie about the date of their separation. *Connivance* means to create the reason for marriage breakdown. For example, if a spouse arranges for someone else to seduce their spouse in order to claim their spouse's adultery as a ground of divorce.

The point of these rules is to ensure that spouses are not trying to cheat the court to get a quick divorce.

Inadequate child support

Section 11 of the *Divorce Act* also requires the court to be satisfied that "reasonable arrangements" have been made for the support of any children before it can grant an order for divorce. As you might expect, a *reasonable arrangement* usually means that child support is being paid according to the Child Support Guidelines. If you have children, you will usually have to show that the children are being provided for as the Guidelines require before you can get a divorce. (Remember that under the Guidelines, the table amount of child support payable for incomes of less than $12,000 per year is zero.)

Here are some cases that show how tricky this can get.

In *Kaur v Nagra* [2], a 2015 decision from the Alberta Court of Queen's Bench, the spouses emigrated to Canada while their child remained at home with his grandparents. When the spouses decided to divorce, the court refused the order because they failed to show what "reasonable arrangements" were in place for the support of their child, even though the child was living with neither of them.

In *Kendo v Kendo* [3], a 2013 decision of the Northwest Territories Supreme Court, the court refused to make a divorce order without proof that the spouses had resolved the issue of child support.

In *Holzbauer v Holzbauer* [4], a 2014 decision from the Alberta Court of Queen's Bench, the court refused to make a divorce order where the parties were relying on an 11-year-old child support order to prove that reasonable arrangements had been made.

In *Walsh v Binet* [5], a 2013 decision from the Alberta Court of Queen's Bench, a spouse tried to get a divorce along with an order that the other spouse would not be required to pay child support. The court refused both orders as it had no information about the other spouse's income.

The divorce order

As we've already talked about, in order to get a divorce order, the court must be satisfied that:

- the marriage legally exists,
- at least one of the parties has been ordinarily resident in British Columbia for at least one year before the court proceeding began, and
- the ground on which marriage breakdown is claimed has been proven.

It must also be satisfied that there is no possibility of reconciliation, that adequate child support is being paid if there are children, and that there has been no collusion, connivance or condonation with respect to the application for the divorce order.

It is possible to oppose an application for a divorce order. Practically speaking, however, by the time the application gets before a judge, the other side has usually come to realize that a divorce is inevitable. However, even if the other side continues to object to the divorce order, the court will make the order over that spouse's objections if marriage breakdown has been proven.

Corollary relief

An order for divorce can be made on its own or together with *corollary relief*. "Corollary relief" means orders made under the *Divorce Act* other than divorce; namely, orders about parenting children, child support and spousal support.

Divorce orders are usually made after all of the corollary claims, if any, have been dealt with, either as a result of a trial or the spouses' agreement. The court is usually very reluctant to make a divorce order until *all* of the other legal issues have been resolved.

Effective date

Orders for divorce usually contain a term that says "this order shall not take effect until the 31st day after its pronouncement." This is to allow the 30-day appeal period to expire. Once those 31 days have passed, however, the parties are officially divorced and are free to remarry if they wish.

It is possible to abridge the appeal period, if the divorce must take effect sooner for some urgent reason such as remarriage. If this is the case, you should advise the court of the need for haste, and a waiver of appeal will have to be filed.

Certificate of divorce

Once the appeal period has expired, either person may ask the court registry staff for a Certificate of Divorce. The certificate merely confirms that the spouses are divorced and doesn't say anything else about the reasons for the divorce or the other orders that were made along with the divorce order. It is, strictly speaking, not necessary to get a Certificate of Divorce as the divorce order itself is more than sufficient proof of divorce. Nevertheless, people often want this certificate:

- to obtain a sense of closure,
- because they expect to marry within the next couple of years, or
- to have proof they are divorced without having to disclose the other terms of their divorce order.

Most family law lawyers take care to prepare Certificates of Divorce nicely, in a format suitable for framing. For an overview of this process, go to the Helpful Guides & Common Questions section of this resource and read How Do I Get my Certificate of Divorce?. It's located under *Marriage, Separation and Divorce*.

Foreign divorce orders

Section 22(1) of the *Divorce Act* deals with the effect in Canada of divorces obtained elsewhere. In a nutshell, if a divorce was properly granted by a foreign country, the parties will also be considered to be divorced here, without the need to obtain a Canadian divorce order.

Of course, there is a small catch. Either spouse must have been "habitually resident" in the country in which the divorce order was made for at least one year before the divorce proceedings started. In other words, if you've lived in Sri Lanka for less than a year before you started your application for divorce, your divorce may not be recognized in Canada even though it's perfectly good under Sri Lankan law. As long as you had lived in Sri Lanka for more than one year before you started your application, a divorce there will be valid here.

Even if a foreign divorce isn't good under Canadian law, everyone will usually accept the fact that the spouse is divorced. Whether the divorce meets Canadian requirements will only ever become an issue if one of the spouses later claims that the divorce is not valid. This can have some fairly serious consequences, mostly when there are unresolved issues about the division of property and pensions. You can find more information about the property entitlements of married spouses in the chapter Property and Debt.

The do-it-yourself divorce

The only way to get divorced is to get a divorce order, and the only way to get a court order is to start a court proceeding. You must sue your spouse if you want to get divorced, even if you're still quite friendly with each other and even if you agree on everything. The do-it-yourself process, called the *desk order divorce process*, is a special process designed to let you start a court proceeding and get a divorce order without ever having to appear in court. The order you ask for can even deal with issues other than divorce, and can include orders about parenting children, child support, spousal support and the division of property and debt.

You can get your divorce yourself using the desk order divorce process, without having to retain a lawyer. While some of the court forms can be a bit intimidating, there are plenty of resources, such as this website, that can help you unravel the mysteries and complete the process on your own.

Generally speaking, a desk order divorce is appropriate in two situations:

1. when the only issue between you and your spouse is getting a divorce, or
2. when you and your spouse have other legal issues, but those issues have been settled either through a separation agreement or an agreement about the terms of a consent order.

In the first case, a desk order application will be for a divorce alone. In the second case, a desk order application will be an application for a divorce and other orders about things like parenting children, paying support, and dividing

property.

Most court proceedings go like this: the claimant files a Notice of Family Claim and serves it on the respondent; and, the respondent then files a Response to Family Claim and sometimes a Counterclaim. If the respondent fails to file a Response to Family Claim within the allowed time, the claimant's court proceeding is said to be *uncontested*. This means that the respondent is assumed to either agree with the relief sought by the claimant or to have chosen not to defend the claim. In such circumstances, the claimant is free to seek a *default judgment* against the respondent.

A desk order divorce application is essentially an application for a default judgment, whether the claimant's court proceeding is for a divorce order alone or for a divorce order with corollary relief, and is governed by Rule 10-10 of the Supreme Court Family Rules [3].

For a brief summary of this process, go to the Helpful Guides & Common Questions section of this resource and read How Do I Get Divorced?. It's located under *Marriage, Separation and Divorce*.

Choosing between the sole application process and the joint application process

There are two types of desk order divorce processes:

1. the *sole application* process, in which only one spouse is responsible for ushering the process through, and
2. the *joint application* process, in which both spouses work together to get the job done.

There are a few important differences between sole applications and joint applications.

- Joint applications are quicker and cheaper, but the spouses will have to cooperate with each other. In a sole application, no cooperation is required.
- The sole application process takes a little longer because the claimant has to serve the respondent with the Notice of Family Claim and wait 40 days before proceeding. In a joint application, service is not necessary and you can apply for the divorce order right away.
- In a sole application, the spouses are called the claimant and respondent. In a joint application, the spouses are called claimant 1 and claimant 2.
- In a joint application, both spouses must sign the Notice of Joint Family Claim in Form F1, and both must complete an affidavit for the application for the divorce order.

The sole divorce application

These instructions are for the sole divorce application process:

Step One

Prepare your Notice of Family Claim in Form F3. Make three copies of the original.

Step Two

Go to your local registry of the British Columbia Supreme Court. Bring the original Notice of Family Claim and the three copies you have made of it. Also bring the original of your government-issued Marriage Certificate. Fill out the Registration of Divorce Proceeding form, which will be available at the courthouse. File all of these materials and pay the $210 court fee. The court will stamp the action number and the court seal on all copies of your Notice of Family Claim, keep the original, and give you back the three duplicates. Your Marriage Certificate will go into the court file.

Step Three

Serve your ex with your Notice of Family Claim. You cannot serve your ex yourself, *you must arrange for someone else to do it*. Give the person who will be your process server two copies of your Notice of Family Claim, along with a photograph of your ex. The process server will serve one copy of your Notice of Family Claim on your ex, and will use the photograph and the remaining copy of your Notice of Family Claim in their Affidavit of Personal Service to prove that your ex was served.

Step Four

Once your ex is served, wait 40 days. Technically, you only need to wait 31 days from the date of service, but it doesn't hurt to add a few days just to be sure. If your ex files a Response to Family Claim or Counterclaim in this period, there's a problem. Read the discussion in "What happens if a response or counterclaim is filed?" at the end of this section.

Step Five

Assuming your ex hasn't filed a Response to Family Claim or Counterclaim, prepare a Requisition asking the court for the divorce order, your Divorce Affidavit in support of the application, a draft of the order you want the court to make, and the Registrar's Certificate. If you have children, you will also have to prepare a Child Support Affidavit, which sets out the details of your income and your spouse's income and the terms on which child support will (or won't) be paid.

Step Six

Go to the court registry where you filed your Notice of Family Claim, and file your Requisition, your Affidavit, your Child Support Affidavit if required, your Registrar's Certificate, your draft order, and your process server's Affidavit of Personal Service. Pay the $80 court fee.

Step Seven

Once you've filed your application, wait four weeks.

Step Eight

Start calling the court registry to see whether your order is ready for you to pick up. This should take four to eight weeks, depending on how busy the court is. When your order is ready, go to the courthouse to get the entered order, and then mail a copy to your ex.

Once you've got your entered divorce order and 31 days have passed from the date the order was made, you are officially divorced, and you have a court order bearing the seal of the court to prove it. Some people may find that a Certificate of Divorce is necessary in order to remarry. If you wish to get this Certificate, this is what you must do:

Step Nine

Wait 32 days from the date the divorce order was made. (The date will be shown on the first page of the order.)

Step Ten

Prepare your draft Certificate of Divorce and file it in the court registry, together with a Requisition asking the registry to complete the Certificate. Pay the $40 court fee, and grab a chair. The registry will normally complete your Certificate of Divorce while you wait.

The joint divorce application

The joint divorce application process is almost exactly the same as the sole divorce application process, except that some of the forms are different, service is not required, and the length of time it takes to get a divorce is about four to eight weeks in total. The main differences that set the joint application apart from the sole application process are:

- a special form, called the Notice of Joint Family Claim, is required,
- both parties sign the Notice of Joint Family Claim,
- the Notice of Joint Family Claim doesn't need to be served on anyone, and there's no waiting period that must pass before the application for the divorce order can be made,
- both parties must swear an affidavit in support of the application for the divorce order, and
- all of the documents can be filed at once, although at least one of the affidavits in support of the application must be sworn after everything else is filed, even if only by a few minutes.

If either party withdraws from the joint application process before the divorce order is made, there's a problem. Read the discussion in "What happens if a response or counterclaim is filed?" at the end of this section.

The Ministry of Justice introduced an online application [26] to help those without children apply for joint divorce.

These instructions are for the joint divorce application process:

Step One

Prepare a Notice of Joint Family Claim; prepare and execute one Divorce Affidavit in support of the application; prepare your blank Registrar's Certificate; prepare and complete your Requisition to apply for the divorce order; and, prepare your draft order. Make two copies of everything. Prepare but do not execute the other Divorce Affidavit.

Step Two

Go to your local registry of the British Columbia Supreme Court. Bring all the documents listed in Step One and the original of your government-issued Marriage Certificate. Fill out the Registration of Divorce Proceeding form, which will be available at the family and divorce counter. File all of these materials (except the unexecuted affidavit) and pay the $290 court fee. The court will stamp the action number and the court seal on all copies of your Notice of Joint Family Claim, keep the original, and give you back the two duplicates. Your Marriage Certificate will go into the court file.

Step Three

While you're at the registry counter, execute the remaining affidavit in support of the application for divorce, and pay the $40 court fee.

Step Four

Once you've filed your application, wait four weeks.

Step Five

Once four weeks have passed, start calling the court registry to see whether your order is ready for you to pick up. This should take four to eight weeks, depending on how busy the court is. When your order is ready, go to the courthouse to pick the entered order up, and then mail a copy to your ex.

Once you've got your entered divorce order and 31 days have passed, you are officially divorced, and you have a court order bearing the seal of the court to prove it. Some people may find that a Certificate of Divorce is necessary in order to remarry. If you wish to get this Certificate, this is what you must do:

Step Six

Wait 32 days from the date the order was made. (The date will be shown on the first page of the order.)

Step Seven

Prepare your Certificate of Divorce and file it in the court registry, together with a Requisition asking the registry to complete the Certificate. Pay the $40 court fee, and grab a chair. The registry will normally complete your Certificate of Divorce while you wait.

With the exception of the special form, Notice of Joint Family Claim, all of the forms used in the joint process are the same as the sole process, except that the parties aren't called *Claimant* and *Respondent*, they're called *Claimant 1* and *Claimant 2*.

Help with your divorce

Understandably, you want to spend as little money as possible to get your divorce. However, the forms are complicated and sometimes you'll need help. There are a few free services around that you might be able to use, but you can also pay lawyers or legal service companies to do your divorce for you.

Free services

Access Pro Bono [6] offers free meetings with lawyers who can review your forms with you before you file them in court. Although the lawyers available through this program are not likely to prepare your documents, they will give them a check to make sure that the registry will accept them.

The British Columbia Continuing Legal Education Society [7] has published an excellent guide to the desk order divorce process called *Desk Order Divorce—An Annotated Guide*, which has samples of the different clauses you may need to complete your court forms. This book is available at your local courthouse library.

Legal Aid BC [8] also has an excellent online step-by-step guide to the divorce process.

The BC Ministry of Attorney General has an online do-it-yourself joint divorce application [26] process, called the Online Divorce Assistant. This process can only be used when all orders being sought are by consent.

Services that are not free

You're usually best off if you hire a lawyer to handle your divorce for you, as a lawyer will be familiar with the nuances and complications of the desk order divorce process and can give you expert advice about the short- and long-term advantages and disadvantages of the arrangement you've worked out with your spouse. This can be critical where the terms or circumstances of your divorce are unusual or complicated.

Lawyers, however, come at a cost. You should expect that you will be charged fees of anywhere between $1,000 and $2,500 for your divorce, plus the lawyer's out-of-pocket expenses for things like court fees and photocopying.

There are also a number of commercial services available online that will prepare the necessary documents for you, likely at a rate lower than what a lawyer would charge, including these businesses:

- www.divorceoptions.ca [9]
- www.untietheknot.ca [10]
- www.britishcolumbiadivorce.ca [11]

If I understand things correctly, untietheknot.ca will also file your documents in court for you. A Google search for the phrase "desk order divorce BC" should provide you with a few other options, but whatever you do, make sure you're using a service that offers the forms required for a divorce in British Columbia!

What happens if a response or counterclaim is filed?

The do-it-yourself divorce process is based on the idea that either everyone agrees to get divorced or no one is going to object to the divorce. The process will go off the rails if:

- in a **sole application** the respondent files a Response to Family Claim or a Counterclaim, or
- in a **joint application** one of the claimants withdraws from the process and files a Response to Family Claim or a Counterclaim.

In either situation, the divorce claim will cease to qualify as an *undefended family law case*, as defined by the Supreme Court Family Rules [3], and the court proceedings will be kicked out of the desk order process. The court proceeding will continue like any other contested family law case, with the possibility of a resolution at trial if settlement cannot be reached before then.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- Supreme Court Family Rules [9]
- Child Support Guidelines [2]

Links

- Ministry of Attorney General's Online Divorce Assistant [26]
- Supreme Court of British Columbia website [1]
- Provincial Court of British Columbia website [12]
- Families Change [2] website from the Justice Education Society of BC and BC Ministry of Attorney General
- Support and Resources for Dealing with Separation and Divorce [3] website from the BC Ministry of Attorney General
- DivorceOptions.ca [13]
- Untie the Knot Divorce Service [14]
- Canadian Divorce Online [15]

Resources

- Legal Aid BC's Family Law website's information page "Getting a divorce" [12]
- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- Divorce Fact Sheet [10] website from the Department of Justice
- Separation and Separation Agreements [4] from Dial-a-Law by the People's Law School
- Deciding Who Will Move Out When You Separate [5] from Dial-a-Law by the People's Law School
- "Coping with Separation Handbook" [15] from Legal Aid BC
- MyLaw BC Make a Separation Plan Pathway [9] from Legal Aid BC
- Parent Guide to Separation and Divorce [14] from the Justice Education Society of BC
- "Legal Health Checks: Breaking Up - Without Court" [8] from the Canadian Bar Association
- Going Through Separation [6] from Legal Aid BC
- "Ending Relationships" video [17] from John-Paul Boyd, QC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 26 March 2023.

References

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[2] http://canlii.ca/t/gg05v
[3] http://canlii.ca/t/g0mt9
[4] http://canlii.ca/t/g36tp
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[6] http://accessprobono.ca/
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[8] https://clicklaw.bc.ca/resource/4647
[9] http://www.divorceoptions.ca
[10] http://www.untietheknot.ca
[11] http://www.britishcolumbiadivorce.ca
[12] https://www.provincialcourt.bc.ca/
[13] https://divorceoptions.ca/
[14] https://untietheknot.ca/
[15] https://www.divorcecanada.ca/

Resolving Problems out of Court

Resolving Family Law Problems out of Court

Family law problems can be resolved in a bunch of different ways. Court is not the only option. In fact, depending on your circumstances, you may never need to darken the doorway of a courtroom.

Almost every issue people face when their relationships breaks down can be handled without going to court, as long as everyone is able to discuss those issues in a cooperative, reasonable and respectful manner, and everyone is flexible enough to compromise. The only reason why people leaving a relationship have to start a court proceeding is to get a divorce order, and that's only important if people are married to each other.

There are many reasons why it is generally better to resolve things out of court. Agreements that people make cooperatively tend to be longer-lasting and are more likely to leave everyone satisfied with the result than if someone else — a judge or an arbitrator — imposes a resolution. As well, resolving family law problems out of court is often far quicker and far less expensive than resolving them in court. This isn't to say out of court processes are cheap. They still require you to make a financial investment.

This chapter talks about how family law problems can be resolved without going to court. It begins with a brief overview of the different out-of-court options and the different ways that settlements and agreements can be recorded. It also reviews what can happen when someone has a change of heart after an agreement has been reached. The other sections in this chapter discuss the different dispute resolution options — collaborative negotiation, mediation, arbitration, and parenting coordination — in more detail.

Introduction

The fundamental goal shared by all out-of-court dispute resolution processes is to reach a settlement of the legal issues, particularly those issues that people could have fought about in court. As you might expect, reaching a settlement can require a certain amount of flexibility, empathy and maturity. Most importantly, the people involved must understand that none of them is going to get everything they want in a settlement. Whatever a person's wish list might be going into negotiations, the end result *always* represents a compromise and some accommodation of someone else's goals, hopes, and expectations.

It's not always possible to avoid court. Sometimes someone is so stubborn that they can't or won't compromise their position, and sometimes urgent court action is necessary to stop something bad from happening, like property being damaged, someone being hurt, or a child being taken out of the country. But out-of-court processes always offer a cheaper, friendlier and faster resolution to the legal problems that come up when a relationship ends than going to court. They're also far less stressful and disruptive to the people involved, and to their children.

It is particularly important to negotiate a settlement when children are involved. Where there are no children, people can walk away from their relationship and have nothing more to do with each another for the rest of their lives. However, where there are children, parents can expect to be involved with each other — whether they like it or not — for the rest of their lives. Each of them will want to be at their children's high school graduation, attend parent-teacher meetings, and go to school concerts and sports days. The children will want their parents to be there too. As a result, maintaining a functioning relationship is an absolute necessity. Resolving family law problems out of court gives parents the best chance of doing just that.

For more information about parenting after a relationship has ended and how to put the children first in your dispute with the other parent, see the section on Parenting after Separation in the chapter Children and Parenting after

Separation. For more information about the emotional issues that tend to come with the end of a long-term relationship and how to keep those issues from hopelessly complicating your dispute, see the section Separating Emotionally in the chapter Separating and Getting Divorced.

The legislation on family law problems and out-of-court options

Both the federal *Divorce Act* and British Columbia's *Family Law Act* now talk about the importance of resolving legal disputes out of court.

This is a big change from how the law used to be. Before 2020, all the *Divorce Act* had to say about this issue was to require lawyers to discuss with their clients "the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters." The old *Family Relations Act*, the law in British Columbia before the *Family Law Act* came into force in 2013, didn't say a word about mediation or the other alternatives to court.

The *Family Law Act*

According to the Ministry of Justice's guide [10] to the *Family Law Act*, the legislation was written to encourage people to resolve family law problems without having to go to court. The Ministry has said that the *Family Law Act* "emphasizes that out-of-court dispute resolution processes and resolution through agreements are not simply add-ons to litigation but are the preferred option, with court as a valued, but last, resort." The Ministry has also said that:

> "This focus on family dispute resolution signals an important shift from the *Family Relations Act*, which was criticized for being litigation-focused and for assuming that every dispute would end in a trial."

The act supports the resolution of family law disputes outside of court by:

- requiring lawyers to explain the different dispute resolution processes to their clients, under sections 4 and 8,
- requiring the people involved in a family law dispute to make full disclosure of the information necessary to resolve the dispute, under section 5, even when they're not in court,
- allowing parenting coordinators to be used to resolve disputes about parenting once a final order, award or agreement about children's parenting arrangements has been reached, under sections 15 to 19,
- including mediation and collaborative negotiation as dispute resolution processes to which the court can refer people, under sections 1 and 224,
- changing the rules about arbitration to better accommodate the arbitration of family law disputes, in sections 19.1 to 19.22, and
- allowing the court to delay a proceeding while the parties attempt to resolve a family law dispute out of court, under section 223.

The act also allows the court to require the people involved in a court proceeding to try to resolve their dispute out of court, and to attend counselling if the court thinks that counselling would be helpful. Section 224 says that:

> (1) A court may make an order to do one or both of the following:
>
> (a) require the parties to participate in family dispute resolution;
>
> (b) require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.
>
> (2) If the court makes an order under subsection (1), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, services or programs.

That's pretty cool, and a huge change from the old *Family Relations Act*, which didn't talk about out-of-court dispute resolution processes at all, except in terms of how agreements could be enforced or cancelled.

This change in the *Family Law Act* has laid the groundwork for changing how families interact with the court system. A pilot project launched in May 2019 at the Provincial Court in Victoria encourages parties to resolve matters by agreement. The Victoria Early Resolution & Case Management Model [1] provides family case management earlier in the court process, and tries to refer people in appropriate cases to either mediation or collaborative negotiation before appearing before a judge in court.

The *Divorce Act*

The *Divorce Act* was changed in March 2021 to address some of the same goals as British Columbia's *Family Law Act* when it comes to resolving family law disputes. Section 7.3 puts a new duty on spouses:

> To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

while section 7.7 puts a similar duty on lawyers:

> (2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act
>
> (a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
>
> (b) to inform the person of the family justice services known to the legal adviser that might assist the person
>
> (i) in resolving the matters that may be the subject of an order under this Act, and
>
> (ii) in complying with any order or decision made under this Act; and
>
> (c) to inform the person of the parties' duties under this Act.

The guide [2] published by the Department of Justice says that these provisions are intended to encourage spouses to try to resolve their differences out of court using processes including negotiation, mediation and collaborative negotiation. The guide says that:

> "In most cases, family dispute resolution processes tend to be faster, less expensive and more effective than court proceedings. They are also more likely to serve the interests of the child. A greater variety of such processes are available than ever before, including mediation, negotiation and collaborative law. The phrase 'it would clearly not be appropriate' means that legal advisers do not have to encourage family dispute resolution in some situations, such as when family violence poses safety risks."

As well, section 16.1, which talks about parenting orders, allows the court to make an order directing the parties to "attend a family dispute resolution process." The guide says that:

> "This amendment aims to encourage parties to attempt to resolve disputes through a 'family dispute resolution process', such as mediation, negotiation or collaborative law. ... The court may, for example, order that for future disputes, the parties attempt some form of family dispute resolution before bringing the matter to court."

However, because only the provincial governments have jurisdiction over contracts, including separation agreements, this is really about as far as the federal government can go in encouraging people to resolve their

disputes out of court.

The fine print under the *Family Law Act*

Alright. So we know that the *Family Law Act* is intended to promote and support people to resolve their family law disputes out of court rather than in court. That's important, but there are some important details about how the legislation does this. First, the act talks about the importance of making proper disclosure, and encourages proper disclosure by making sure that everyone knows that information that is disclosed is private and confidential, and can't be used for purposes other than resolving the family law dispute. Section 5 says this:

> (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.
>
> (2) A person must not use information obtained under this section except as necessary to resolve a family law dispute.

Since family law disputes that are resolved out of court are usually going to be resolved with a separation agreement — although those family law disputes which are addressed through arbitration will result in an arbitrator's *award* — section 6 says this:

> (1) Subject to this Act, 2 or more persons may make an agreement
>
> (a) to resolve a family law dispute, or
>
> (b) respecting
>
> (i) a matter that may be the subject of a family law dispute in the future,
>
> (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
>
> (iii) the implementation of an agreement or order.
>
> (2) A single agreement may be made respecting one or more matters.
>
> (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.
>
> (4) Subsection (3) applies whether or not
>
> (a) there is consideration,
>
> (b) the agreement has been made with the involvement of a family dispute resolution professional, or
>
> (c) the agreement is filed with a court.

Subsections (3) and (4) are really important. They say, in a nutshell, that people who make a family law agreement are bound by the agreement — they are legally required to do what it says — and that people are bound by their agreement whether or not the agreement was made with a "family dispute resolution professional." That's kind of cool, because it means that family law agreements are presumed to be binding on the people who make them, regardless of how they make them.

However, section 198(5) says that the time limits within which people must apply for orders for the payment of spousal support and the division of property are suspended "during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional." A *time limit* is a period of time, often two years, within which someone must start a court proceeding, or their right to start that court proceeding will be lost forever. All of a sudden, who is and isn't a "family dispute resolution professional" is important.

Section 1 provides this definition:

> **"family dispute resolution professional"** means any of the following:
>
> (b) a parenting coordinator;
>
> (c) a lawyer advising a party in relation to a family law dispute;
>
> (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
>
> (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations; ...

Let's take a closer look at who these people are. Section 1 defines a *parenting coordinator* as "a person who may act as a parenting coordinator under section 14." When you go to section 14, you find out that "a person meeting the requirements set out in the regulations may be a parenting coordinator." And now we need to look at the regulations. Section 6 of the Family Law Act Regulation [11] provides the details. A "parenting coordinator" is someone who is a member of the Law Society of British Columbia and is accredited by the Law Society as a parenting coordinator. It also includes someone who:

1. is a member of the College of Psychologists of British Columbia, the British Columbia College of Social Workers, the BC Association of Clinical Counsellors, Family Mediation Canada, the Mediate BC Family Roster or the BC Parenting Coordinators Roster Society;
2. maintains professional liability insurance; and,
3. meets a list of training requirements set out in section 6(1)(b).

Under the *Legal Professions Act* [3], a *lawyer* is defined as someone who is as a member of the Law Society of British Columbia [11] or a member of another Canadian law society. That's easy enough. And if you want the details about who the members of the Law Society are, you can get those from the Law Society's Rules [5].

The term *mediator* isn't defined in the *Family Law Act*, but section 1 does say that a person who works as a mediator must "meet the requirements set out in the regulations" if they are going to qualify as a "family dispute resolution professional" under the act. Section 4 of the Family Law Act Regulation provides the requirements. A "mediator" is someone who is a member of the Law Society of British Columbia and is accredited by the Law Society as a family law mediator. It also includes someone who:

1. is a member of Family Mediation Canada or a member of the Mediate BC Family Roster; or,
2. maintains professional liability insurance and meets a list of training requirements set out in section 4(2)(d).

The term *arbitrator* is also undefined in the *Family Law Act*. Section 1 says that a person who works as an arbitrator must "meet the requirements set out in the regulations" if they are going to qualify as a "family dispute resolution professional." Section 5 of the Family Law Act Regulation provides the requirements. An "arbitrator" is someone who is a member of the Law Society of British Columbia and is accredited by the Law Society as a family law arbitrator. It also includes someone who is a member of:

1. the College of Psychologists of British Columbia or the British Columbia College of Social Workers,
2. maintains professional liability insurance; and,
3. meets a list of training requirements set out in section 5(2)(b).

Although parenting coordinators, mediators and arbitrators are required to provide "written confirmation" that they meet the requirements set out in the Family Law Act Regulation to qualify as a "family dispute resolution professional," this is something you may want to investigate for yourself, before you hire anyone as your parenting coordinator, mediator or arbitrator. If it turns out that your family dispute resolution professional doesn't qualify as a "family dispute resolution professional" under the act and the regulations, you will *not* be able to take advantage of section 198(5) to claim a delay in the running of the time limits!

For family dispute resolution professionals who are lawyers, you can get this information from the Lawyer Directory [12] on the Law Society's website. The profile of each lawyer shows how long the lawyer has been practicing law, their contact information, and their discipline history, as well as their accreditations. Here's my listing, for example:

The sections Mediation, Arbitration, and Parenting Coordination which follow later in this chapter provide more information about the training and other requirements mediators, arbitrators, and parenting coordinators must have under the *Family Law Act*.

The out-of-court options

There really are only two ways to resolve a legal problem. You can work out a settlement and create your own resolution to the legal problem. Or, you can ask someone to resolve the legal problem for you.

Going to court means that you're asking a judge to resolve your legal problem. If you decide to stay out of court but still want someone to resolve your legal problem for you, you'll be resolving your dispute through *arbitration*. If you want to work out a settlement, you'll be resolving your dispute through *negotiation*, *mediation* or *collaborative negotiation*. *Parenting coordination* is a hybrid process that uses elements of mediation and arbitration to resolve disputes about parenting arrangements set out in a final order, award or agreement.

One of the criticisms that people often make about lawyers is that we are greedy and provoke conflict to make money. While that may be true of some lawyers, and certainly the advertising you see from lawyers in the United States tends to support this impression, the majority of Canadian family law lawyers would rather resolve family law disputes in any way other than court. In 2017, the Canadian Research Institute for Law and the Family published the results of a study [9] of family law lawyers and their views of the different dispute resolution options. The research institute found that:

- Mediation and collaborative negotiation are viewed as the most useful dispute resolution processes for low-conflict disputes as well as disputes about the care of children and parenting, child support or spousal support, and the division of property and debt.
- Mediation and collaborative negotiation tend to result in longer-lasting resolutions than litigation.
- Cases resolved through mediation, collaborative negotiation, and arbitration take the least amount of time to conclude, while cases that are litigated take the most amount of time to resolve.
- Over 90% of the lawyers using collaborative negotiation or mediation agreed that the results they achieve are in the client’s interest, compared to only about one-third of lawyers using litigation.
- Almost all lawyers using collaborative negotiation and mediation agreed that the results they achieve are in the interest of the client’s children, compared to less than one-third of lawyers using litigation.
- When comparing the extent to which lawyers agree that their clients are satisfied with the results they achieve using the various dispute resolution processes, more lawyers agreed their clients are satisfied when they use collaborative negotiation or mediation than when they use litigation.

In other words, the majority of family law lawyers think that collaborative negotiation, mediation and arbitration are cheaper and faster than litigation, and are more likely to produce results that are in the interests of their clients and their clients' children.

Negotiation

Negotiation is a cooperative effort to resolve a dispute through discussion. Mediation and collaborative negotiation are structured ways of handling this discussion; they're both processes of negotiation.

People can negotiate the resolution of a dispute between themselves, with the help of a lawyer, or with the help of a judge at a case conference or a settlement conference if a court proceeding has started. Negotiation boils down to this:

> **Pat**: "I'll give you 60% of the money from the sale of the house if you'll let me keep my Porsche Boxster."
>
> **Sandy**: "Look, 60% is great, but I need more compensation for my interest in the Porsche. Why not give me 65% of the house and half of your hockey card collection instead?"
>
> **Pat**: "You know how important my hockey card collection is to me. Let me keep my hockey cards; I'll give you 60% of the house, and I'll sell the Porsche and give you half of what I get for it. Plus, I'll let you keep your Ford Pinto."

In a process of negotiation, each person gives a little and takes a little, all in the hope that at the end of the day they'll be able to come to an agreement on all of the issues that have cropped up because of the end of their relationship.

If you do reach a settlement, you'll want to record the terms of your settlement in some way. This is really important because, without some record of the deal that was reached, there's no way to confirm what the exact terms of the deal were if people start remembering things differently. While most people record their settlement by printing out a summary of the deal and signing it, really almost *any* record of the terms of the settlement will do.

For a quick introduction to starting negotiations, see How Do I Start Negotiations with My Spouse?. It's located in the Helpful Guides & Common Questions part of this resource, in the section, *Alternatives to Court*.

Collaborative negotiation

The collaborative process is a kind of structured negotiation in which the parties and their lawyers sign an agreement not to go to court and to work together as a team to reach a settlement. The team can include clinical counsellors or psychologists who work with each of the parties to address any emotional issues related to the separation and provide their expertise on parenting plans. Other specialists can be recruited to help with particular subjects, such as issues about the children or complicated financial problems, as the need arises. The goal of collaborative negotiation is to arrive at a long-lasting settlement of the parties' legal problems that, as much as possible, meets each party's most important needs and goals, and leaves them healthy and well and able to work together in the future.

There are collaborative "practice groups" all over British Columbia. These multidisciplinary groups consist of legal professionals, mental health professionals and financial experts whose main focus is using the collaborative process to help their clients.

- BC Collaborative Roster Society [4] (province-wide)
- Collaborative Divorce Vancouver [5] (Vancouver and the lower mainland)
- Victoria's Collaborative Family Separation Professionals [6] (Victoria)
- Okanagan Collaborative Family Law Group [7] (the interior)
- Collaborative Law Group of Nelson [8] (Nelson)
- Collaborative Association in Metro Vancouver [9] (Surrey, New Westminster and the Fraser Valley)

More information about the collaborative process is discussed in this chapter's section on Collaborative Processes. For a quick introduction on how to start the collaborative negotiation process, see How Do I Start a Collaborative Process with My Spouse? located in the Helpful Guides & Common Questions part of this resource.

Mediation

Mediation is another kind of structured negotiation. In this process, the parties attempt to reach an agreement with the help of a mediator. A mediator is a neutral third party who guides the parties through their negotiations, helps to identify the parties' interests, and helps them to find a settlement that will work for both of them. The goal of mediation is to arrive at a settlement of some or all of the legal issues which both parties are as happy with as possible.

Mediation may be used by parties who never plan to set foot in a courtroom. It is also useful for parties who have started a court proceeding but would rather settle out of court than go through trial. The general rule is that mediation is a *voluntary* process. There is one exception to that rule. If you and your spouse are already parties to an action in the Supreme Court, the *Notice to Mediate (Family) Regulation* [10] provides a mechanism for requiring the other side to try mediation before getting into the courtroom. To find out how to use this regulation, see JP Boyd on Family Law: The Blog [11].

If the parties reach a settlement, the terms of the deal can be set out in a *separation agreement*, in *minutes of settlement*, in a *memorandum of agreement*, or in a *consent order*, depending on the circumstances and the preferences of the parties. These are all ways of recording the terms of settlement. This is really important because, without some record of the deal that was reached, there's no way to confirm what the exact terms of the deal were if people start remembering things differently.

Many lawyers also work as mediators. Lawyers who work as mediators are called *family law mediators*. They have to have additional training in mediation, family violence, and the power dynamics involved in dispute resolution processes. Lawyers who are family law mediators will usually advertise that they are both lawyers and mediators. More information about the training requirements for family law mediators is available from the Law Society of British Columbia's page on Family Law Mediators [12].

For a quick introduction on starting mediation, see How Do I Start Mediation with My Spouse?. It's located in the Helpful Guides & Common Questions part of this resource, in the section *Alternatives to Court*. For more detailed information about the mediation process, see the Mediation section of this chapter.

Arbitration

Arbitration is *not* a form of negotiation. It is a decision-making process that can look a lot like court.

In arbitration, the parties hire a neutral third party called an *arbitrator* to act as their personal judge. They agree that their arbitrator can make decisions about their legal dispute that they will be bound by, as if those decisions had been made by a judge in court. However, unlike court, arbitration is a completely private process and the people involved can go through the process as quickly or as slowly as they'd like.

Arbitration is a lot more formal than mediation because the arbitration process results in a decision that is imposed on the parties, rather than an agreement which they reach themselves. Although the process includes a lot of flexibility and different procedural options, in general, in arbitration each party presents their evidence and their arguments, and tries to persuade the arbitrator that their position is the right one. Mediation, on the other hand, is often more like a conversation, with no formal rules of procedure and no evidence, apart from helpful things like financial statements.

The arbitration of family law problems is governed by sections 19.1 to 19.22 of the *Family Law Act*. It is *not* governed by the provincial *Arbitration Act* [13]; that legislation mainly covers corporate and commercial disputes. Arbitration is, like mediation and collaborative negotiation, one of the dispute resolution processes that the court can refer people to under section 224 of the *Family Law Act*.

Some lawyers also work as arbitrators. Lawyers who work as arbitrators are called *family law arbitrators*. They have to have practised as a lawyer for at least ten years and have additional training in arbitration, family violence, and the power dynamics involved in dispute resolution processes. Lawyers who are family law arbitrators will usually

advertise that they provide arbitration services. More information about the training requirements for family law arbitrators is set out in the Law Society's Code of Professional Conduct [14] in Appendix B, and in the Law Society's Rules [15] at Part 3, Division 3.

For a quick introduction on how to start arbitration, see How Do I Start Arbitration with My Spouse?. It's located in the Helpful Guides & Common Questions part of this resource, in the section, Alternatives to Court. For more detailed information about the arbitration process, see the Arbitration section of this chapter.

Using mediation and arbitration together

Mediation has lots to recommend it. It's cooperative, it's based on discussion and compromise, and its goal is to reach a settlement by consensus. However, without that last ingredient, *consensus*, mediation will always fail. It sometimes makes sense to use a dispute resolution process that includes a way of resolving any issues that can't be agreed to, and that might mean a process that gives the mediator the power to resolve a stalemate by imposing a decision like an arbitrator. This hybrid approach to mediation and arbitration is called *mediation-arbitration*, sometimes shortened to *med-arb*.

In med-arb processes, the parties will sign an agreement that commits them to the mediation process and describes what will happen if agreement can't be reached on particular issues. The agreement should say whether the mediator will use information from the mediation phase to make decisions in the arbitration phase, and how any other evidence will be presented in the arbitration phase. It's really important to understand what will trigger the end of mediation and the beginning of arbitration, and whether the mediator will have the power to make decisions as an arbitrator on all of the issues or just some of them.

Parenting coordination

Parenting coordination is a hybrid dispute resolution process that relies on elements of both mediation and arbitration. It is only used to deal with problems about the care of children after a final parenting plan has been made by a court order, an arbitrator's award or a separation agreement. Parenting coordination is a child-focused process in which a neutral third party, a *parenting coordinator*, helps parents implement the terms of their parenting plan. Parenting coordination is really only useful for parents who always seem to find themselves in conflict about parenting issues, despite their order, award or agreement. If you and your ex don't argue about your parenting plan a lot, you don't need parenting coordination.

In the parenting coordination process, the parents hire a parenting coordinator and sign a parenting coordination agreement that outlines their rights and responsibilities to each other and the scope of the parenting coordinator's services and authority. When a problem implementing the parenting plan comes up, one of the parents will contact the parenting coordinator and the parenting coordinator will get to work. First, the parenting coordinator will try to work out a solution by finding consensus, like a mediator. However, if the parents can't reach an agreement resolving the problem, the parenting coordinator will make a decision resolving the dispute, like an arbitrator.

Parenting coordination is governed by sections 14 to 19 of the *Family Law Act*, and section 6 of the Family Law Act Regulation [11]. The court can make an order requiring people to start parenting coordination under section 15 of the act.

Parenting coordinators are family law lawyers and mental health professionals who are hired for lengthy terms of between six to 24 months. Lawyers who work as parenting coordinators have to have practised as a lawyer for ten years and have additional training in parenting coordination, arbitration, mediation, family violence, and the power dynamics involved in dispute resolution processes. Lawyers who are parenting coordinators will usually advertise that they also provide those services. More information about the training requirements for parenting coordinators is set out in the *Law Society Rules* [5], Part 3, Division 4. More information about parenting coordination is available at the website of the BC Parenting Coordinators Roster Society [18].

To find out more about parenting coordinators, see How Do I Hire a Parenting Coordinator?. It's located in the Helpful Guides & Common Questions part of this resource, in the section, Alternatives to Court. For more detailed information about the parenting coordination process, see the Parenting Coordination section of this chapter.

Free and lower-cost options

Generally, people have to pay for their mediator, collaborative lawyer, arbitrator, or parenting coordinator. Sometimes these specialists charge on a sliding scale, but often the fees they charge will be in the neighbourhood of $200 to $400 per hour and up. They will also usually require the parties to pay significant retainers in advance. (A *retainer* is money paid to a lawyer as a deposit against the fees they will charge in the future.) These costs are the major challenge involved in getting access to legal assistance. The reality is that many people do not have the money to pay these fees or have a limited budget in which to work. Here is a list of services that may be able to assist:

- some mediation services about issues involving children and support are provided at no cost by family justice counsellors [16],
- pro bono assistance from a collaborative negotiation team may be available through the Pro Bono Collaborative Divorce Project run by the BC Collaborative Roster Society [17], as long as you meet certain eligibility requirements,
- pro bono mediation may be available through the Pro Bono Family Mediation Clinic run by the North Shore Pro Bono Society [18], again, if you meet certain eligibility requirements,
- Legal Aid will pay for a limited amount of mediation in certain circumstances, and
- you may be able to hire one of these specialists to work on an *unbundled*, or *limited scope*, basis, and they will charge for their services on an as-needed basis rather than requiring that a large retainer be paid up front.

For more information on unbundled legal services, see the website of the People's Law School [22]. For more information about retainers and how lawyers usually charge for their services, see the You and Your Lawyer section in the chapter on Understanding the Legal System for Family Law Matters.

Resolving disputes and thinking outside the box

The end of a relationship can be a messy business at times. In addition to the legal issues that sometimes come up, there are always emotional issues, and the emotional issues can sometimes cloud people's judgment. (This is one of the reasons why hiring a lawyer can be a good idea; the lawyer's job is to help you see the forest when all you can see is the tree in front of you.) Over time, the intensity of the emotional issues changes and, hopefully, mellows. This can have an effect on how the legal issues are managed; things that once seemed terribly urgent or incapable of compromise become less urgent and more susceptible to alternatives.

At the same time, the people who used to be in a romantic partnership are also moving forward with their lives and learning how to live independently and apart. They're setting up separate homes, establishing separate bank accounts and building new daily routines. Temporary parenting arrangements get sorted out, whether by habit, by agreement, by order, or by award, and temporary arrangements also get worked out about how the family's income will be distributed to support two homes. This too has an effect on how the legal issues are managed.

As your circumstances and attitudes evolve, so should the approach you're taking to the resolution of your disputes.

It seems to me that no single dispute resolution process is going to be appropriate throughout the life of a dispute, except perhaps litigation when the conflict between the parties is extreme or there are mental health or violence issues that cannot be addressed otherwise. Apart from unhappy situations like those, different dispute resolution processes will likely be appropriate for different issues at different times over the course of a dispute. Being sensitive to this can really pay off.

Say, for example, that mediation has got you to the point where you agree on everything except for a technical issue, like someone's income or the best way to divide a family business. Rather than getting hung up on the issue that

you're stuck on, why not try something different? Agree that the issue will be dealt with through arbitration. Agree that the issue will be referred to a senior family law lawyer with special expertise in the area for an opinion, and agree to be bound by the lawyer's recommended solution. (I've been asked to do this, and it's a lot of fun.) Agree to seek the opinion of a non-lawyer expert. Or, if you must, agree to take that one issue to trial or ask a judge to provide an opinion on the issue at a settlement conference.

There is a whole spectrum of processes that can be used to resolve some or all aspects of a family law dispute. Litigation, arbitration, mediation, and collaborative negotiation are all important ways of resolving disputes, and more than one process can be best suited for any given problem at any point over the course of a dispute. However, a willingness to be creative can suggest further options, like agreeing to be bound by the opinion of a respected lawyer or agreeing to take just one issue to a settlement conference. Don't get locked into the idea that only litigation or only mediation will work. Be willing to think outside the box.

Formalizing settlements

It is always best to write out the terms of a deal when the deal is done. Writing the agreement out gives everyone a record of their settlement which they can refer to if there's a dispute about what they agreed to down the road. This does happen.

Although it's true that oral agreements are just as binding as written agreements, it can be very difficult to prove the terms of an oral agreement, especially when a lot of time has passed since the agreement was originally made. On the other hand, when an agreement is written down, that written record is usually all the court will need to determine the terms of the agreement. Notes scribbled on a napkin, for example, might be a written agreement that the court will uphold. Letters and emails exchanged in the negotiation process have also been found to record the terms of an agreement.

Lawyers and mediators always make a tremendous effort to record the terms of a settlement as clearly and comprehensively as possible, and will usually put the settlement into a formal document like a separation agreement, a memorandum of understanding, minutes of settlement, or a consent order.

Separation agreements

A separation agreement is a written contract entered into after a relationship has broken down and the legal issues arising from the breakdown have been settled. The contract is written to reflect the terms of the settlement the parties have reached, and includes a lot of extra language that:

1. describes the basic background of the parties' relationship,
2. summarizes the circumstances of the settlement discussions,
3. confirms that each party has had legal advice about the agreement,
4. confirms that the parties intend to be bound by the agreement, and
5. explains the consequences if a party decides not to follow the agreement.

Separation agreements are the product of negotiation, collaborative negotiation, or mediation, and may deal with all or just some of the legal issues between the parties. A separation agreement can also be used to record a settlement reached after litigation has started, instead of or in addition to a consent order.

Separation agreements are discussed in more detail in the chapter Family Law Agreements, in the section Agreements after Separation.

Minutes of settlement

Minutes of settlement are used to create a quick record of an agreement and are not nearly as comprehensive and detailed as separation agreements. Minutes are sometimes drafted by a mediator when the mediator isn't a lawyer or expects the lawyer for one of the parties to write a proper separation agreement describing the parties' settlement at some point in the near future. Sometimes minutes are used when a settlement has been reached on the brink of trial and there isn't enough time, or maybe enough emotional energy, to draft a proper consent order.

Typically, minutes of settlement are little more than an outline of the essential points agreed to, and are signed on the understanding that the terms will be elaborated and put into proper legal language later.

Minutes of settlement are the product of negotiation or mediation, and they usually deal with all of the issues between the parties. The terms of the minutes are usually used to draft a consent order or a separation agreement. When minutes are used as the basis for a consent order, they are often attached to the back of the order.

Minutes of settlement are signed by the parties and their lawyers. Minutes of settlement can be enforced by the courts as a binding agreement between the parties, even without a judge approving the consent order and without the parties signing a separation agreement.

Memoranda of understanding

A memorandum of understanding describes the terms on which all or part of a dispute has been settled. Memoranda are even less formal than minutes of settlement, and may not even be signed by both parties or both lawyers. A memorandum may even take the form of a letter sent by one of the lawyers:

> "I confirm that in our telephone conversation of earlier this afternoon, we agreed that the children would live mostly with Suman and that Harjit would have parenting time with the children on weekends and every other Wednesday night, and that Harjit would pay child support to Suman in the amount of $326.00 per month."

While memoranda of understanding can be enforced by the courts on their own, they are almost always put into a more formal document later on, either as a consent order or as a separation agreement.

Consent orders

Consent orders are orders that parties have agreed the court should make — they're orders that the parties *consent* to the court making. Consent orders are meant to reflect the terms of a temporary or a permanent agreement between the parties, on some or all of the legal issues, after litigation has started.

Sometimes, parties will come to an agreement before a court proceeding has started and want to put the agreement in the form of a court order rather than in the form of a separation agreement. This would really only make sense if there was some important legal reason to have the agreement put in the form of a court order, or if the court would be asked to make an order about something anyway, like a divorce order.

When a judge makes a consent order, the order is just as important and is just as binding as if it was an order made after a trial. Consent orders are notoriously difficult to appeal or change without proof of some sort of deception by the other side or a change of circumstances since the order was made.

Consent awards

Consent awards are awards that parties have agreed an arbitrator should make. Consent awards are meant to reflect the terms of a temporary or a permanent agreement between the parties reached after they have started arbitration.

When an arbitrator makes a consent award, the award is just as important and is just as binding as if it was an award made after the arbitration hearing. Consent awards are difficult, if not impossible, to appeal or change without proof of some sort of deception by the other side or a significant change of circumstances since the award was made.

Wait, I've changed my mind!

Generally speaking, it is *not* okay to change your mind after you've come to a settlement, especially right after you've reached the settlement. What you can do about it, *if* you can do anything about it, depends on the circumstances in which the settlement was reached and whether the agreement has already been reduced to writing and signed.

After the agreement has been formalized

If you have a change of heart after a *separation agreement* has been signed, you can attempt to negotiate an amendment to the terms of the agreement. An amendment is another agreement, put into writing and executed just like the original separation agreement, and is usually described as an *amending agreement* or an *addendum agreement*, or something similar. However, if the other side isn't prepared to change the agreement, you'll have little choice except to go to court and ask the judge to make an order different than the terms of the agreement. Be warned! This may be very difficult unless you can show that there was a significant flaw in how the agreement was reached or that there has been a serious and unexpected change in circumstances since the agreement was executed. You can't ask the court to make an order different from the agreement just because you've decided you don't like it. There must be an awfully good reason why the court should do anything different than what you had agreed to.

If you have a change of heart after a *consent order* has been made by the court, you'll face exactly the same problem. You can try to negotiate the terms of a new order changing the consent order, which will be presented to the court by consent in the same manner as the original consent order. Failing that, you'll have to apply to court to change the original consent order. You will have to prove that there has been a meaningful and unexpected change in circumstances since the order was made or that there was a significant flaw in how the agreement leading to the consent order was reached.

Amending separation agreements and asking the court to set them aside are discussed in more detail in the chapter Family Law Agreements, in the section Changing Family Law Agreements. Changing orders is discussed in more detail in the chapter Resolving Family Law Problems in Court, in the section Changing Orders in Family Matters.

It's important to know that if you disagree with an order or an agreement and simply decide not to comply with the order or agreement, the other side can go to court to enforce the order or agreement. In the case of a court order, you could also be faced with an application for an order that you be found in contempt of court. Contempt is punishable by jail time, a fine, or both jail time and a fine. Note also that minutes of settlement and memoranda of understanding may be enforceable as binding agreements in the same way that separation agreements are enforceable.

The enforcement of orders is discussed in more detail in the chapter Resolving Problems in Court, in the section Enforcing Orders in Family Matters. The enforcement of agreements is discussed in the chapter Family Law Agreements, in the section Enforcing Family Law Agreements.

Before the agreement has been formalized

People sometimes have a change of heart between the time the deal is struck and the time the agreement is put into the form of a consent order or a separation agreement. (Lawyers often think of this as a form of buyer's remorse.) If this happens, you have two options: you can either live with the agreement, or you can try to get the other side to agree to change the agreement.

You must really think hard before bringing your complaint to the other side, because any attempt to renegotiate the deal can upset not only the terms that you want to change, but also the terms that you're really quite happy with. As well, depending on the circumstances, the agreement that you struck may be enforceable even *before* it is put into the form of a separation agreement or court order. Here are some things to think about.

- Is the thing you want to change something you can actually live with? Is changing that one thing worth the risk of losing the settlement altogether?
- Is it worth the additional legal fees it will cost to go back into the negotiation process and to draft a new agreement?
- Is it worth the chance of losing other parts of the settlement that you're happy with but that the other side isn't too keen on?
- Is it worth the risk that the other side will start a court proceeding to enforce the unsigned agreement? Is it worth the legal fees it will cost to defend a court proceeding to enforce the agreement?

Remember that the negotiation process is a process of give and take. It is almost a certainty that you are going to be unhappy with some aspects of the agreement, just as the other side is going to be unhappy with other aspects of the agreement. Each of you gave things up and compromised your positions in order to reach a settlement. After all of the anxiety of the negotiation process and the pain of giving up on a hard-fought point, it is also almost a certainty that if one side wants to re-open an issue, the other side will want to re-open another issue.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce act* [7]
- *Family Relations Act* [19]
- *Legal Professions Act* [20]
- Family Law Act Regulation [12]
- Notice to Mediate (Family) Regulation [21]

Links

- Divorce Act Changes Explained [2] from the Government of Canada
- Early Resolution Process [1] from the Government of British Columbia
- Family Justice Counsellors [22] from the Government of British Columbia
- Unbundled Legal Services [22] from the People's Law School
- Family Mediation Services [23] from Mediate BC
- Family Law Mediators [12] from the Law Society of BC
- Settling Out of Court [22] from Justice Education Society of BC
- Resolving Disputes Without Going to Court [24] from Dial-a-Law by the People's Law School
- Mediation, collaborative negotiation, and arbitration [21] from Dial-a-Law by the People's Law School
- Family Mediation [25] from Justice Education Society of BC
- Mediation - Child protection and Aboriginal Families [26] from Legal Aid BC
- Virtual Pro Bono Conflict Resolution Clinics [27] from Mediate BC

- North Shore Probono [18]
- Lawyer Directory [12]
- BC Parenting Coordinators Roster Society [18]
- Collaborative Divorce Vancouver [28] (Vancouver and the lower mainland)
- Collaborative Law Group of Nelson [29] (Nelson)
- Okanagan Collaborative Family Law Group [30] (the interior)
- The Collaborative Association [31] (Surrey, New Westminster and the Fraser Valley)
- BC Collaborative Roster Society [17] (province-wide)
- Collaborative Family Separation Professionals [32] (Victoria)

Resources

- “Family Law Basics” video [11] from JP Boyd
- “Alternatives to Going to Court” PDF [25] from Justice Education Society of BC
- “A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation” PDF [33] from Mediate BC Society
- “All About Mediation” infographic poster [34] from Legal Aid BC
- “An Inside Look at Family Mediation” video [23] from Legal Aid BC
- "How Can We Resolve Our Family Law Issues?" PDF [35] from Legal Aid BC
- "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" [24] from the Canadian Research Institute for Law and the Family

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 August 2021.

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[7] http://www.collaborativefamilylaw.ca
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[12] https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-practice/areas-of-practice/family-law-alternate-dispute-resolution-accreditat/
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[24] https://www.clicklaw.bc.ca/resource/4616
[25] https://www.clicklaw.bc.ca/resource/4150
[26] https://www.clicklaw.bc.ca/resource/2949
[27] https://www.clicklaw.bc.ca/resource/4847
[28] http://www.collaborativedivorcebc.com/
[29] http://www.nocourt.ca/
[30] https://collaborativefamilylaw.ca/
[31] https://www.nocourt.net/
[32] http://www.collaborativefamilylawgroup.com/
[33] https://www.clicklaw.bc.ca/resource/2979
[34] https://www.clicklaw.bc.ca/resource/4921
[35] https://www.clicklaw.bc.ca/resource/4922

Collaborative Negotiation

In collaborative processes, the parties and their lawyers, and sometimes other professionals, work together as a team to find a resolution to the issues arising from the breakdown of the parties' relationship. The other professionals the parties might work with include psychologists or clinical counsellors, and experts such as child specialists and financial specialists, who are called upon as the need arises during the collaborative process.

Collaborative negotiation is meant to address both the legal and the emotional consequences of the breakdown of a relationship, in a cooperative rather than a competitive way. As a result, it can help people deal with difficult issues, like substance abuse and mental health problems, in a far more constructive way than going to court. It is, in my view, one of the best possible ways of resolving family law disputes.

This section provides a brief introduction to collaborative negotiation, a step-by-step overview of what happens in collaborative processes, and resources for learning more and getting started.

Introduction

Collaborative negotiation is a voluntary, cooperative process in which each party retains a collaboratively-trained lawyer, and other collaborative professionals as needed, to resolve not just the legal issues but also the emotional issues arising from the end of a long-term relationship. (Not surprisingly, the emotional issues that come up after separation can often be a barrier to resolving the legal issues.) The other professionals who might be involved in a collaborative process include:

- **Divorce coaches:** counsellors trained in collaborative negotiation who may work with each party to manage the emotions typically associated with separation and help them finalize a parenting plan that best meets the needs of the children. ("Divorce coach" really isn't the best name for the mental health professionals who take this role, since collaborative negotiation is available for all families, not just those in which the adults are married to each other.)
- **Financial specialists:** neutral financial experts, trained in collaborative negotiation, who may work with everybody to review and make recommendations about the available financial options. They include accountants, business valuators and investment advisors, as well as people who are experts in wills and estates, taxation, retirement planning and public benefits.
- **Child specialists:** neutral mental health experts, trained in collaborative negotiation, who may work with everybody and with the children to ensure the children's wishes and preferences are heard. They may also make recommendations about the parenting arrangements that will best meet the children's needs.

This sounds like an awful lot of professionals; however, in collaborative processes the lawyers and their clients work together to build the team that best suits their needs and circumstances. As well, this approach provides a more

specialized, and often more cost-effective, way to deal with separation than just leaving it all to the lawyers. Most collaborative professionals believe that this process is normally more cost-effective and more efficient than litigation.

The purpose of collaborative negotiation is to help the parties negotiate a reasonable settlement that restructures their family in the most positive manner possible, recognizing that families continue and need to flourish despite the separation of the adults involved. Parents *must* be able to effectively work together to raise their children long after their romantic relationship has come to an end, and that is the fundamental goal of collaborative negotiation.

How do I start a collaborative process?

Because collaborative negotiation is voluntary, everyone has to agree to use it to resolve their dispute. Once the parties have agreed to use a collaborative process, they must each hire a collaboratively-trained lawyer. Sometimes the process starts when the parties meet with a divorce coach, and then decide to involve lawyers trained in collaborative processes.

Finding a collaborative professional

The first step in the process is to find and meet with a collaborative lawyer or divorce coach. To find collaborative lawyers and divorce coaches, go to these websites:

- BC Collaborative Roster Society [4] (province-wide)
- Collaborative Divorce Vancouver [5] (Vancouver and the lower mainland)
- Collaborative Family Separation Professionals [6] (Victoria)
- Okanagan Collaborative Family Law Group [7] (the interior)
- Collaborative Law Group of Nelson [8] (Nelson)
- Collaborative Association in Metro Vancouver [9] (Surrey, New Westminster and the Fraser Valley)

Signing the participation agreement

Once each party has hired a collaboratively-trained lawyer, they will all sign a collaborative participation agreement. The process starts when the participation agreement is signed. The agreement says, among other things, that:

- no party will commence a court action while in the process,
- each party will make full disclosure of their financial information and circumstances,
- all communications between the parties are confidential, and will stay that way until a written separation agreement is signed,
- none of the lawyers can represent their clients if the collaborative process fails and the parties go to court,
- each of the lawyers must terminate the process if their client refuses to provide necessary financial disclosure, and
- the parties will make their best efforts to communicate with each other in a respectful manner.

Next steps in collaborative processes

Most of the work in collaborative negotiation takes place in meetings between the parties and the professional members of the process. The professionals work to identify the needs and interests of each of the parties, and, together with the parties, discuss options for settlement and the resolution of the legal issues. The parties are very involved in these discussions, and retain control over the collaborative process and its outcomes. Other professionals — divorce coaches, financial specialists, child specialists, and others — will participate in these meetings as needed.

Financial disclosure

As in all family law dispute resolution processes, honest, accurate and up-to-date financial disclosure is essential. The lawyers will work with the parties to make full disclosure of all relevant documents and information. The sort of documents that are most often important in making financial disclosure include:

- statements for bank accounts, retirement savings accounts, investment accounts, and other financial accounts,
- current statements for debts including loans, mortgages, and credit cards,
- income tax returns, along with notices of assessment and any notices of reassessment,
- corporate financial statements and corporate tax returns, and
- statements of the parties' current incomes.

The parties provide their documents and information to the collaborative team on the express understanding that all discussions and negotiations in the collaborative process are private and confidential. In fact, this is a requirement of the *Family Law Act* as well. Section 5 says that:

> (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.
>
> (2) A person must not use information obtained under this section except as necessary to resolve a family law dispute.

Exploring options for settlement

Once financial disclosure has been made, the parties and their lawyers, and sometimes a financial specialist, begin exploring options for settlement. If necessary, the lawyers will get expert opinions on the current market value of any property, businesses, artwork, collections, and other assets that can be difficult to value. In collaborative negotiation, the parties will usually retain a valuator or appraiser together. Discussions continue until the parties reach a resolution that meets their most important needs.

We've said a few times that collaborative processes are private and confidential. This includes both discussions in the negotiation process — whether those communications occur in meetings between the parties and their lawyers or in correspondence by mail and email — and the documents and information that are exchanged for the purposes of those discussions. The reason why these discussions and documents are private is to allow everyone to be as honest and as creative as possible in exploring options for settlement. Each party needs to be able to make settlement proposals and admissions without worrying that their statements will be held against them in the event the process goes off the rails and winds up being resolved in court.

Because collaborative negotiation is confidential, discussions to identify options for settlement tend to involve some surprisingly candid, transparent and imaginative brainstorming, even when the parties are dealing with very difficult subjects like substance use and abuse, physical and mental health challenges, and parenting deficits. The settlements that result from collaborative negotiation are usually equally creative, sometimes in ways that are not possible through processes like arbitration and litigation.

You may want to have a look at the discussion of tips for successful mediation in the Mediation section later in this chapter. It has information about communication skills that can be helpful during collaborative processes.

Developing parenting plans

When there are children, the parties will usually work with their divorce coaches to develop and settle on a parenting plan that focuses on the best interests of their children. If needed, a child specialist may be involved to meet separately with the children in an effort to bring other opinions, and sometimes the voice of the children, into the parents' discussions. While the coaches are working with the parents to finalize a parenting plan, they help the parents deal with any emotional issues that arise and work with the parents to equip them, as best as possible, to raise

their children together and resolve any problems that may arise in the future.

Reaching an agreement

The lawyers and divorce coaches try to help the parties reach a durable, long-lasting agreement that addresses most of the parties' needs and priorities in a timely manner, without the pressures and conflict involved in going to court. When an agreement is reached, the lawyers will confirm the terms of the settlement in a separation agreement and attach the parenting plan to that agreement. The collaborative process ends when the separation agreement is finalized and everyone has signed the agreement.

Read the Agreements after Separation section in the Family Law Agreements chapter for a discussion about separation agreements and their effect.

What if a resolution is not reached in a collaborative process?

Approximately 92 to 95% of all family law disputes that go to collaborative negotiation are resolved. That's a pretty good success rate.

When a dispute is not resolved through collaborative negotiation, which doesn't happen all that often, the parties must hire new lawyers and try to resolve their dispute some other way. It is important to remember, however, that all of the discussions and negotiations that happened in the collaborative process are private and confidential, and can't be used by anyone in any court proceedings.

Pro Bono Collaborative Family Law Project

The BC Collaborative Roster Society offers a pro bono program for people who are separating, do not have lawyers, and are willing to meet with each other and negotiate using the principles of collaborative negotiation but can't afford the collaborative team for their case. The Pro Bono Collaborative Family Law Project is available in Vancouver and Victoria. To be eligible for the program, the parties must:

1. both consent to participate in settlement meetings,
2. have a combined gross annual income of less than $75,000, and
3. own property, excluding pension plans, with less than $100,000 in equity.

The program gives preference to the most needy applicants.

Visit the website of the BC Collaborative Roster Society [1] for more information.

Resources and links

Legislation

- *Family Law Act* [6]

Links

- BC Collaborative Roster Society [4] (province-wide)
- Collaborative Divorce Vancouver [5] (Vancouver and the lower mainland)
- Collaborative Family Separation Professionals [6] (Victoria)
- Okanagan Collaborative Family Law Group [7] (the interior)
- Collaborative Law Group of Nelson [8] (Nelson)
- Collaborative Association in Metro Vancouver [9] (Surrey, New Westminster and the Fraser Valley)
- Settling Out of Court [22] from Justice Education Society of BC
- Resolving Disputes Without Going to Court [24] from Dial-a-Law by the People's Law School

- Mediation, collaborative negotiation, and arbitration [21] from Dial-a-Law by the People's Law School

Resources

- Sample collaborative negotiation participation agreement (PDF)
  - This sample participation agreement may not look like the participation agreement you may be asked to sign. It provides a more or less accurate picture of what collaborative participation agreements usually say, but should be used only as a reference.
- Participation Agreements & Other Forms [2] from the website John-Paul Boyd Arbitration Chambers
  - model participation agreements for download.
- Participation Agreements [3] from the BC Collaborative Roster Society
  - free, downloadable copies of the participation agreements currently used by its members.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 August 2021.

References

[1] https://www.bccollaborativerostersociety.com/pro-bono-collaborative-family-law-project/
[2] https://www.boydarbitration.ca/participationagreements
[3] https://www.bccollaborativerostersociety.com/collaborative-practice/participation-agreements/

Family Law Mediation

Mediation is a process in which the parties to a dispute work with a neutral third party, a *mediator*, to reach a settlement of some or all of the legal issues in their dispute. It's important to know that *mediation is not couples' counselling*. It's not a process designed to help people reconcile and resume their relationship, although it has at times had that effect. It's a dispute resolution process intended to help people settle legal problems without going to court.

People who work as mediators are usually trained professionals who qualify as "family law dispute resolution professionals" under the *Family Law Act*, meaning that they have the experience and education required by the Family Law Act Regulation. Lawyers who are "family law mediators" are specially accredited to mediate family law disputes by the Law Society of British Columbia [7].

This section provides a brief overview of mediation, a description of the mediation process, some tips for making the most of mediation, and an introduction to the mediation services offered through the provincial government.

Introduction

At its heart, mediation is a cooperative, managed process of negotiation. All parties must be willing to work together, and each person must be prepared to give a little if they expect to get a little. Because the mediation process is based on a cooperative effort to achieve a common goal — a settlement of the legal issues — there is usually a lot less of the bitterness and acrimony that can accompany litigation. Mediation is also much cheaper and much faster than going to court, and more likely to produce results that are in the interests of the parties and their children.

In mediation, the parties work with a neutral professional, a *mediator*, to settle their legal issues. The mediator helps the parties talk to each other and recognize their interests, and tries to identify options for settlement. The mediator

provides a useful third-party perspective and helps to ensure that any settlement is reasonably fair to all concerned, including the parties' children. The mediator will take one of two different approaches to their role:

- **Evaluative mediation:** in this approach, also called *directive mediation*, the mediator will also make comments and observations about the strengths and weaknesses of each party's position, often from the perspective of the likely result if the dispute were to be resolved in court.
- **Non-evaluative mediation:** in this approach, also called *interest-based mediation*, the mediator does not comment on the strengths and weaknesses of each party's position and, rather than looking at the law and the probable result if the dispute were to be resolved in court, tries to focus the parties on their separate and shared interests.

People can start mediation right off the bat, as soon as a legal problem has come up, or they can use it as a settlement process after a court proceeding has started. The result of a successful process of mediation is usually a *separation agreement*. If litigation has already started, a settlement can be recorded as a separation agreement or as an order that the parties agree the court will make, called a *consent order*. If the parties are married, a consent order may make more sense since they'll usually want an order for their divorce at the same time as they're wrapping everything else up.

The parties can meet with their mediator on their own or with their lawyers. As a mediator, I usually appreciate having the parties' lawyers present, especially when I'm asked to take an evaluative approach to resolving the dispute. I recognize that having the lawyers at the mediation meeting costs the parties a bit more money, but it makes my job easier and increases the likelihood of settlement if I can rely on the lawyers to explain the law or to point out why a particular position is ill-advised.

The mediator has no stake in how the mediation turns out, should have no bias in favour of either party and should have no special connection, business or otherwise, with either party. The mediator's position as a neutral, objective stranger is probably the mediator's most important contribution to the resolution of the parties' dispute. It allows the mediator to be absolutely frank with each of the parties, and to point out when a party's expectations on an issue are unfair, unrealistic or problematic for some other reason. Someone involved in a mediation process is much more likely to accept the advice that their position is unreasonable if that opinion comes from the mediator rather than another party.

Working with "family law mediators" under the *Family Law Act*

A mediator who qualifies as a "family dispute resolution professional" under the *Family Law Act* must meet the requirements set out in the Family Law Act Regulation [11]. Section 4 of the regulation says that:

> (1) Only a mediator who is qualified as a family dispute resolution professional may conduct a mediation in relation to a family law dispute.

Lawyers who qualify as *family law mediators* meet the training requirements of, and are accredited by, the Law Society of British Columbia. You can find out if a lawyer is a "family law mediator" by looking the lawyer up in the Lawyer Directory [12] on the Law Society's website. The training requirements that professionals other than lawyers must meet to qualify as "family dispute resolution professionals" are set out in section 4(2) of the Family Law Act Regulation, and include:

1. being a member in good standing with specific organizations,
2. meeting specific educational and experiential requirements,
3. taking continuing family dispute resolution training, and
4. carrying professional liability insurance.

Section 4 of the regulation imposes two extra duties on mediators who are family dispute resolution professionals: they must use written participation agreements; and, they must provide the parties with confirmation that they

qualify as family dispute resolution professionals. Section 4(3) says this:

> (3) The following practice standards apply to a family dispute resolution professional who wishes to engage in mediation in relation to a family law dispute:
>
> (a) before initiating mediation, the mediator must enter into a written agreement to mediate with the parties to the family law dispute;
>
> (b) before initiating mediation, the mediator must provide written confirmation to the parties to the family law dispute that the mediator meets the professional requirements set out in subsection (2).

The mediation process

The first step is for each party to meet with a lawyer, hopefully a family law lawyer. Even if you don't intend on hiring the lawyer for the whole mediation process, or having the lawyer with you at the mediation, it can be really helpful to meet with a lawyer before the process begins to get some proper legal advice about the law that applies to your situation, and a sense of the general range of likely outcomes and the options available to you.

If you plan on retaining the lawyer for the mediation process, the lawyer will have the names of three or four mediators with whom they prefer to work. Mediate BC [1], formerly the BC Mediation Roster Society, maintains a list of many, but not all, of the people who are trained as mediators in this province. Their website can help you find a mediator and offers more information about the mediation process, and you can also do a google search for "family law mediator British Columbia" to get more names. Many family law lawyers — who may or may not be members of Mediate BC — are also accredited family law mediators; lawyers who work as mediators will usually say so in their advertising.

Once you've picked a mediator, the mediator will usually provide you or your lawyer with an intake sheet to get some basic information about you, your family and your legal dispute, as well as their usual participation agreement. Mediation participation agreements, just like the participation agreements used in collaborative negotiation, arbitration and parenting coordination, describe your rights and responsibilities during the mediation process, the process itself and the terms of the mediator's services. The mediator may want you to get independent legal advice about the meaning and effect of their mediation participation agreement if you have not hired a lawyer already.

Getting organized

The mediator will sometimes meet with the parties separately before the actual mediation begins. This is because mediators, like arbitrators and parenting coordinators, have a duty to assess for the presence of family violence under section 8(1) of the *Family Law Act* and, if it is present, the extent to which the family violence may affect:

1. the safety of a party; and,
2. the ability of a party to negotiate a fair agreement.

The mediator may not conduct this assessment for parties who are represented by a lawyer, because their lawyer will already have been required to assess for the presence of family violence. In addition to assessing for the presence of family violence, this meeting also gives the mediator a chance to get to know each of the parties a bit, and for the parties to discuss with the mediator any concerns or questions they might have about the mediation process.

Next, the parties and the mediator will agree to:

1. a meeting, or schedule of meetings,
2. the ground rules for any meetings, and
3. the legal issues that are to be addressed.

Sometimes decisions about ground rules and goals are left to the parties themselves; it is their process, after all, not that of the mediator. If the parties are using lawyers, this step may be left out either because ground rules aren't required or because the lawyers will negotiate the ground rules between themselves. Whether there are multiple meetings or not depends largely on the parties and the number and complexity of the legal issues. Often a single half- or full-day meeting will produce an agreement.

Exchanging documents and information

The parties will then begin to assemble the documents and information necessary to help everyone understand the facts and the position each party is taking. Sometimes this information is purely financial in nature. Depending on the circumstances and the issues, the parties may also want to gather parenting assessments, educational assessments, psychological assessments, medical assessments and so on.

Financial information is often provided in the form of a *financial statement*. Financial statements provide the details of someone's income and expenses, and assets and liabilities, and may be prepared using a form supplied by the mediator or one of the court forms designed for this purpose. Supporting documents will need to be provided, usually consisting of things like:

- personal income tax returns, notices of assessment and any notices of reassessments,
- paystubs or other proof of income,
- property assessments or appraisals,
- bank and credit card account statements, and
- corporate financial statements and income tax returns.

It is critical that both parties are honest and forthcoming about their finances. Nothing will damage the mediation process and the chances of reaching settlement more than the discovery that someone is hiding information or acting in bad faith.

These documents will be exchanged between the parties before the first mediation meeting. Based on the documents disclosed and the issues on the table, it may be necessary to gather and exchange more information and documents. The nature and extent of any additional materials will depend entirely on the circumstances of each couple and their children.

Confidentiality

Mediation processes are private and confidential. This includes both the discussions at mediation meetings as well as the documents and information that the parties exchange for the purpose of those discussions. The reason why these discussions and documents are private is to allow everyone to be as honest and as creative as possible in exploring options for settlement. Each party needs to be able to make settlement proposals and admissions without worrying that their statements will be held against them in the event the process goes off the rails and winds up being resolved in court.

The *Family Law Act* helps support mediation by talking about the importance of making proper disclosure, and it encourages making proper disclosure by making sure that everyone knows that information that is disclosed is private and confidential, and can't be used for purposes other than resolving the family law dispute. Section 5 of the act says this:

> (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.
>
> (2) A person must not use information obtained under this section except as necessary to resolve a family law dispute.

Exchanging briefs

Where the parties are represented by lawyers, the mediator may ask the lawyers to prepare *mediation briefs*. Mediation briefs are summaries of the parties' relationship, the legal issues, any progress made on those issues to date, and each party's position on the legal issues which remain unresolved. When a party's position is legally complex or the issues are more technical than usual, mediation briefs may also provide an explanation of the law or facts supporting that position. The lawyers will give copies of their briefs to each other and to the mediator ahead of the first mediation meeting.

Mediating the dispute

Once all the information, reports, and briefs have been gathered and exchanged, and everybody has had a chance to digest everything, the parties, their lawyers, and the mediator will meet at one or more mediation meetings. The mediator will first welcome everyone to the table, and ask the parties to sign the participation agreement if that hasn't already happened.

After the participation agreement has been signed, every mediator will have their own preferred way of doing things. Most will ask someone to provide a general overview of the relationship and describe what exactly is at issue, or describe their own preliminary understanding of the facts and the legal dispute, or break the ice by asking their own questions to flesh out their understanding of the background facts. Each party will have the opportunity to share their thoughts on things. If lawyers are being used, they may want to do a lot of the talking, but the mediator will ensure that the parties themselves have plenty of opportunities to speak their minds... and you really should, it's your dispute! In fact, I prefer that the parties do most of the talking.

Once this initial exchange of positions is complete, the mediator may keep everyone in the same room or may split the parties into separate rooms. If the parties are kept together, the mediator will press on and work on the legal problems, issue by issue. The mediator will keep some control over how the discussion flows, help the parties express their emotions in a productive way when things get heated, and keep everyone focused on their interests and the law rather than grievances best left in the past. If the parties are split into separate rooms, the mediator will alternate working with each party. You may hear this style of mediation described as *shuttle mediation*.

Assuming the mediation process is successful, the mediator will sometimes prepare a list describing how each issue has been resolved, called *minutes of settlement* or a *memorandum of agreement*, before anyone leaves. Memoranda are usually rather informal and are meant to record the bare bones of the settlement in the expectation that a more complete document, like a separation agreement or a consent order, will be prepared in the future. The parties and sometimes their lawyers will be asked to sign the memorandum to acknowledge the settlement that was reached.

Formalizing the settlement

The final stage involves putting the terms of the agreement into more formal language in a written document that the parties, or, depending on the type of document, their lawyers, will sign. Typically, a settlement will be recorded as a separation agreement or, if there is an existing court proceeding, an order that the parties agree the court should make. Sometimes, a mediator who is also a lawyer will prepare the separation agreement. *Mediators who are not lawyers may not prepare agreements.*

If someone changes their mind before the separation agreement or consent order is filed, the minutes of settlement or memorandum of agreement can usually be presented to the judge as evidence of the deal that was reached between the parties. In fact, in certain circumstances the mediator's notes alone may stand as proof of the parties' agreement! As long as it is plain what has been agreed to and that the intentions of the parties were finally settled, the minutes, memorandum or the mediator's notes can be used as evidence of a binding agreement.

Note that if you are relying on a mediated settlement in court, it is important that the settlement be conclusive and leave nothing else for further negotiation, agreement or confirmation. In the 2005 British Columbia Supreme Court

case of *S.A.A. v P.W.J.A.* [2], the court held that the parties couldn't rely on an agreement that was "subject to confirmation" as a final, binding agreement. In that case, the agreement was subject to the wife producing financial information which, when produced, did not substantiate the information provided at mediation.

Tips for successful mediation

In mediation, as in all other forms of negotiation, the goal is to produce a fair agreement in an efficient and cooperative way. There are lots of things you can do that will hinder this process, and other things you can do that will help. The following are a few tips on how to make mediation work for you.

Remember that the more you argue about a particular position of yours, the more you wind up being stuck with that position. Many people find that after they've argued a particular point to death, they're stuck with it because they can't back down without losing face. Try to focus on interests — your underlying needs — rather than on specific outcomes, and to always ask yourself "Why not?" when you hear what the other side has to say.

One of the most important skills you can bring to your mediation is the ability to really listen to what the other side is saying. Active listening involves paying close attention to what the other side is saying, and restating their position to ensure that you know what the other side means and to ensure that the other side recognizes that you're hearing what they are saying. Phrases like "What I hear you saying is..." and "If I understand you correctly, what you're saying is..." can be extremely helpful. At the same time, you must also take some care in how you choose to express yourself. Instead of saying "You did..." or "You're a...," try something like "When you did that I felt..." or "I feel that...." This may all seem a bit flaky, but, believe it or not, it works.

You must be able to talk directly about a problem in an assertive, direct manner. Talk about the issues; don't skirt around them, no matter how uncomfortable or awkward you might feel. Take care in how you express yourself, but when you're in a private session with the mediator, don't mince words.

Things to do

The following points boil down to just a few central ideas: respect yourself and the other side; be flexible and avoid taking absolute positions; and, be honest and open. When you go into the mediation session, try to have a few options prepared, a few other alternatives that you might be happy with, rather than a single fixed, rigid goal. Think not just about what specific outcomes you would like, but why those outcomes are important to you. Think about what you hope for as it relates to your future finances and your future parenting relationship, and also what your biggest worries are as you transition into a two-home family. There may be a creative option that you and your ex have not thought about that meets both of your underlying goals.

- Be honest. Trust is essential to the mediation process.
- Be empathetic. Use phrases that indicate you understand and respect how the other party is feeling and thinking, like "I understand how you're feeling..." or "I appreciate the effort you've put into this..."
- Ask for a break when you're feeling too wound up or upset to continue, rather than abandoning a meeting.
- Dress comfortably and be prompt.
- If you disagree with something, say so. You must respect, and express, your own thoughts, opinions, and feelings. Agreeing simply to keep the peace on matters that are important to you can sometimes result in either hitting a wall later on in the mediation or ending up with a deal you later regret.
- Bring the documents you were asked to bring with you. If you don't, matters will only be delayed and the other side may be irritated by the inconvenience.
- Watch your body language! Making disgusted grunts, rolling your eyes, or slamming your fist on the table won't help anything.

Things not to do

Suspicion and dishonesty will damage the mediation process, sometimes beyond repair. If the mediator doesn't believe you and the other party doesn't believe you, it might be impossible to arrive at a negotiated settlement. Likewise, bitterness, jealousy, and resentment can also be triggers that undermine each party's faith in the other and make resolution by a judge at a trial inevitable.

- Try to avoid letting your emotions get tangled up with your analysis of the problem at hand. Mediation is tough work, and it's normal for strong emotions to bubble up to the surface. Try to express your feelings in a productive way so that they can actually move you forward rather than keep you stuck.
- Don't hide information, financial or otherwise, on the assumption that the other party won't find out. They usually do; and if they do, the process is likely at an end.
- Don't raise your voice or make comments that are hurtful.
- Don't interrupt. Wait until each person has stopped speaking before you interject, no matter how upset you might feel with what they are saying. If you want, you can raise your hand to let the mediator know you've got something to say.
- Negotiations are stressful, but don't use drugs or alcohol to calm your nerves. Drugs and alcohol will impair your judgment and reduce your ability to be objective and bargain in your own best interests.
- Don't feel that you must give an instant answer when you can't. Take a few moments or a few minutes to compose your reply; no one will begrudge a considered response.
- Don't make personal attacks or threats.
- Don't play on the other person's sense of guilt or otherwise be emotionally manipulative.

Government mediation services

Mediation is available at no charge from family justice counsellors [16] through those Provincial Court registries that are designated as Family Justice Centres [3]. Family justice counsellors are fully trained mediators, certified by Family Mediation Canada [4], who work with separated parents to assist in resolving disputes over the care of children, child support, and spousal support. Family justice counsellors can't deal with property issues and they usually can't help with support when someone's income is not straightforward.

Other agencies and organizations may provide mediation services. For instance, an organization called Access Pro Bono was offering free online family mediation and advice services to low and modest income families through the Virtual Family Mediation Project [5]. Make sure whatever service you learn about can help with family law disputes before trying to get help.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce act* [7]
- Family Law Act Regulation [6]
- Notice to Mediate Regulation [10]

Links

- Mediate BC website [7]
  - See page on Separation & Divorce [19]
- Provincial Court family justice counsellors [16]
- Clicklaw BC Map of Family Justice Centres [3]

- Mediation - Child protection and Aboriginal Families [26] from Legal Aid BC
- Family Mediation Services [23] from Mediate BC
- Family Law Mediators [12] from the Law Society of BC
- Settling Out of Court [22] from Justice Education Society of BC
- Resolving Disputes Without Going to Court [24] from Dial-a-Law by the People's Law School
- Mediation, collaborative negotiation, and arbitration [21] from Dial-a-Law by the People's Law School
- Family Mediation [25] from Justice Education Society of BC
- Virtual Family Mediation Project [5] from Access Pro Bono

Resources

- “Family Law Basics” video [11] from JP Boyd
- “Alternatives to Going to Court” PDF [25] from Justice Education Society of BC
- “A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation” PDF [33] from Mediate BC Society
- “All About Mediation” infographic poster [34] from Legal Aid BC
- “An Inside Look at Family Mediation” video [23] from Legal Aid BC
- "How Can We Resolve Our Family Law Issues?" PDF [35] from Legal Aid BC
- Sample mediation participation agreement (PDF) in cases where the parties are represented by lawyers.
- Sample mediation participation agreement (PDF) in cases where the parties are not represented by lawyers.

These sample participation agreements may not resemble the participation agreement you are asked to sign. They provide a more or less accurate picture of what mediation participation agreements usually look like, but should be used as a reference only.

You can also look at the website of John-Paul Boyd Arbitration Chambers [2] which provides a number of model participation agreements for download.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 August 2021.

References

[1] https://www.mediatebc.com/
[2] http://canlii.ca/t/1q34b
[3] http://www.clicklaw.bc.ca/helpmap/service/1019
[4] http://www.fmc.ca/
[5] https://www.clicklaw.bc.ca/helpmap/service/1333
[6] http://canlii.ca/t/8rdx#sec4subsec1
[7] http://mediatebc.com/

Family Law Arbitration

Arbitration is a dispute resolution process in which the parties hire a neutral third party, an *arbitrator*, to make decisions resolving some or all of the legal issues in their dispute. While the job of a mediator is to help people work toward their own resolution of their family law dispute, the arbitrator's job is to act like a judge and make a decision resolving a legal dispute, after hearing the evidence and listening to the arguments of each party.

People who work as arbitrators are usually trained professionals who qualify as "family law dispute resolution professionals" under the *Family Law Act*, meaning that they have the experience and education required by the Family Law Act Regulation [25]. Lawyers who are "family law arbitrators" are specially accredited to arbitrate family law disputes by the Law Society of British Columbia [7].

This section provides an introduction to arbitration and discusses when to use arbitration in a family law dispute. It also provides some suggestions about how to find a family law arbitrator.

Introduction

Like mediation and collaborative negotiation, arbitration is a voluntary process. The parties to a dispute must all *agree* to use arbitration to resolve their legal dispute. Like those processes, arbitration is also an out-of-court way of resolving problems. However, that's where the similarities between arbitration, mediation and collaborative negotiation end. While the parties to a dispute may have agreed to use arbitration to resolve their dispute, it's the *arbitrator* who resolves their dispute, not the parties themselves.

Before the new *Family Law Act* became law in British Columbia, arbitration was rarely used in family law disputes. Arbitration was most frequently used in the context of commercial, labour, and construction disputes. In other places, such as Ontario and Alberta, the arbitration of family law disputes is well-established and has been for some time. The *Family Law Act*, however, made a number of changes to the law that improved the usefulness of arbitration for family law disputes in British Columbia, and the number of people choosing arbitration over going to court has been increasing as a result.

Arbitration offers a number of advantages for resolving family law problems:

- it allows the parties to hand-pick the person who will make decisions about the issues they cannot agree on, which means that they might pick an arbitrator who is not just an expert family law lawyer, but an expert family law lawyer with special knowledge of a specific issue, like parenting children, tax problems, or property division,
- it allows the parties to pick the rules that will apply to the hearing and the decision-making process,
- arbitration resolves disputes much faster than going to court,
- the arbitration process is private, confidential, and closed to the public, and
- the result of the process is an arbitrator's award that is just as binding as a court order and is enforceable just like a court order.

As well, it's often faster to get a date for an arbitration hearing than it is for a court hearing. Although short trials of two or three days can usually be booked within ten to twelve months, it can take a year or more to get a date for longer trials because the court is so busy. An arbitration hearing can be booked as soon as everyone has free time in their calendars.

People can start arbitration right off the bat, as soon as a legal problem has come up, or they can use it to resolve a court proceeding as an alternative to trial. The result of a successful process of arbitration is an arbitrator's *award*. If litigation has already started, the award can be turned into an order that the parties agree the court will make, called a *consent order*. If the parties are married, a consent order may make more sense since they'll usually want an order for their divorce at the same time as they're wrapping everything else up.

The parties can meet with their arbitrator on their own or with their lawyers. As an arbitrator, I always appreciate having the parties' lawyers present. I recognize that having the lawyers at the arbitration hearing costs the parties

more money, but the lawyers are intimately familiar with how to write briefs, make legal arguments and present evidence, and arbitration hearings with lawyers are usually much shorter than hearings without lawyers. However, there is no rule that you must have a lawyer represent you in arbitration, just like there's no rule that you must have a lawyer represent you in litigation.

The arbitrator has no stake in how the arbitration turns out. The arbitrator must be neutral and have no bias in favour of either party. Most of the time, the arbitrator should have no special connection — business, personal or otherwise — with either party, and the arbitrator must make sure that all parties are aware of any such special connections before they agree to hire the arbitrator.

Working with "family law arbitrators" under the *Family Law Act*

An arbitrator who qualifies as a "family dispute resolution professional" under the *Family Law Act* must meet the requirements set out in the Family Law Act Regulation [11]. Section 5 of the regulation says that:

> (1) Only an arbitrator who is qualified as a family dispute resolution professional may conduct an arbitration in relation to a family law dispute.

Lawyers who qualify as *family law arbitrators* meet the training requirements of, and are accredited by, the Law Society of British Columbia. You can find out if a lawyer is a "family law arbitrator" by looking the lawyer up in the Lawyer Directory [12] on the Law Society's website. The training requirements that professionals other than lawyers must meet to qualify as "family dispute resolution professionals" are set out in section 5(2)(b) of the Family Law Act Regulation, and include:

- being a member in good standing with specific organizations,
- meeting specific educational and experiential requirements, including at least 10 years' experience in family-related practice,
- taking continuing family dispute resolution training, and
- carrying professional liability insurance.

It's important to know that, under section 5(3) of the regulation, people other than lawyers may only arbitrate disputes dealing with *parenting children*, including contact with a child, and *child support*. However, they can only deal with child support if:

- all of the children are under 19 years of age,
- none of the payor's income is self-employment income or partnership income,
- the payor's income is less than $150,000 per year, and
- the Child Support Guidelines tables are being used to calculate the basic child support amount.

As well, if children's special or extraordinary expenses are an issue that is to be resolved by an arbitrator who is not a lawyer, section 5(3)(c)(v) says that "the determination of what those expenses are and how they are to be calculated" must be "straightforward."

Section 5 of the regulation imposes two extra duties on arbitrators who are family dispute resolution professionals: they must use written participation agreements; and, they must provide the parties with confirmation that they qualify as family dispute resolution professionals. Section 5(4) says this:

> (4) The following practice standards apply to a family dispute resolution professional who wishes to engage in arbitration in relation to a family law dispute:
>
> (a) before initiating arbitration, he or she must enter into a written agreement to arbitrate with the parties to the family law dispute;

(b) before initiating arbitration, he or she must provide written confirmation to the parties to the family law dispute that he or she meets the professional requirements set out in subsection (2).

The arbitration process

These are the steps involved in the basic arbitration process.

- **Pick your arbitrator.** Your lawyer will have the names of three or four arbitrators they prefer to work with. If you don't have a lawyer, you can look at the membership lists of organizations like the ADR Institute of Canada [1], although many accredited family law arbitrators may not have decided to spend the money to join those organizations.
- **Sign the arbitrator's participation agreement.** This is a contract that describes your responsibilities and the responsibilities of your arbitrator, and how the arbitrator will be paid. It also requires you to agree to be bound by the result of the arbitration.
- **Prepare for and attend the prehearing conference.** This is a meeting during which the parties, their lawyers and the arbitrator will make decisions about how the arbitration will work, including the rules for the hearing, the place and date of the hearing, and the legal issues to be resolved at the hearing.
- **Prepare your case.** Start working on your case by researching the law and thinking about the evidence you need to prove your case.
- **Complete discovery and disclosure.** This is a process in which you and the other party or parties will exchange documents and information that are relevant to the legal issues in your dispute, such as income tax returns if child support or spousal support is one of those issues.
- **Exchange the documents you're going to use at the hearing.** These documents might include written arguments, financial statements or summaries of what your witnesses are going to say.
- **Attend the hearing.** An arbitration hearing is the equivalent of a trial, but with special rules and shorter processes. Sometimes you may attend by teleconference or videoconference rather than in person.
- **Receive the arbitrator's decision.** The arbitrator will prepare their decision, and the reasons for their decision, in a written document called an award. Most arbitrators try to get their awards to the parties as soon as possible, but it can sometimes take a long time to finish a decision, especially if the evidence presented at the hearing was unusually complicated.
- **Review the award and ask for corrections.** You have 30 days after you get the arbitrator's award to ask the arbitrator to correct any typos and other mistakes, and to ask the arbitrator to explain specific parts of their award.

Under section 19.16 of the *Family Law Act*, an arbitration is over when:

1. the arbitrator has delivered their final award and the time to correct the arbitrator's decision has passed;
2. the parties agree to end the arbitration; or,
3. the arbitrator makes an order that it is "unnecessary or impossible" to continue the arbitration.

Starting arbitration

There are only two ways you can get your family law problem into arbitration.

First, you might have a family law agreement — like a cohabitation agreement, a marriage agreement, or a separation agreement — which says that any disputes or questions about the agreement, or the subjects the agreement covers, will be resolved through arbitration.

Second, you might agree, after a problem has arisen, that you'll go to arbitration instead of going to court, or instead of another process like mediation or collaborative negotiation. You can even agree to resolve a dispute through arbitration after a court proceeding has started. A lot of people decide to do this when they find out how far away their trial is scheduled to start, and when they find out that there's no guarantee that they'll get a judge who is an

expert in resolving family law disputes.

You cannot force someone into arbitration, including by asking for a court order that you go to arbitration. Even though section 224(1) of the *Family Law Act* says that "a court may make an order to ... require the parties to participate in family dispute resolution," the court will not make an order that someone go to arbitration. Resolving a dispute through arbitration has to be voluntary, either because you've already agreed to use arbitration *if* a problem comes up or because you've agreed to use arbitration *after* the problem has come up.

Arbitration processes

When people agree or are required to arbitrate their dispute, they first pick their arbitrator. The arbitrator you choose should be someone who is an expert in family law, and perhaps even an expert in family law with special knowledge or skills concerning the most important issues in your dispute. You probably want to choose someone who has a lot of experience as an arbitrator, someone who has a good reputation in the legal community, and, most importantly, someone you see as being neutral, fair-minded and unbiased.

After picking the arbitrator, the arbitrator will ask the parties to sign a participation agreement, usually called an *arbitration agreement.* This agreement does three things. First, it serves as the arbitrator's retainer agreement and describes how the arbitrator will charge for their services and when they will expect to be paid. (You can read more about retainer agreements in the Understanding the Legal System for Family Law Matters chapter, in the You and Your Lawyer section.) Second, it describes the parties' rights and responsibilities in the process, as well as the responsibilities of the arbitrator and the scope of their authority. Third, it identifies the legal issues the arbitrator will address.

The next step is to meet with the arbitrator to discuss the process leading to the arbitration hearing, decide the date and place for the hearing, and pick the rules that will govern the hearing. This meeting is called a *prehearing conference*, and picking the rules that will govern the hearing is sometimes the most important part of the arbitration process. A lot of the time, the rules that people select are taken from the more important parts of the Supreme Court Family Rules [9] that talk about evidence, experts, and hearing procedures. However, there are lots of other options. People can pick the rules that best suit the circumstances of their children, the nature of their dispute, and the status of their finances. It's important to be as thoughtful as possible in deciding what rules are necessary. Arbitration can look just like going to court, but it doesn't have to. It can be a lot more focused, a lot more efficient, and a lot faster.

How the arbitration process works after the prehearing conference will depend on the rules you've picked.

The basic arbitration process

Most of the time, the next step after the prehearing conference involves exchanging the documents and information that are relevant to the legal issues in the dispute. If child support is an issue, for example, financial statements might be prepared and documents like income tax returns, T4 slips, and paystubs might be exchanged. If property is an issue, you might need tax assessments, purchase documents, mortgage statements, and maybe a professional appraisal of the current value of the property.

You need to think carefully about what sort of documents and information you need. For complicated problems, you might also hire an expert to give an opinion about things like the value of a pension, a tax problem, or the best parenting arrangements for the children. (That last kind of opinion is called a *parenting assessment* or a *section 211 report*, and is usually prepared by a psychologist, clinical counsellor, or social worker. You can get more information about *reports* and *assessments* in the Children and Parenting after Separation chapter.) You might also need to exchange bank statements, credit card statements and corporate financial statements. The nature of the documents that are important, the extent of the disclosure that is required, and the type of expert opinions that are most useful will change depending on the circumstances, the legal issues, and how the parties have decided to approach the arbitration process.

Once the relevant documents have been exchanged and any expert opinions have been completed, each party will start to work on how they're going to present their case to the arbitrator and on the documents they'll want to refer the arbitrator to at the hearing. These might include:

- written arguments,
- timelines, charts, financial tables, photographs, videos, and other visual aids,
- summaries of what your witnesses are going to say, called *will-say statements*,
- affidavits and financial statements,
- binders with the financial and other documents you're going to be asking your witnesses to identify, comment on, or explain, called *books of documents*, and
- binders with the case law you're going to be asking the arbitrator to consider, called *books of authorities*.

Sometimes the arbitrator will want the parties to cooperate and prepare other hearing documents together. These might include:

- *statements of agreed facts*, a written summary of the facts both parties agree about, and
- *joint books of documents*, binders with the financial and other documents you will both rely on.

Next, the parties and their lawyers, if they have them, will attend the hearing. Arbitration hearings can take place in the arbitrator's office, a boardroom in a hotel or anywhere else that's private, or even remotely by videoconference, and are usually less formal than court hearings; arbitration processes can be as formal or informal as the parties and the arbitrator want.

At the hearing, each party makes an opening argument describing the evidence that will be given and then presents their evidence. The parties' evidence usually consists of the testimony of witnesses, documents, and affidavits. Each party then makes a closing argument to show the arbitrator why the arbitrator should resolve their dispute in the way they each prefer.

After the hearing process is over, the arbitrator will provide a written decision, called an *award*, summarizing the evidence and resolving all of the legal issues, and explaining why the arbitrator resolved the issues in the way they resolved them.

Alternative arbitration processes

Arbitration processes can be as simple or as complicated as the parties want. The basic arbitration process I've just described looks and feels very much like the process that applies in court. However, it isn't always necessary to have a witness who gives oral evidence, or to have any evidence at all. It isn't always necessary to have oral arguments. Sometimes written arguments alone will do. And, if the parties agree, awards can provide a summary explanation of the arbitrator's decision rather than a full explanation.

Here are some examples of alternative arbitration processes:

- The parties could make their arguments to the arbitrator by telephone or videoconference, with no evidence at all, and the arbitrator giving an oral decision right there on the spot. (This process would be ideal for decisions about a legal question where the facts either don't matter or aren't in dispute. It's also the cheapest and fastest way to get a decision.)
- If evidence is necessary to help the arbitrator make their decision, the parties could make their arguments by telephone or video, and the evidence could be presented by affidavits alone, without the in-person testimony of any witness.
- If an in-person hearing is necessary, the parties could agree that evidence will be provided by affidavit, with the people who made the affidavits being cross-examined by the other person or their lawyer. Or, the parties could agree that only a limited number of witnesses will testify, and that each party will have a limited amount of time to examine and cross-examine each witness.
- If an in-person hearing is necessary and the parties agree to very few of the important facts, the parties could have an arbitration with all the bells and whistles available if they were going to court, with no limits on the number or

amount of time for each witness. (This process will take the longest time to wrap up and also cost the most money.)

- Where neither party is represented by a lawyer, the hearing could be in-person but be managed completely by the arbitrator who can explore issues and ask questions. The arbitrator would work with the parties to identify the legal issues in the dispute, and then lead the examination of all of the witnesses.

I have developed a checklist of procedural elements that is helpful for designing arbitration processes, and covers every part of the arbitration process, from deciding whether to have an in-person hearing or a hearing by videoconference, to whether and how experts will be hired, to how evidence will be presented at the hearing. You can download my "Arbitration Rules Pick-List" from the website [2] of John-Paul Boyd Arbitration Chambers.

Mandatory elements of arbitration processes

Although arbitration processes are incredibly flexible, there are certain aspects of arbitration that are required in British Columbia.

First, the arbitrator must give each party the opportunity to make their case, and to reply to the case made by the other party. This is a basic element of the Canadian justice system, called either "natural justice" or "fundamental justice," that is required of judges as well as arbitrators.

Second, the arbitrator must treat each party fairly and not be biased in favour of one party over the other. Section 19.8 of the *Family Law Act* says this:

> (1) An arbitrator must be independent of the parties.
>
> (2) An arbitrator must be impartial and act impartially.
>
> (3) If a person is approached in connection with the person's possible appointment as an arbitrator, the person must, without delay, disclose any circumstances likely to give rise to justifiable doubts as to the person's independence or impartiality.
>
> (4) An arbitrator, from the time of the arbitrator's appointment and throughout the arbitration, must, without delay, disclose to the parties any circumstances referred to in subsection (3).

Third, when it comes to decisions about children, the arbitrator must consider only the best interests of the children.

Finally, arbitral awards must be given in writing and be signed by the arbitrator.

Otherwise, the parties and their arbitrator are free to be as creative as they want and create the rules and the process that are best-suited to the parties, their children, their dispute, their timeline, and their budget.

Changing, challenging and appealing awards

If you are unhappy with an arbitrator's decision, you might be able to *appeal* the arbitrator's award, in the same way that a decision of the Provincial Court can be appealed to the Supreme Court, and a decision of the Supreme Court can be appealed to the Court of Appeal. When you appeal an award, you are arguing that the arbitrator made an important mistake and that, as a result of the arbitrator's mistake, all or some of their award should be cancelled.

There are other reasons why you might ask that an award be cancelled, usually because of flaws in the arbitration process itself. You would only challenge an award you're unhappy with; if you're happy with the award, you're not likely to be concerned about the fairness of the arbitration process.

On the other hand, you might have an award that you're happy with, but no longer works because there's been an important change in your circumstances, the circumstances of the other party or the circumstances of the children. If there has been an important change, you can apply to court to *vary* the award, in the same way that the court can vary a court order.

Changing awards

Under section 19.18(3) of the Family Law Act, you can apply to the Supreme Court to change, suspend or cancel all or some of an arbitrator's award when there has been an important change in circumstances after the award was made. This is called "varying" an award.

You can apply to vary an award about a particular issue on the same terms as you can apply to vary a court order about that issue. This means that you need to look at the part of the *Family Law Act* that applies to varying orders about the particular issue you're dealing with. If your issue is about child support, for example, you need to look at section 152 of the act. Under section 152, the court may vary an order about child support for one of three reasons:

1. if there has been an important change of circumstances since the child support order was made, usually a change about income or the children's living arrangements,
2. if important evidence has come to light that wasn't available at the hearing which resulted in the child support order, or
3. if a lack of financial disclosure was discovered after the hearing which resulted in the child support order.

Section 47 of the *Family Law Act* is about varying orders for children's parenting arrangements, section 60 is about varying orders for contact with a child, and section 167 is about varying orders for spousal support.

Challenging awards

Under section 19.18(1) of the *Family Law Act*, you can apply to the Supreme Court to change or cancel an arbitration award for one or five reasons concerning the basic fairness of the arbitration process:

1. you have doubts about the arbitrator's independence or impartiality,
2. you were not given a reasonable opportunity to be heard during the arbitration process,
3. the arbitrator's award was obtained through fraud or duress from the other party,
4. the award deals with legal issues not included in your arbitration agreement, or
5. the arbitrator exceeded their authority.

It's important to know that, under section 16.18(2), you can only ask to change or cancel an award because of doubts about the arbitrator's independence or impartiality if there is a "real danger of bias" on the part of the arbitrator. This can be difficult to prove. In *Spence v. The Board of Police Commissioners of Prince Albert* [3], a 1987 decision of the Saskatchewan Court of Appeal, the court explained what you have to prove to show a real danger of bias, saying that:

> “The test is whether a reasonable person would believe there is a real danger of bias or whether there would be a reasonable suspicion of bias even though unintended.

Appealing awards

Under section 19.19 of the *Family Law Act*, you can appeal all or part of an arbitrator's award to the Supreme Court on:

1. a question of law, or
2. a question of mixed fact and law.

Questions of law are about which law should be applied to determine a legal issue. Appeals based on questions of law argue that the arbitrator applied the wrong legal test or interpreted the legal test incorrectly. Questions of mixed fact and law are about whether the facts satisfy the legal test. Appeals can be complicated, and it's always a good idea to talk to a lawyer before deciding to appeal an arbitrator's decision.

Appeals must be started within 40 days of the date you received the arbitrator's award.

Other uses of arbitration

Arbitration is very helpful in resolving family law problems quickly and efficiently. Parenting coordinators use a process a lot like arbitration to make decisions resolving disagreements when the parents aren't able to find solutions to which they both agree. The flexibility of arbitration also means that people can ask their arbitrator to make a decision based on the rules of a religion, based on grounds of conscience, or based on equity and fairness.

Arbitration can also be used to:

- break logjams in settlement discussions, where only one or two issues can't be agreed upon,
- resolve disagreements about how the law should be interpreted or applied in a particular situation,
- make temporary decisions about support or parenting arrangements while the parties are negotiating a settlement, or
- perform technical calculations, like about the amount of costs payable in a court proceeding, the income of someone who is self-employed, the amount of spousal support payable, or the after-tax cost of children's expenses.

Faith-based arbitration

Under section 19.10 of the *Family Law Act*, the parties can choose their own law to govern the arbitration process. Nothing in the act says that this law cannot be a religious law. Judaism and Islam, for example, each have religious laws that can apply to family law disputes for members of those faiths. Members of the orthodox Jewish community may use Halakha to settle personal disputes. Muslims can use Sharia law for the same purpose.

Whatever rules a couple chooses, however, the result of an arbitration cannot be "inconsistent" with the *Family Law Act* or the *Divorce Act*. Section 19.20 of the *Family Law Act* says this:

> Despite any agreement of the parties to a family law dispute, a provision of an arbitration award that is inconsistent with this Act or the Divorce Act (Canada) is not enforceable.

This means, for example, that child support must be paid to the person who has the child most of the time by the person who has the child for the least amount of time, and that the amount of support paid cannot be too different from what the Child Support Guidelines require. It also means that a particular person shouldn't have the primary residence of a child merely because of their gender, the age of the child or some other arbitrary reason.

Note that if the parties to faith-based arbitration wish to obtain a divorce, they must still start a court proceeding in the Supreme Court of British Columbia for a divorce order. A religious divorce, such as the Jewish Get, is not a legal divorce.

Parenting coordination

Parenting coordination uses a process that includes a decision-making function that's a lot like arbitration. In parenting coordination, the arbitrator is called a *parenting coordinator* and first tries to settle a dispute about parenting through a settlement process like mediation. If the parents cannot find consensus, however, the parenting coordinator acts like an arbitrator and makes a written decision, called a *determination*, resolving the dispute. The parenting coordinator's authority to resolve these disputes comes from the participation agreement the parents sign, in this case called a *parenting coordination agreement*.

As with faith-based arbitration, or any other kind of family law arbitration for that matter, the parenting coordinator cannot make determinations that are inconsistent with the *Family Law Act*. However, parenting coordinators are subject to additional restrictions in the scope of the things they can make decisions about. Under section 6(3) and (4)(a)(ix) of the Family Law Act Regulation [11], parenting coordinators can make determinations about parenting arrangements, contact with a child, and other issues agreed to by the parties and the parenting coordinator. However, regardless of whatever the parties and the parenting coordinator may have agreed to, a parenting coordinator may *not* make decisions about:

- legal issues that are excluded by an order or a parenting coordination agreement,
- changes to the guardianship of a child,
- changes to the allocation of parental responsibilities,
- giving parenting time or contact to a person who does not already have parenting time or contact,
- substantial changes to parenting time or contact, or
- the relocation of a child.

There's a lot more information about parenting coordination in the next section of this chapter.

When to use arbitration

There are lots of good reasons to use arbitration rather than go to court. It's fast and efficient, the rules that govern the process are extremely flexible, it's confidential and private, and you get to pick a judge who is an expert in not just family law but the aspects of the law that are the most important in your case. There are, however, only a few circumstances that make arbitration a necessary choice over mediation, collaborative negotiation, or litigation. Typically, people will choose to arbitrate their dispute if:

- they want the laws of their religion or another set of legal, moral or ethical principles to apply to their dispute,
- their positions are too far apart to make negotiation or mediation a reasonable option and must have a decision made for them, but don't want to go to the expense, anxiety, and acrimony typically involved in going to court,
- they want to resolve their dispute discreetly and privately, and don't want to risk their personal business being made public,
- the legal issues are complex and demand a decision-maker who is a specialist in those issues, or
- they want their dispute resolved more quickly than the court schedule will allow.

It's important to understand that while arbitrators can make awards on all of the usual family law issues — including parenting arrangements, contact, child support, spousal support, and the division of property and debt — arbitrators cannot make awards on certain issues that can only be decided by a judge. These include:

- divorce orders and annulments,
- orders appointing someone as the guardian of a child who is not a parent of that child,
- declarations about who is, and who is not, the parent of a child, unless the declaration is necessary to resolve an issue that is within the arbitrator's jurisdiction, and
- orders changing the order of a judge.

How to find a family law arbitrator

Finding a family law arbitrator can sometimes be the hard part about taking your problem to arbitration, as there aren't too many arbitrators who specialize in family law issues. Your first and best bet is to speak to a family law lawyer and see who they might recommend to you. (Most lawyers will have a list of three of four arbitrators who they've used in the past and like working with.) You might also do an internet search for "family law arbitrator British Columbia," as lawyers who work as family law arbitrators will describe themselves this way and take pains to indicate in which jurisdiction they work. You could also contact organizations which specialize in providing legal education and developing out-of-court dispute resolution processes, including:

- the ADR Institute of British Columbia [4], and
- the Arbitrators Association of British Columbia [5].

(Be warned, however, that there are lots of accredited family law arbitrators who may not have decided to pay the money to join these organizations.) Finally, you could call the Canadian Bar Association's Lawyer Referral Service [8]. Although the service can't recommend one family law arbitrator over another, they'll at least be able to give you some names.

Resources and links

Legislation

- *Divorce Act* [7]
- *Family Law Act* [6]
- Family Law Act Regulation [12]
- Federal Child Support Guidelines [2]

Links

- The ADR Institute of British Columbia [4]
- The ADR Institute of Canada [6]
- The Arbitrators Association of British Columbia [5]
- Lawyer Referral Service [8]
- BC Parenting Coordinators Roster Society [18]
- John-Paul Boyd Arbitration Chambers [7] Library
- John-Paul Boyd Arbitration Chamber [2] Arbitration Procedure
- The Law Society of BC [8]
- Resolving Disputes Without Going to Court [24] from Dial-a-Law by the People's Law School
- Settling out of Court [22] from the Justice Education Society of BC
- Mediation, collaborative negotiation, and arbitration [21] from Dial-a-Law by the People's Law School

Resources

- Arbitration procedure pick-list (fillable PDF)
- Sample arbitration participation agreement (PDF) in cases where the parties are represented by lawyers.
- Sample arbitration participation agreement (PDF) in cases where the parties are not represented by lawyers.

These sample participation agreements may not resemble the participation agreement you are asked to sign. They provide a more or less accurate picture of what arbitration participation agreements usually look like, but should be used as a reference only.

You can also look at the website of John-Paul Boyd Arbitration Chambers [2] which provides a number of model participation agreements for download.

- "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" PDF [24] from Canadian Research Institute for Law and the Family
- "Alternatives to Going to Court" PDF [25] from the Justice Education Society of BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 18 April 2023.

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[6] https://adric.ca/
[7] https://www.boydarbitration.ca/library
[8] https://www.lawsociety.bc.ca/

Parenting Coordination

Parenting coordination is a child-focused dispute resolution process that helps parents implement the parenting arrangements set out in a court order, arbitrator's award or separation agreement. *Parenting coordinators* are neutral third parties who work with parents over a lengthy term of between six and 24 months to resolve parenting problems as they arise, help parents put the needs and interests of children first, and improve parents' communication and dispute resolution skills. Parenting coordinators are experienced family law lawyers, mental health professionals, mediators, and arbitrators.

Parenting coordination is intended for higher-conflict parents who are often in court dealing with disputes about their children's parenting arrangements. It is not likely to be particularly useful for separated parents who get along relatively well with each other and are able to problem-solve and work their way through disagreements on their own.

This section provides a brief introduction to parenting coordination, an overview of the process, and links to some additional resources on parenting coordination.

Introduction

Parents who have a separation agreement, an arbitrator's award or a court order with a parenting plan but find themselves arguing about the terms of the parenting plan and new parenting issues might find parenting coordination to be a better alternative for resolving future disputes than going back to court.

Parenting coordination was first developed in California in the 1980s as a response to high-conflict parents who were constantly in court. The Special Master Program, as it was then known, was established to help parents resolve ongoing parenting disputes by providing dispute resolution services while steering parents away from court and providing a more holistic, balanced alternative to the conflict and expense of adversarial court processes. Under this program, parents were referred to mental health professionals who tried to resolve parenting disputes through mediation but, if mediation failed, were able to resolve those disputes through arbitration. Although these professionals initially worked without any common guidelines, a group formed in the early 1990s to share their experiences and work together on creating a common concept of parenting coordination.

Today, both legal and mental health professionals — counsellors, social workers, family therapists, and psychologists — work as parenting coordinators, and professional associations have formed to discuss standards and promote best practices in Alberta, British Columbia and Ontario, all working under variations of the basic parenting coordination model currently used by the Association of Family and Conciliation Courts [1].

Parenting coordination involves a trained professional who works with parents, over a long period of six to 24 months, to implement the parenting plan contained in the parents' final order, award or agreement. As with the Special Master Program, parenting coordinators first attempt to resolve parenting disputes through a process very much like mediation, but, if settlement cannot be found, will resolve those disputes through a process very much like arbitration. It is a child-centred process that also tries to address other goals such as helping the parents learn to

communicate more effectively, keep their children's needs and interests front of mind, and resolve future disputes without intervention. Mental health professionals who work as parenting coordinators have special training in family law, mediation, arbitration and decision-writing, while legal professionals have special training in family systems theory, family violence, child developmental psychology and conflict management.

The services parenting coordinators provide are limited to helping with parenting plans. They cannot make significant, long-lasting changes to those plans; they cannot appoint people as guardians, or deal with issues about support and children's special expenses; they cannot give someone parenting time or contact who does not already have it; and, they cannot make decisions about relocation. (The limitation of parenting coordination to the implementation of final orders and agreements is intentional. Parenting coordination is not a process suited to developing parenting plans, and most parenting coordinators would not want to be caught in the awkward position of creating parenting plans in competition with the court.)

Working with parenting coordinators under the *Family Law Act*

A person who qualifies as a *parenting coordinator* under the *Family Law Act* must meet the requirements set out in the Family Law Act Regulation [11]. Section 14 of the act says that:

> A person meeting the requirements set out in the regulations may be a parenting coordinator.

Those requirements appear in section 6 of the regulation. Lawyers who qualify as parenting coordinators meet the training requirements of, and are accredited by, the Law Society of British Columbia. You can find out if a lawyer is a parenting coordinator by looking the lawyer up in the Lawyer Directory [12] on the Law Society's website. The training requirements professionals other than lawyers must meet to qualify as parenting coordinators are set out in section 6(2) of the Family Law Act Regulation, and include:

- being a member in good standing with specific organizations,
- meeting specific educational and experiential requirements,
- taking continuing family dispute resolution training, and
- carrying professional liability insurance.

Section 6 of the regulation imposes two extra duties on parenting coordinators: they must use written participation agreements; and, they must provide the parties with confirmation that they qualify as a parenting coordinator under the regulation. Section 6(2) says this:

> (2) The following practice standards apply to a parenting coordinator:
>
> (a) before assisting the parties to a family law dispute in his or her capacity as a parenting coordinator, he or she must enter into a written agreement to provide parenting coordination services with the parties to the family law dispute;
>
> (b) before assisting the parties to a family law dispute in his or her capacity as a parenting coordinator, he or she must provide written confirmation to the parties to the family law dispute that he or she meets the professional requirements set out in subsection (1).

The parenting coordination process

Once you have a final court order, arbitrator's award or separation agreement that says how parental responsibilities, parenting time and contact with your child are going to work — a parenting plan — you may hire a parenting coordinator. A parenting coordinator may be appointed by your agreement, or by an arbitrator's award or court order made under section 15 of the *Family Law Act*. The appointing agreement, award or order should specify who is being appointed and a deadline for signing the parenting coordination participation agreement [2] and paying the required deposits and retainers.

Your lawyer will have the names of three or four parenting coordinators they prefer to work with or think well of. If you don't have a lawyer, you can look at the membership lists of organizations like the BC Parenting Coordinators Roster Society [18], although many accredited parenting coordinators may not have decided to spend the money to join these organizations. You probably want to choose someone who has a lot of experience as a parenting coordinator, someone who has a good reputation in the legal or mental health community, and, most importantly, someone you see as being neutral, fair-minded and unbiased.

Starting the process

Starting the parenting coordination usually requires that: the parents sign the parenting coordinator's parenting coordination agreement; the parents pay the retainer and deposit requested by the parenting coordinator; sign a bunch of consent forms so that the professionals involved with your family can talk to your parenting coordinator; and, the parents, and sometimes the children, have an initial meeting with the parenting coordinator.

The parenting coordination agreement

After the parenting coordinator is appointed, you will be asked to sign a participation agreement, usually called a *parenting coordination agreement.* Your parenting coordinator will likely want you to get legal advice about the meaning and effect of the agreement. Your lawyer will usually be happy to give you this advice; if you don't have a lawyer, you can hire one just to give you this advice.

Parenting coordination agreements do four things. First, they serve as the parenting coordinator's retainer agreement and describe how the parenting coordinator will charge for their services and when they will expect to be paid. (You can read more about retainer agreements in the Understanding the Legal System chapter, in the You and Your Lawyer section.) Second, they describe the parties' rights and responsibilities in the process, as well as the responsibilities of the parenting coordinator and the scope of their authority. Third, they summarize any specific issues the parenting coordinator will focus on. Finally, they specify the term for which the parenting coordinator is being hired, usually somewhere between six and 24 months.

Section 15(4) of the *Family Law Act* says that the maximum term parenting coordinators can be hired for is for 24 months. This is usually the best length of time to work with a parenting coordinator. 12-month appointments are fairly common, however. Parenting coordinators have been hired for shorter appointments, but the benefits of parenting coordination generally require a longer engagement. Parenting coordination agreements that have come to an end may be renewed, if the parenting coordinator and the parents agree.

Retainers and deposits

Most parenting coordinators require that each parent provide a deposit and a retainer before they begin work. *Retainers* commonly start at $4,000 to $5,000, and work like a lawyer's normal retainer. The retainer secures the parenting coordinator's future fees, and the parenting coordinator draws on the retainer to pay their accounts after each account is sent to the parents. When the retainer runs out, the parenting coordinator will ask the parents to pay a new retainer. And if there is money left in a parent's retainer when the parenting coordinator's term is finished, that money goes back to the parent.

Deposits are often between $500 and $1,000. They are also a kind of retainer, and are meant to pay for the parenting coordinator's services if a parent's retainer has run out and the parent refuses to pay a new retainer. This lets the parenting coordinator finish dealing with any last outstanding issues. Like the retainers, any money left in a parent's deposit when the parenting coordinator's term is finished goes back to the parent.

Consent forms

You will also usually be asked to sign a number of forms so that the professionals involved with your family — usually people like the children's doctors, care providers, teachers, therapists, and anyone else with important information or insight about your family — can talk to your parenting coordinator. It is often very helpful for your parenting coordinator to be able to talk to a child's teacher, for example, to get their views about problems with homework, behavioural challenges, and any issues transitioning between homes.

First meetings

As with all family dispute resolution professionals, if you do not have lawyers, the parenting coordinator will meet with each of you, separately, before starting the process to assess for the presence of family violence. Some parenting coordinators also invite parents to a short meeting to discuss the parenting coordinator's role prior to the formal appointment. This meeting might have a fixed cost or no cost.

After the parenting coordination agreement has been signed and the deposits and retainers paid, the parenting coordinators will meet with the parties again to talk about the history of the family, events since the parents' separation, and common areas of disagreement and conflict, as well as identifying any issues that need to be addressed in the near future. The parenting coordinator may also meet with the children and with any other adults, like teachers and therapists, who might have helpful information.

Cost

Parenting coordinators' work dealing with problems about children's parenting plans keeps parents out of court, and saves them the time and legal fees that they would pay making and responding to applications; especially if the parents experience higher than usual levels of conflict and frequently used court to resolve problems before they hired their parenting coordinator.

It's important to understand, however, that parenting coordinators charge by the hour for all of the time they spend working with a family, so their services can be expensive, especially if they are over-used. Although parenting coordination is usually quite cost-effective, when the fees of the parenting coordinator are compared to the longer-term benefits they provide and the amount saved on going to court, the cost of parenting coordination is sometimes more expensive than many families can afford. It would be great if the services of parenting coordinators were subsidized by the government or legal aid, but that hasn't happened yet.

How the parenting coordinator works

The primary job of parenting coordinators is to address and resolve problems with the implementation and day-to-day functioning of the parenting plan. In addition to dealing with short-term issues like these, parenting coordinators have the longer-term goals of:

- reducing the conflict between the parents,
- minimizing the effect of the parents' conflict on their children,
- helping parents focus on the needs and best interests of their children,
- improving the parents' communication skills, and
- improving the parents' ability to resolve their own disputes.

When a problem with the parenting plan comes up — which might concern the interpretation of the parenting plan, the need for a temporary change to the parenting plan, resolving an issue not addressed in the parenting plan, or

adapting behaviour to make the parenting plan work better — a parent will contact the parenting coordinator. The parenting coordinator will then contact the other parents and try to find a solution to the problem in the *information-gathering and consensus-building phase* of the parenting coordination process. If a solution can't be found, the parenting coordinator will resolve the problem by making a decision in the *determination-making phase* of the process. Most parenting coordinators see making determinations as a last resort, and would much prefer to help the parents create their own solution to the problem.

As other issues develop, the process repeats. Some issues may be resolved relatively quickly by phone or email, while other issues will require in-person meetings. Where the parents and parenting coordinator work in different cities, parenting coordinators will usually rely on videoconferencing in place of in-person meetings.

Parenting coordinators will usually record the terms of any resolutions reached in the information-gathering and consensus-building phase through a memorandum to the parents, often in the form of an email. This is meant to remind the parents of the terms of the resolution and their obligations under that settlement. Determinations made in the determination-making phase are also provided to the parents in writing, but in a more formal manner.

Agreements reached in the parenting coordination process can be enforced by the court like any other family law agreement. Agreements about parenting arrangements are enforceable under section 44 of the *Family Law Act*; agreements about contact are enforceable under section 58 of the act. Determinations made in the parenting coordination process can be enforced by the court under section 18 of the *Family Law Act*.

What a parenting coordinator does do

Section 17 of the *Family Law Act* outlines the basic functions of parenting coordinators:

> A parenting coordinator may assist the parties in the following manner:
>
> (a) by building consensus between the parties, including by
>
> (i) creating guidelines respecting how an agreement or order will be implemented,
>
> (ii) creating guidelines respecting communication between the parties,
>
> (iii) identifying, and creating strategies for resolving, conflicts between the parties, and
>
> (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
>
> (b) by making determinations respecting the matters prescribed...

Section 6 of the Family Law Act Regulation [11] talks about the determinations parenting coordinators can make:

> (3) The following are the matters in respect of which a parenting coordinator may make determinations:
>
> (a) parenting arrangements;
>
> (b) contact with a child.
>
> (4) For the purposes of subsection (3), a parenting coordinator
>
> (a) may make determinations in respect of
>
> (i) a child's daily routine, including a child's schedule in relation to parenting time or contact with the child,

> (ii) the education of a child, including in relation to the child's special needs,
>
> (iii) the participation of a child in extracurricular activities and special events,
>
> (iv) the temporary care of a child by a person other than
>
> (A) the child's guardian, or
>
> (B) a person who has contact with the child under an agreement or order,
>
> (v) the provision of routine medical, dental or other health care to a child,
>
> (vi) the discipline of a child,
>
> (vii) the transportation and exchange of a child for the purposes of exercising parenting time or contact with the child,
>
> (viii) parenting time or contact with a child during vacations and special occasions, and
>
> (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties and the parenting coordinator...

Some examples of what a parenting coordinator may do include:

- settling disputes or ambiguities about parenting schedules, extracurricular activities, travel arrangements, holidays, and special events,
- making temporary adjustments to the children's parenting plan,
- deciding what school a child will attend,
- determining if a child needs tutoring, therapy, or routine medical treatment, and
- working out protocols for dealing with a child's belongings, communications between parents, communications between a child and a parent, and the parents' attendance at a child's school, sports and social events.

What a parenting coordinator doesn't do

Section 6 of the Family Law Act Regulation [11] also talks about the subjects that parenting coordinators may *not* make determinations on. Subsection (4), noted above, continues and says that a parenting cooordinator:

> (b) must not make determinations in respect of
>
> (i) a change to the guardianship of a child,
>
> (ii) a change to the allocation of parental responsibilities,
>
> (iii) giving parenting time or contact with a child to a person who does not have parenting time or contact with the child,
>
> (iv) a substantial change to the parenting time or contact with a child, or
>
> (v) the relocation of a child.

Although section 6(4)(b) doesn't explicitly say so, parenting coordinators are also prohibited from making determinations about child support, including children's special expenses, spousal support, and the division of property and debt. None of these issues fall within "parenting arrangements" and "contact with a child" under section 6(3). If you need someone to help with these issues, you should probably hire an arbitrator. You can get more information about arbitration in the previous section in this chapter, Family Law Arbitration.

Ending the process

At the end of the parenting coordinator's term, parents and the parenting coordinator may agree to renew the parenting coordination agreement. If the parents can't agree whether the parenting coordination agreement should be renewed, the parenting coordination process is finished until a judge or an arbitrator orders that the parents return to the parenting coordination process.

Under section 15(6) of the *Family Law Act*, a parenting coordination agreement can be terminated *before* the end of a parenting coordinator's term in one of three circumstances:

> (a) in the case of an agreement, by agreement of the parties or by an order made on application by either of the parties;
>
> (b) in the case of an order, by an order made on application by either of the parties;
>
> (c) in any case, by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is acting under an order, to the court.

Enforcing determinations

Section 18 of the *Family Law Act* says that parenting coordinators' determinations are binding on the parents and that they may be enforced by the court:

> (5) Subject to section 19 [changing or setting aside determinations], a determination
>
> (a) is binding on the parties, effective on the date the determination is made or on a later date specified by the parenting coordinator, and
>
> (b) if filed in the court, is enforceable under this Act as if it were an order of the court.

Parenting coordinators' determinations are filed in court under either Rule 133 (using Form 27) of the Provincial Court Family Rules [1] or Rule 2-1.1 of the Supreme Court Family Rules [3].

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation [11]
- Supreme Court Family Rules [3]
- Provincial Court Family Rules [1]

Links

- BC Parenting Coordinators Roster Society [18]
- Association of Family and Conciliation Courts [3]
- Parenting Coordinators [4] from the Ministry of Attorney General
- Parenting Coordinators [5] from Legal Aid BC

Resources

- Sample parenting coordination participation agreement [2] (PDF), BC Parenting Coordinators Roster Society
- Sample parenting coordination participation agreement (PDF), John-Paul Boyd Arbitration Chambers

These sample participation agreements may not resemble the participation agreement you are asked to sign. They provide a more or less accurate picture of what parenting coordination participation agreements usually look like, but should be used as a reference only.

- "Guidelines for Parenting Coordination" PDF [6] from the Association of Family and Conciliation Courts

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 August 2021.

References

[1] https://www.afccnet.org
[2] https://perma.cc/544Y-KP9Y
[3] http://www.afccnet.org/
[4] https://www.clicklaw.bc.ca/resource/4965
[5] https://family.legalaid.bc.ca/children/parenting-guardianship/parenting/parenting-coordinators
[6] https://perma.cc/5L3A-RSR8

Goint to Court

Resolving Family Law Problems in Court Overview

Given that BC's courts are in an especially active state of transformation, and to offer you in-depth and up-to-date information about trial and application procedures as these evolve, we direct readers of the 4th edition of *JP Boyd on Family Law* to the online version of this chapter.

- Follow the QR code, or
- Go to https://bit.ly/JPBOFL

For more information about this decision and the ongoing court reforms, read on and see the Introduction on page 1.

Note for readers of the fourth edition

The process of starting a court proceeding and wrapping it up at trial can be complicated. The details matter. You need to know the procedures, and there are many places you need to look to learn them:

- There are formal *statutes* that contain important laws affecting litigation (such as laws dealing with evidence, causes of action, judge's power to make an order, limitation periods, court jurisdiction, divorce, and so on), which are debated and passed by legislature or parliament.
- There are *court rules and forms* issued by government as regulations, which are legally binding and dictate the majority of what happens once a case is filed.
- Then there are *practice directions* issued by the chief justices and judges for their respective courts, which tend to instruct how rules are carried out in practice and when dealing with registry or scheduling desks, as well as with court technology.
- And then there are common law rules (yes, more rules!) which evolved over centuries and change incrementally as judges refine them. These influence what someone can give as evidence, how a judge assesses credibility, and when a judge will exercise inherent jurisdiction and wield their power.

Most of the time, major procedural changes are planned ahead of time. Maybe one major piece changes, but not many things at once. In 2010, the British Columbia Supreme Court overhauled its family rules and changed all the form names. That was a major change, but it happened years before big changes followed with the coming into force of the *Family Law Act*. And procedure remained fairly stable after that. A new form or two, some tweaks to the language in the rules for clarity were made, but not too much.

We released the 3rd edition of *JP Boyd on Family Law* in 2019, and we then learned about the next major change on the horizon: amendments to the *Divorce Act.* This would mean significant changes to court forms and rules, and

meant 2020 would be a good time to follow up with a fourth edition. As we planned to do just that, in February 2020 the BC Government revealed an amendment to the *Family Law Act* that would change the law around arbitration of family law disputes. This was another update we could manage in the fourth edition.

Then the Covid-19 pandemic struck.

From March 2020 forward, any notion that BC's court procedure was supposed to change gradually and deliberately went out the window. Practice directions from the Chief Justice of the BC Supreme Court and Chief Judge of the Provincial Court were re-writing the rules of court on an emergency basis — literally pursuant to Ministerial Order M121/2020 issued under the *Emergency Program Act* by the Minister of Public Safety — and on the fly. Courtrooms that had only ever run in person, were now being run in Zoom from people's living rooms. The courts' joint policy restricting electronic devices in the courtroom was swiftly revised. Electronic devices suddenly were the courtroom.

It was a time of frantic, unprecedented disruption. Between March 2020 and June 2022 the BC Supreme Court issued 57 different Covid-19 Notices that affected everything imaginable related to procedure.

It was, to put it mildly, no time to try and describe what going to court looked like in the province, and commit that description to the printed page.

In May 2021, the Provincial Court revised the Provincial Court Family Rules while also expanding its use of Early Resolution Registries. These were big changes which resulted in almost all of the discussion and references to rules, forms, and procedures in the 3rd edition of *JP Boyd on Family Law* to be out-of-date. Not only did the names of the Provincial Court Family Rules and accompanying forms change, not only did their numbering change, but their purpose changed. The new rules aimed to help self-represented litigants with easier to understand forms and ensure attendance at court by telephone, video, or in-person, only when something substantial would happen.

If our purpose is to print a book that educates on how to bring or defend a case before British Columbia's family courts, then we want to be reasonably sure that the information we tell you is accurate — and not only at the moment we print it, but for a reasonable window of time afterwards too.

As we prepared to print this edition, it became more clear that the transformative work and experimentation by the courts will likely mean further changes to court rules and procedures heading into 2024. The Provincial Court continues to solicit feedback about how the new forms, rules, and types of registries are working for court participants. There is no reason to expect that this is the end of the reform work.

We have had to make a choice. We could have tried to generalize our discussion of the litigation process by minimizing specific references to rules, forms, and steps in a proceeding so that we only talked about general principles and perhaps strategies for thinking about litigation. This could mean it would not matter if the Provincial Court Family Rules changed again three months after we printed.

On the other hand, if the greater benefit to readers is that we go into detail about court procedures, then this chapter is better off being placed online where it can be updated. The print version you are holding will therefore tell the story of why it does not contain a detailed chapter on Resolving Family Law Problems in Court. It offers a link to the full version. And below is an overview on going to court instead.

Overview on going to court

The online version of this chapter is actually three chapters. One is an overview much like this print version you're reading. And the other two discuss — for each trial court separately — the process for starting and replying to court proceedings, making applications before trial, completing a trial, and enforcing or changing orders.

This overview provides a thumbnail sketch of the basic court process common to all family law court proceedings.

Hold on for a minute, do you really have to go to court?

Sometimes, you really have no choice except to start a court proceeding. But you should think twice before you do, and make sure that litigation is your best choice.

The end of a relationship, especially a long relationship, is an emotionally charged, stressful time. Court is not the only way there is to solve a problem, even though it might be really tempting to drop the bomb and hire the most aggressive lawyer you can find. Before you decide to go to start a court proceeding, think about these things first:

Your future relationship with your ex. Right now you might hate your ex and want to make their life miserable. You might not feel that way in a year or two. If you don't have children, it might be entirely possible for you to simply walk out of each other's lives and into the sunset. If you do have children, however, you don't have that option. Your relationship as lovers and partners might be over, but your relationship as *parents* will continue forever.

Your children, and your relationship with your children. Your children will be aware that there is a certain degree of conflict between you and your ex, an understanding that will differ depending on the children's ages. When parents are engaged in a court proceeding, it can be tremendously difficult to shield the children from the litigation, from your emotional reactions to the litigation, and from your conflict with their other parents. It can also be difficult to refrain from using the children as weapons in the litigation. This will always affect the children adversely, and often in ways you don't expect.

Your own worries and anxieties. Litigation is always an uncertain process. No one, not even your lawyer, can guarantee that you will be completely successful about any particular issue. At the end of the day, fundamental decisions will be made by a complete stranger — a judge — about the things that matter the most to you, and the judge's decision is not something you can predict with any certainty. On top of that, litigation, especially when you're doing it yourself, is very stressful. The forms and processes will be new to you, and each court appearance will likely be a fresh cause of anxiety and uncertainty.

Your wallet. If you opt to hire a lawyer, be prepared to pay and to pay a lot. Sometimes a lawyer can help you get things done quickly and with a minimum of fuss and bother, but if emotions are running high, you stand to pay a whopping legal bill, especially if you go all the way through to trial. Even if you don't hire a lawyer, litigation can be expensive, and if you are unsuccessful you can also be ordered to pay the other side's court costs.

There are other ways of solving your problem than litigation. Going to court is only one of the ways to bring your dispute to an end. Other, less confrontational and less adversarial approaches include negotiation, mediation, collaborative negotiation and arbitration. All of these other approaches generally cost a lot less, and, because they are cooperative in nature, they'll give you the best chance of maintaining a working relationship with your ex after the dust has settled. These options are discussed in more detail in the chapter Resolving Family Law Problems out of Court.

Now, in fairness, there are times when going to court may be your only choice. It may be critical to start a court proceeding when:

1. there has been family violence in your relationship, whether involving you or your children,
2. there have been threats to your physical safety, or to the safety of your children,

3. your ex has threatened to take the children out of town, out of the province, or out of the country against your wishes,
4. there is a threat or a risk that your ex will damage, hide, or dispose of property,
5. you urgently need to get some financial help,
6. negotiations have failed and, despite your very best efforts, you and your ex can't agree on how to solve your differences, or
7. your ex refuses to communicate with you about the legal issues that need to be resolved.

While you should think twice before deciding that court is your only option, starting a lawsuit doesn't mean that you can't continue to try to negotiate a resolution outside of the court process.

For more information about the emotions that surround the end of a long-term relationship, and how these emotions can affect the course of litigation, read the section Separating Emotionally in the chapter Separating and Getting Divorced. You should also track down and read a copy of *Tug of War* [1] by Mr. Justice Brownstone from the Ontario Court of Justice. He gives a lot of practical advice about the family law court system, when it works best and when it doesn't work at all.

You might also want to read a paper I wrote for people who are representing themselves in court proceedings, "The Rights and Responsibilities of the Self-Represented Litigant [2]".

Okay, I'm going to court. Which court do I go to?

Before getting any deeper into this chapter, go review the chapter Understanding the Legal System for Family Law Matters, in particular, the section on The Court System. What you'll learn there is that there are two courts that hear trials in British Columbia, the *Provincial Court* [12] and the *Supreme Court* [1], and that these courts are very different from one another.

The Provincial Court deals with issues relating to parenting children, child support, spousal support, and orders protecting people under the *Family Law Act*. The Supreme Court has the authority to deal with all of those issues, but can also deal with issues about parentage, dividing property and debt, and orders protecting property under the act. Only the Supreme Court has the authority to make orders under the *Divorce Act*, including orders for divorce. This chart shows which trial court can deal with which family law problem:

	Supreme Court	**Provincial Court**
Claims under the *Divorce Act*	All claims	
Claims under the *Family Law Act*	All claims	Some but not all claims
Divorce	Yes	
Guardianship and parenting children	Yes	Yes
Time with children	Yes	Yes
Child support	Yes	Yes
Children's property	Yes	
Spousal support	Yes	Yes
Family property and family debt	Yes	Pets only
Orders protecting people	Yes	Yes
Orders protecting property	Yes	

The rules of the Supreme Court can be very complicated and fees are charged for many steps in the court process, including filing the paperwork that starts a court proceeding, making an application, or going to trial. The Provincial

Court process is intended to be more affordable and easier to navigate without a lawyer's help. Visit the link to the more in-depth version of this chapter at the beginning of this section, or go to Legal Aid BC's Family Law website for more information, including *If you have to go to court* [3] and *Trials in Provincial Court* [4].

It is possible to start a proceeding in the Provincial Court to deal with things like child support, and then start a proceeding in the Supreme Court to get a divorce and deal with things like property. It can be complicated to split your family law issues between two courts. A lot of people find it easier just to deal with everything in one court, but because of the limits of the authority of the Provincial Court, the Supreme Court is the only choice available.

What's the court process going to be like?

If you need the court to make an order about something, even about something you might agree to, like a divorce, you must start a *court proceeding*. Court proceedings are also called cases, lawsuits, and actions. There are two types of court proceedings, *criminal matters* and *civil matters*. Criminal matters concern the government's claim that someone has broken a criminal law, like the *Criminal Code* [3] or the *Controlled Drugs and Substances Act* [5]. Civil matters concern claims between people, companies and governments. Family law cases are civil matters.

A few definitions

Before going further, it'll help to learn some of the terminology used in litigation. (You can call find more definitions in the Terminology pages of this resource.)

- **Family law proceeding:** A court proceeding that is started to resolve a family law dispute, and other civil claims related to that dispute.
- **Claimant or Applicant:** The person who starts a court proceeding in the Supreme Court is the *claimant*. In the Provincial Court, this person is the *applicant*. (In this section, *claimant* refers to both claimants and applicants.)
- **Respondent:** The person or people against whom a court proceeding is brought are the *respondents*.
- **Parties:** The claimant and the respondent are, together, called the *parties* to the court proceeding.
- **Claim or Application:** The document that is filed to start a court proceeding in the Supreme Court is a *Notice of Family Claim* or, less often, a *Petition*. In the Provincial Court, court proceedings are started with an *Application About a Family Law Matter*. (In this section, *claim* refers to all of these documents.)
- **Reply and Counterclaim:** A respondent who objects to all or some of the orders sought by a claimant in the Supreme Court will file a *Response to Family Claim* and sometimes a *Counterclaim:* A Counterclaim lets a respondent make claims of their own against a claimant. In the Provincial Court, a respondent will file a *Reply to an Application about a Family Law Matter*, which includes a section to make a counterclaim against an applicant. (In this section, *reply* refers to all of these documents.)
- **Pleadings:** The basic documents that are used to start and reply to a court proceeding are called the *pleadings*. In most Supreme Court family law proceedings, the pleadings are the Notice of Family Claim, the Response to Family Claim, and, usually, a Counterclaim. In most Provincial Court proceedings, the pleadings are the Application About a Family Law Matter and the Reply to an Application about a Family Law Matter.
- **Trial:** The formal hearing of a claim, a response to a claim and a counterclaim by a judge, following which the judge makes an order resolving all of the claims and counterclaims made in the court proceeding.

The court process in a nutshell

Visit Legal Aid BC's Family Law website [27] or visit the link to the in-depth online chapter of this resource at the beginning of this section to learn about the current Provincial Court process. Proceedings in the Supreme Court, other than proceedings in criminal matters, work more or less as follows.

The claimant starts the proceeding. The person who wants a court order, the *claimant*, starts a court proceeding by filing a *claim* in court and serving the filed claim on the respondent. The claims says what orders the claimant wants the court to make. Serving the filed claim involves having the claim hand-delivered to the *respondent* by someone other than the claimant.

The respondent files a response. The respondent has a certain amount of time after being served to reply to the court proceeding by filing a *response* in court. (The number of days is set out in the document filed by the claimant to start the court proceeding.) The response says which of the orders sought by the claimant are agreed to by the respondent and which are opposed. The respondent can also ask the court for orders they want. If the respondent wants a court order, the respondent will file a claim of their own, called a *counterclaim*. The response and any counterclaim must be delivered to the claimant.

The claimant files a reply. The claimant has a certain amount of time after receiving the counterclaim to reply to any claim made by the respondent by filing a *reply* in court. The reply says which of the orders sought by the respondent are agreed to by the claimant and which are opposed. The claimant's reply must be delivered to the respondent.

The parties exchange information. Next, the parties gather the information and documents they need to explain why they should have the orders they are asking for. Because trials are not run like an ambush, the parties must exchange their information and documents well ahead of trial. This way everyone knows exactly what is going on and how strong each person's case is. There are different processes in Supreme Court and Provincial Court for exchanging information. For more details, see the section Starting a Court Proceeding in a Family Matter in this chapter.

The parties attend case conferences. *Case conferences* are meetings with judge to talk about the court proceeding. They often provide an opportunity to talk about settlement option and to ask for orders about steps in the court proceeding as the proceeding heads to trial. For more about case conferences, see the section about Case Conferences in this chapter.

Each party answers questions out of court. In court proceedings before the Supreme Court, each party is usually required to attend an *examination for discovery*. This is an opportunity for each party to ask the other parties questions about things that are relevant to the legal issues so that everyone knows the evidence that will be given at the trial. This is also an opportunity to ask each party to provide more documents.

Go to trial. Assuming that settlement isn't possible, court proceedings are resolved by trials. At trial, each of the parties presents their evidence and explains to the judge why the judge should make the orders they're asking for. The judge may make a decision resolving the decision on the spot; most often, however, the judge will want to think about the evidence and the parties' arguments and will give a written decision later, often weeks or even months later.

Remember that you can continue to try to negotiate a settlement with the other party at every stage of this process. You can even decide to try mediation in the middle of a court proceeding, and, if you are getting tired of the court process or are worried about how long it will take to have a trial, you can abandon the court process altogether and go to arbitration.

While working your way through the court process, you may find that it's sometimes necessary to ask for *interim orders*. These are temporary orders that address a short-term problem or need, or that help the court proceeding get

to trial. In family law cases, people often ask for interim orders to protect someone when family violence is an issue, to deal with the payment of child support or spousal support, to get a parenting schedule in place, to determine how the children will be cared for, or to protect property while waiting for the trial.

The process for interim orders is a miniature version of the larger process for getting a claim to trial.

The applicant starts the application. The person who wants the interim order, the *applicant*, starts the application process by filing an application and an affidavit in court, and delivering the filed application and affidavit on the other party, called the *application respondent*. The application describes the orders the applicant wants the court to make. The affidavit describes the facts that are relevant to the application and the orders the applicant is looking for. For more information about affidavits, see the page, How Do I Prepare an Affidavit?, in the Helpful Guides & Common Questions part of this resource.

The application respondent files a response. The *application respondent*, the person who is responding to the application, has a certain amount of time after receiving the application and affidavit to file a response and an affidavit in court. The response says which orders the person agrees to and which they object to. The affidavit describes any additional facts that are important to the application. The response and affidavit must be delivered to the applicant.

The applicant may file another affidavit. The applicant has a certain amount of time after receiving the application respondent's materials to file another affidavit in court. This affidavit is a response to the application respondent's affidavit and describes any additional facts that are important to the application. This affidavit must be delivered to the application respondent.

Go to the hearing. Assuming that settlement isn't possible, the only way to resolve the application is to have a hearing. At the hearing, each of the parties will present the evidence set out in their affidavits and explain to the judge why the judge should, or shouldn't, make the orders asked for. Most of the time the judge will make a decision resolving the decision on the spot; sometimes, however, the judge will want to think about the evidence and the parties' arguments, and will give a written decision later.

For more details follow the link to the online chapter section on interim applications at the beginning of this section.

There are lots of details we've skipped over in this brief overview, including details about important things like experts, case conferences, and the rules of evidence, but this is the basic process in a nutshell. These other details are governed by each court's set of rules. The rules of court are very important, and the rules of the Provincial Court [1] are *very* different than the rules of the Supreme Court [3].

You can probably guess that getting a court proceeding to trial can be a long and involved process, and that if you have a lawyer representing you, it'll cost a lot of money to wrap everything up. Making these procedural delays worse, trial dates are often in short supply. In Vancouver, for example, you may not be able to get dates for a one-week trial any sooner than 18 months.

It's important to remember that you and the other party can agree to resolve your dispute out of court at any time in this process. If you haven't done so already, please read the chapter Resolving Family Law Problems out of Court.

Rules promoting settlement

Just because a court proceeding has started, it doesn’t mean you will be going to court. The majority of cases settle prior to trial; in fact, the number of civil court proceedings in the Supreme Court of British Columbia that are resolved by trial is less than 5%! There are a few reasons why this is the case. First, trials are time-consuming and expensive. Second, you can never be absolutely sure what the result is going to be. You're always rolling the dice when you go to trial. Third, you can usually find a way to settle a dispute sooner than the first available trial date.

It also helps that the rules of court — both the Provincial Court Family Rules and the Supreme Court Family Rules — are written to promote settlement and find ways of pushing litigants toward the offramps that lead away from

trial. (It says something, I think, that the rules of the province's two trial courts are designed to discourage trials.) This section talks about these offramps, the rules that are intended to encourage people to propose settlement options, the rules that provide judges to help people negotiate settlements, and the rules that penalize people for going to trial without fully thinking things through.

Introduction to rules promoting settlement

There are many reasons why it's important to resolve family law disputes other than by trial. From the court's point of view, when separated spouses or parents are able to reach a settlement of their legal problems, their agreement:

1. helps to protect the children from their ongoing conflict
2. frees up valuable judicial and administrative resources for other cases, and,
3. decreases the likelihood that the dispute will require ongoing court hearings in the future.

From the point of view of the spouses or parents involved in the dispute, making an agreement:

1. is cheaper and faster than going to trial,
2. is more likely to give you more of what you want than a judicial decision,
3. shows you and your ex that you can resolve even difficult disputes on your own, and
4. resolves disputes and lets you move on with your life more quickly.

Settling a family law dispute gives spouses or parents a lot more personal control and creativity about the resolution of their dispute than is possible in court. It also gives everyone the best chance of being able to work together in the future.

(Lawyers also have an interest in settling matters, believe it or not, for all of the same reasons as the courts and the parties. As well, lawyers have a professional and an ethical duty to pursue settlement wherever possible, provided that a proposed settlement is not an unreasonable compromise of their clients' interests. This duty is so important that it has been written into lawyers' Code of Professional Conduct [6].)

The legislation on family law and the rules of court for family law proceedings have evolved over the last two or three decades to provide additional opportunities and incentives for settlement, and steer people out of court and away from trial whenever possible. In fact, the first division of Part 2 of the provincial *Family Law Act* is titled "Resolution Out of Court Preferred," and begins with a statement in section 4 which says that the purposes of the Part are to:

> (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;
>
> (c) to encourage parents and guardians to
>
> (i) resolve conflict other than through court intervention, and
>
> (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.

Under section 8(2), lawyers are required to "discuss with the party the advisability of using various types of family dispute resolution to resolve the matter." (That awful, clumsy term *family dispute resolution* is defined in section 1(1) as including mediation, arbitration, and collaborative negotiation.) Lawyers have the same sort of obligation under section 7.7 of the federal *Divorce Act*:

> (2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act
>
> (a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are

> of such a nature that it would clearly not be appropriate to do so;
>
> (b) to inform the person of the family justice services known to the legal adviser that might assist the person
>
> (i) in resolving the matters that may be the subject of an order under this Act, and
>
> (ii) in complying with any order or decision made under this Act; and
>
> (c) to inform the person of the parties' duties under this Act.

Whether or not your lawyer gives you this encouragement or information, section 7.3 of the *Divorce Act* requires you, and the other parties to your court proceeding, to at least *try* to resolve your disagreements out of court:

> To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

In general, you should try to resolve a court proceeding without going to trial if you can. However, your settlement, whether it's reached with the help of a judge or not, must be fair and reasonable and roughly within the range of what would have happened if the issues in your proceeding had been resolved at trial. While it's always a relief to wrap up a court proceeding, if the settlement is really unfair to either party a return to court may be inevitable!

The Provincial Court

In 2021, BC received a complete overhaul of its Provincial Court Family Rules, and into 2024 there are still signs that the courts are not quote done tinkering with them. Visit the link at the beginning of this section to see our more in-depth online chapter, or visit Legal Aid BC's Family Law website [27] for more guidance on what the new rules require you to do, and how this can change depending on where you are located. The purpose of the revamped Provincial Court Family Rules is aimed at promoting settlement, helping parties resolve their case by agreement, or to help them obtain a fair outcome in way that minimizes conflict and promotes cooperation between parties.

Section 8 of the Rules clearly states that "parties may come to an agreement or otherwise reach resolution about family issues at any time". That means that even if it's the morning of your trial and you're all ready to go, you and your ex can decide to settle without going to trial.

The new Rules have also divided various courthouse registries into different categories. For example, Victoria is an *Early Resolution Registry*, Vancouver (Robson Square) is a *Family Justice Registry*, and Abbotsford is a *Parenting Education Program Registry*. Legal Aid BC's Family Law website has more information on each of these types of registry [6].

No matter the registry in which you find yourself, there are certain steps you have to take before you'll be able to argue before a judge. In most cases, the first time that parties will be before a judge will be at what's called a *Family Management Conference* (FMC), which is a settlement-focused appearance. If settlement isn't possible at the FMC, the judge can make orders (by consent or not), make interim orders to address needs until resolution is reached, and determine next appropriate steps.

A notable difference between Supreme Court and Provincial Court is that costs are not payable in Provincial Court. That said, a word of caution: if a judge decides that cross examining an expert witness was unnecessary, then the party who decides to cross examine that expert can be responsible for the costs associated with that, which can be in the thousands of dollars.

The Supreme Court

The rules of the Supreme Court allow the court to refer people to other dispute resolution services, much like the rules of the Provincial Court. In addition to offering carrots like this, the Supreme Court Family Rules [3] also include a stick or two. The biggest stick is the court's jurisdiction to make an order about *costs*. An order for *costs* is an order that one party pay for some or all of the expenses another party incurred dealing with the court proceeding. Costs are usually, but not always, awarded to the party who is most successful at trial. They can also be awarded to punish bad behaviour in the course of a court proceeding, or to penalize a party who failed to accept a reasonable settlement proposal.

Judicial case conferences

Rule 7-1 requires that the parties to a court proceeding attend a *judicial case conference* before they can send a Notice of Application or an affidavit to another party. This usually has the effect of making judicial case conferences a mandatory part of all family law cases in the Supreme Court. A judicial case conference, usually referred to as a *JCC,* is a relatively informal, off-the-record, private meetings between the parties, their lawyers, and a master or judge in a courtroom.

Rule 7-1(15) gives the court a broad authority to take steps and make orders to promote the settlement of the court proceeding. Among other things, the master or judge may:

1. identify the issues that are in dispute and those that are not in dispute and explore ways in which the issues in dispute may be resolved without recourse to trial;
2. mediate any of the issues in dispute; and,
3. without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial.

What's really cool about JCCs is that, under Rule 7-1(1), "a party may request a judicial case conference at any time, whether or not one or more judicial case conferences have already been held in the family law case." If there's a chance of settlement as you head toward trial, take advantage of this rule and book another JCC!

JCCs are discussed in more detail in the section on Conferences and Supreme Court Family Law Proceedings in the online chapter about Supreme Court litigation.

Settlement conferences

Settlement conferences are available under Rule 7-2 at the request of both parties. Settlement conferences are are relatively informal meetings between the parties, their lawyers, and a master or judge that are solely concerned with finding a way to settle the court proceeding.

Settlement conferences are private and are held in courtrooms that are closed to the public. Only the parties and their lawyers are allowed to attend the conference, unless the parties and the judge all agree that someone else can be present. They are held on a confidential, off-the-record basis, so that nothing said in the conference can be used against anyone later on.

Offers to settle

You can make a formal *offer to settle* at any time during a court proceeding. An "offer to settle" is a proposal about how all of the claims made in the claimant's Notice of Family Claim and in the respondent's Counterclaim will be wrapped up. A party receiving an offer to settle can decide to accept the offer or to refuse it. There are, however, important consequences for refusing a reasonable offer under Rule 11-1 that we'll talk about in a second.

It's important to know, first, that offers to settle are *private and confidential*. The point of this is to let someone make an offer to resolve a court proceeding without being held to that position if the offer is rejected and the case goes to trial. You want to be able to make a serious proposal that offers to compromise your position without being stuck with that compromise at trial. In fact, Rule 11-1 expressly states that no one can tell a judge that offer has been made until the case is wrapped up:

> (2) The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the family law case, until all issues in the family law case, other than costs, have been determined.

The stick shows up in subrules (5) and (6) when comparing the results of the trial against the terms of an offer to settle that was refused. These parts of Rule 11-1 say that:

> (5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:
>
> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would 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;
>
> (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.
>
> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

Let's break this down a bit. What these subrules essentially say is that *even if you were successful at trial*, you may have to pay costs to the other side if their offer to settle was better than, or as good as, the result of the trial! The court may decide to:

1. withhold an award of costs that you would normally be entitled to;
2. make you pay some or all of the costs of the other side; and,
3. make you pay double the normal costs of the other side after the date the offer was delivered to you.

Ouch. It pays to pay attention to an offer to settle.

To qualify as an offer to settle under Rule 11-1 an offer must:

1. be in writing;
2. be served on all parties to the court proceeding; and,
3. include this sentence

> "The [*Claimant* or *Respondent*], [*name of party*], reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

An offer to settle must meet these requirements if the party making the offer is going to ask the court for a costs order under Rule 11-1(5).

Costs

In the Supreme Court, a party may ask for their *costs* of an application, of a trial or of the whole of a court proceeding under Rule 16-1. "Costs" are a partial payment of the expenses and legal fees incurred by a party to a court proceeding, and are calculated under a schedule included in the Supreme Court Family Rules. Costs normally don't amount to more than approximately 30% of a party's actual legal fees.

Normally, the party who gets most of what they asked gets an order that the other side pay their "costs," but there are exceptions. In general, costs are a sort of idiot tax designed to punish a litigant who has unreasonably started or defended a court proceeding. Say, for example, you were hit by a car and you sue the driver for $10,000. Here are some possible outcomes and how costs might work if the driver refuses to pay and defends your claim.

- You are successful at trial and get an award of $10,000. You would get your costs because the driver was an idiot for refusing to pay the money you asked for and making both of you go through a trial.
- You are successful at trial and get an award of $1,000. Even though you were successful, the driver would probably get their costs because you had demanded an unreasonable amount and the driver was right to defend your claim. You were an idiot for asking for too high an amount of money, which forced the driver to go through a trial.
- You are unsuccessful at trial. The driver would get their costs because you were an idiot for suing the driver in the first place. Your unreasonable behaviour forced the driver to go through a trial.

The schedule that is used to calculate the amount of costs payable is in Appendix B of the Supreme Court Family Rules. Under that schedule, you get a specific amount of money for specific steps taken in a court proceeding. The amount you get varies depending on whether the court proceeding was of *less than ordinary difficulty*, of *ordinary difficulty*, or of *more than ordinary difficulty*. "Ordinary difficulty" is the default if the court that makes a costs order makes no order about the difficulty of the court proceeding. Here's the list of those steps and the amounts payable depending on difficulty:

Item	Description	Costs ($)	
1	Correspondence, conferences, instructions, investigations or negotiations and preparation, filing and service of notice of family claim, response to family claim, counterclaim or response to counterclaim	If the family law case involves less than ordinary difficulty ordinary difficulty more than ordinary difficulty	 1 000 3 000 5 000
2	Process for discovery and inspection of documents	If the family law case involves less than ordinary difficulty ordinary difficulty more than ordinary difficulty	 750 2 000 5 000
3	Preparation for and attendance at each examination for discovery	1 000 for each day or part of a day of examination for discovery	
4	Preparation for and attendance at each contested application	1 000 for each half day of attendance	
5	Preparation for and attendance at each judicial case conference or settlement conference	1 000 for each half day of attendance	
6	Preparation for and attendance at each uncontested application or trial management conference	500	
7	Preparation for and attendance at trial of family law case or of an issue in a family law case	2 000 per day for each day or part of a day of trial up to 5 days, and 3 000 for each additional day or part of a day of trial	
8	Preparation for and attendance at each examination in aid of execution and subpoena to debtor	250	
9	All process not otherwise provided for relating to execution on or enforcement of an order	250	

In addition to costs calculated under the schedule, a party who gets their costs also usually gets reimbursed for the money they spent on reasonable and necessary disbursements as well. Disbursements are out-of-pocket expenses for things like court filing fees, witness fees, transcripts, experts' fees, photocopies, couriers, postage, and the like.

The likelihood of a cost award being made after a hearing or trial can provide a strong incentive for people to try and settle their court proceeding. It can encourage parties to be more reasonable in their positions and try to reduce the number of issues that need court intervention.

For more information about costs, see the Legal Services Society's Family Law website's information page If you have to go to court [7] under the section "Costs and expenses."

The Notice to Mediate Regulation

Under the Notice to Mediate (Family) Regulation [10], someone who is a party to a court proceeding in the Supreme Court can make the other parties go to mediation by serving a Notice to Mediate on them.

A Notice to Mediate must be served at least 90 days after the Response to Family Claim is filed but at least 90 days before the scheduled trial date. Once the Notice is served, the parties *must* attend mediation unless:

1. a party has triggered a mediation meeting using a Notice to Mediate;
2. there is a protection order against a party;
3. the mediator decides that the mediation is not appropriate or will not be productive; or,
4. the court orders that a party is exempt because, in the court's opinion, it is "impracticable or materially unfair" to require the party to attend.

The Notice to Mediate (Family) Regulation provides the guidelines for proceeding with the mediation. In a nutshell:

1. the parties must jointly appoint a mediator within 14 days after service of the Notice to Mediate, and if they can't agree on a mediator, any of them may apply to a roster organization for the appointment of a mediator;
2. the mediator must have a pre-mediation meeting with each party to screen for power imbalances and family violence, and talk about preparing for the mediation;
3. the parties sign the mediator's participation agreement; and,
4. the parties attend a mediation meeting, which concludes when the legal issues are resolved or when "the mediation session is completed and there is no agreement to continue."

It seems unlikely that a mediation that people are forced to attend could produce a settlement. However, even compulsory mediation sometimes works. While no one is going to be happy being compelled to do something they'd rather avoid, if the process results in a settlement, it's probably worth it. The time and money spent on the mediation process will be a *fraction* of the time and money you'll spend on trial.

Resources and links

Again, we encourage readers to visit the online version of this chapter for more in-depth and up-to-date information about Supreme Court and Provincial Court litigation and procedure topics: https://bit.ly/JPBOFL

Legislation

- Provincial Court Family Rules [1]
- *Provincial Court Act* [15]
- Supreme Court Family Rules [3]
- *Supreme Court Act* [16]
- Court of Appeal Rules [8]
- *Court of Appeal Act* [9]
- *Court Rules Act* [18]

Resources

- Provincial Court Practice Directions [24]
- Supreme Court Family Practice Directions [10]
- Supreme Court Administrative Notices [11]
- Court of Appeal Practice Directives [14]
- *Tug of War* [1] by Mr. Justice Brownstone
- "The Rights and Responsibilities of the Self-Represented Litigant [2]" (PDF) by John-Paul Boyd

Links

- Legal Aid BC's Family Law website information on Provincial Court process:
  - Get a new family order in Provincial Court if you can't agree [10]
  - Provincial Court registries [6]
- Courts of British Columbia website [11]
- Provincial Court website [12]
- Supreme Court website [1]
- Supreme Court Trial Scheduling [12]
- Court of Appeal website [13]
- Guidebooks from the BC Supreme Court website [14]
- Justice Education Society's Court Tips for Parents (videos) [15]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 23 November 2023.

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[3] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court
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[5] http://canlii.ca/t/7vtc
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[11] https://www.bccourts.ca/
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[13] https://www.bccourts.ca/Court_of_Appeal/
[14] https://www.bccourts.ca/supreme_court/self-represented_litigants/guidebooks.aspx
[15] http://www.clicklaw.bc.ca/resource/1115

Family Law Agreements

Family Law Agreements

Family law agreements, like cohabitation agreements, marriage agreements and separation agreements, are contracts, just like the contract you might have with an employer, a landlord or a company you rent a car from: each party promises to do something in exchange for something the other party promises to do, and both parties expect that they'll be held responsible for fulfilling their promises. In family law, contracts like these are used to resolve the issues that come up when a relationship ends, although cohabitation agreements and marriage agreements are sometimes also used to decide how a relationship will be managed.

This chapter begins with an overview of family law agreements, and discusses the role they play during relationships and when relationships end. It also talks about the typical elements of family law agreements and discusses some of the things you might wish to keep in mind when negotiating and drafting an agreement yourself.

The other sections of this chapter look at cohabitation agreements, marriage agreements, and separation agreements in more detail, and provide additional information about enforcing an agreement and changing an agreement.

Introduction

People who sign a family law agreement when they marry or plan to marry are entering into a *marriage agreement*, also called a pre-nuptial agreement. People who sign an agreement when they start living together or plan on living together are entering into a *cohabitation agreement*, also called a living-together agreement. Under the *Family Law Act*, couples who live together for at least two years have the same rights when they separate as married couples do. As a result, there aren't any important differences between marriage agreements and cohabitation agreements.

The usual point of agreements like these is to say what will happen if the relationship breaks down, although they can also talk about how things will be handled during the relationship or if one of the parties dies during the relationship. The weird thing about marriage agreements and cohabitation agreements is that although they mostly talk about what will happen when a relationship ends, that may not be something that happens for five years or 20 years, or it may never happen at all. As a result, it can be difficult to make plans based on what the family's circumstances might be like at some unknown point in the future when the relationship ends.

Married spouses, unmarried spouses, and other unmarried couples who enter into an agreement after their relationship has broken down are entering into a *separation agreement*. A separation agreement is a contract that describes how some or all of the legal issues arising from the end of the relationship have been resolved.

All of these different kinds of agreement are legal contracts that describe the parties' entitlements and responsibilities towards each other. They can deal with everything from who gets to keep the Kenny G boxed CD set, to where the children will live, to how the parties will deal with their mutual friends, to who gets to keep the Ford Pinto. While these agreements usually deal with all of the legal issues that come up when a relationship ends, they don't have to. Some issues can be left for the courts to deal with. A couple might sign a *property agreement* dealing with just property issues, or a *parenting agreement* dealing with just issues about parenting after separation.

Despite the intentions a couple may have when they sign a family law agreement, the terms of their agreement may still wind up being reviewed by the court, and possibly changed, if one of the parties later has a problem with the agreement. While the court will pay a great deal of respect to any written agreement, if an agreement was unfairly negotiated, is significantly unfair, or becomes significantly unfair, the court will generally be willing to look into things and perhaps set aside the agreement and make an order on different terms.

The *Family Law Act* encourages people to make agreements resolving their disputes rather than going to court. Section 6 of the act says this:

> (1) Subject to this Act, 2 or more persons may make an agreement
>
> (a) to resolve a family law dispute, or
>
> (b) respecting
>
> (i) a matter that may be the subject of a family law dispute in the future,
>
> (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
>
> (iii) the implementation of an agreement or order.
>
> (2) A single agreement may be made respecting one or more matters.
>
> (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

Under section 214 of the act, however, the court may:

- set aside part of an agreement, without changing the rest of the agreement,
- incorporate all or part of a written agreement into an order, or
- make an order replacing all or part of an agreement.

The test the court must apply in deciding whether to set aside an agreement changes depending on the subject matter of the particular part of the agreement at issue. Some tests, like the test to make a child support order in place of an agreement on child support, are really easy; others, like the test to set aside an agreement on property division, are really hard. If you're asking the court to set aside an agreement, you must read the parts of the *Family Law Act* that deal with setting aside agreements.

The role of family law agreements

The fundamental purpose of all family law agreements is to settle an issue that has come up, or one that could come up, and might be the subject of a legal dispute.

It is almost always better to settle a dispute yourself rather than have the courts resolve your problem for you. It is usually cheaper to settle a dispute rather than take it to court, and negotiated settlements usually give you the best possible chance of maintaining a halfway decent relationship with your ex in the future. Family law agreements also give you an incredibly flexible way of resolving your dispute. Your agreement can be tailored to suit your particular circumstances and needs, and can be far more creative in resolving a problem than a court order ever could be.

Marriage and cohabitation agreements

Marriage agreements and cohabitation agreements usually talk about what will happen if the parties' relationship breaks down, although they can sometimes talk about how things will be handled during the relationship. These sorts of agreements are normally made before the parties marry or begin to live together, but can be made at any time during the parties' relationship.

It is important to know that you do not have to sign a marriage or cohabitation agreement just because your partner wants you to, or just because you're about to marry or start living with someone. While your partner may want you to sign an agreement, you are under no legal obligation to do so. With or without a family law agreement, remedies are almost always available under the common law, the *Divorce Act*, or the *Family Law Act* if problems crop up later on.

Marriage agreements and cohabitation agreements aren't always appropriate. Most people who enter into these agreements have been married before (once bitten, twice shy!), are coming into the relationship with children, are

coming into the relationship with significant assets or significant debts, or expect to receive significant assets during the relationship. A young couple who have no significant assets or debts and no children don't necessarily get any benefit from signing a marriage agreement or a cohabitation agreement.

During the relationship

The sorts of terms people want to apply during their relationships are most often financial. That being said, family law agreements are incredibly flexible and can require the parties to do anything imaginable, from caring for the children during the workweek, to having a certain number of vacations each year, to always wearing purple shirts on Thursdays, to sharing the household chores. Most of the time, people want to address issues like these:

- How will a joint bank account be managed? Will the parties contribute a fixed monthly amount to the joint account to cover shared costs?
- How will common household expenses be shared? Will specific bills be paid by a specific party or will they be shared by everyone?
- How will unexpected expenses be paid for? Will both parties contribute to the cost of big household repairs?
- How will savings, RESPs, RRSPs, and retirement funds be managed? Will each party be required to contribute a fixed monthly amount?
- How will each party's income during the relationship be handled? What will happen if someone gets an unexpected windfall, like a lottery win or an inheritance?

Most cohabitation and marriage agreements don't deal with these issues, and some paint only a vague picture of the parties' respective financial responsibilities. Other agreements are mind-bogglingly detailed and cover even the tiniest details. In my view, unless someone is spectacularly anal retentive, the less said in a marriage agreement or cohabitation agreement about how a relationship will be managed, the better. You wouldn't want every aspect of your relationship governed by a legal contract; that's exactly the sort of thing that encourages relationship breakdown.

After the relationship

The most common reason why people enter into a marriage agreement or a cohabitation agreement is to specify how property will be dealt with if the relationship comes to an end, although agreements like these can also deal with the payment or waiver of spousal support. It's hard to make plans about parenting after separation or child support before you've had any kids.

Agreements about the care of children or the payment of child support are only binding if they are made after separation or when the parties are about to separate.

Separation agreements

Separation agreements are made after a relationship has broken down. There is no need for the parties to have moved out or gotten a divorce when the agreement is signed; in fact, when a couple is married it's best to deal with the separation agreement before you go to court for a divorce order, just in case you can't reach an agreement.

Separation agreements are always the product of negotiations between the parties and, hopefully, their lawyers. The goal of a separation agreement is to deal with all or some of the legal issues related to the separation in a way that both parties are as happy with as possible. Separation agreements usually deal with the following issues:

- How will the children be cared for? How will important parenting decisions about the children be made?
- If the children will be living mostly with one parent, how much time will the children have with the other parent?
- How much child support will be paid and to whom, and which of the children's expenses will be shared between the parents?
- Should someone receive spousal support? If so, how much support should be paid and for how long?
- How will the family property be divided? Should any of the parties' excluded property be divided?

- How will the family debt be paid or split up?

Separation agreements can cover everything that is a problem for a couple, even things that the court would not ordinarily deal with or be able to deal with.

Separation agreements are binding from the moment they are signed by both parties, unless the agreement says something different. They operate from the time they are made and, where children, child support, or spousal support are issues, they often continue to operate indefinitely into the future. Theoretically, separation agreements are binding on the parties until they die. In practice, however, most people stop relying on the agreement once the children have grown up, left home, and become independent, even though their agreement continues to be binding on them.

The anatomy of a family law agreement

The point of a family law agreement is to make a legal contract that both parties intend to be bound by, and that the court can and will enforce if a party doesn't live up to their obligations. In order to be legally binding and enforceable, agreements must be negotiated, written, and signed in a certain way and include certain terms.

Negotiating the terms of an agreement

Family law agreements are about really important things like where the children will live, who will pay support to whom, and how the parties will divide their property and debts. As a result, the terms of the agreement are almost always the result of lots of talking and negotiating. It is critical that:

- each person has all of the information that is necessary to figure out what's a good deal and what's not,
- each person understands their legal rights and obligations to know what's a good deal and what's not,
- each person is able to express their views and contribute when negotiating the agreement, and
- there is no pressure to reach an agreement on either party, beyond the importance of reaching a reasonable agreement and saving money on legal fees and court costs.

Properly negotiating and entering into a family law agreement isn't simply a matter of putting the important parts on paper and signing the document. There must be fairness in the way an agreement is negotiated, fairness in the way it is drafted, and fairness in the way it is signed. The people who are negotiating the agreement must be able to understand the agreement, be capable of agreeing to it, and agree to it voluntarily. This is what section 93(3) of the *Family Law Act* says about agreements for the division of property and debt:

> (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 ... 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.

This is fairly straightforward:

- you have to make full disclosure of your income, your expenses, your assets and your debts, and any other information that is important to the agreement,
- you can't exploit the other party's weaknesses to get a good deal for yourself,
- you have to make sure that the other party understands exactly what the agreement means and how it will affect their life, both now and in the future, and
- you can't force or pressure someone to sign the agreement, you can't trick or cheat someone into signing the agreement, and the agreement must be reasonable.

Although section 93 is about property, section 164(3) says the same thing about agreements for spousal support, and I think that this is a pretty reasonable standard to use for all other issues in a family law agreement. If you don't want the court to throw out your agreement, you've got to take the time to do it right, and you've got to be fair and not take advantage of the other party.

The legal formalities common to all family law agreements are these:

- The parties to the agreement must provide full financial disclosure to each other and must be completely honest in describing their circumstances.
- In most cases, the agreement must be in writing. While oral agreements have been upheld by the courts, it can be very difficult to establish the terms of the agreement, and oral agreements cannot be enforced until a court has determined what the terms of the agreement are.
- The parties can't be under any sort of legal disability such as insanity.
- The parties must both sign the agreement of their own free will, without unfair pressure by the other party.
- The agreement must be properly executed, which means being signed by each of the parties in the presence of at least one witness who is not a party to the agreement.

As a general rule, each person who enters into a family law agreement should get *independent legal advice*, advice from their own lawyer given before the agreement is signed, about:

- what the agreement means,
- what rights and obligations the agreement gives to each party,
- how the agreement does or doesn't limit the other legal remedies that might be available,
- how the agreement may affect each person over the short- and long-term, and
- the options and remedies that would have been available if everyone had decided to go to court instead of settling things with an agreement.

Independent legal advice is important for two reasons: it ensures that the parties to the agreement know exactly what their rights and obligations are; and, it makes the agreement stronger by preventing a party from claiming later on that they didn't fully understand what the agreement meant or how it would impact them. If you really want to make sure that your agreement will stand the test of time, you've got to make sure that you and the other party have both seen a lawyer about the agreement!

Writing an agreement

Lawyers often draft family law agreements in a standard format using standard terms, tailored, of course, to the specific needs and circumstances of the parties. Just because family law agreements are often written using standard terms and standard language doesn't mean that an agreement using different wording will be set aside because it expresses things in a different way. As long as it is clear what the intentions of the parties are and as long as the agreement is fair and continues to be fair, the courts will usually uphold the agreement.

A British Columbia company called Self-Counsel Press publishes a variety of do-it-yourself agreement kits along with instructions for completing and executing them, or you might try LawDepot.com [1], an American company which says that it has family law agreement kits suitable for British Columbia.

There are still other resources available for free that might help, and your library might have a copy of the Self-Counsel Press materials available for loan. Guides to drafting family law agreements are also available at branches of Courthouse Libraries BC [2]; one of the very best is the *Family Law Agreements: Annotated Precedents* [3] published by the Continuing Legal Education Society of British Columbia.

What follows are examples of the typical elements of a family agreement, using the example of John Doe and Jane Doe, a married couple who are entering into a separation agreement. These examples are not complete and are provided only to illustrate a point; they should not be used to draft your own agreement!

The introduction

The introduction to an agreement, also known as the *exordium* (isn't that a great word?), is the portion of an agreement that identifies the parties to the agreement, provides a title for the agreement, and sets out the date on which the agreement is made. This section typically looks like this:

> THIS SEPARATION AGREEMENT is made on this the 1st day of March, 2022.
>
> BETWEEN:
>
> Jane Iphegenia Doe
> of 123 King Street, Anytown, British Columbia
> ("Jane")
>
> AND:
>
> John McKinnon Doe
> of 456 Queen Street, Anytown, British Columbia
> ("John")

The recitals

The recitals provide a short description of the parties' circumstances when the agreement is made. They usually talk about the basic facts of the parties' relationship, give the names and birth dates of any children, describe the property and debts that the agreement deals with, and describe the parties' incomes, among other things.

The recitals are the foundation on which the agreement is built. They should be sufficient to explain to a complete stranger why the parties entered not just into any agreement, but this particular agreement. The recitals set out the facts that were important to the parties at the time the agreement was made.

In the case of a separation agreement, the recitals usually look something like this:

> WHEREAS:
>
> A. Jane and John were married on August 1st, 2006 at Anytown, British Columbia.
>
> B. There are two children of the marriage:
>
> i) Buckminster Elliot Doe, born on March 5th, 2008, and
>
> ii) Randall Eustace Doe, born on April 11th, 2010
>
> (together, "the Children").
>
> C. Jane is presently employed part-time as a mason by ABC Construction Ltd. and has an annual income of approximately $34,000.
>
> D. John is presently employed full-time as a chef by DEF Resorts Inc. and has an annual income of approximately $45,000.
>
> E. Jane and John have been separated since December 25th, 2019 (the "Date of Separation"), when Jane left the family home.

F. Since the Date of Separation, the Children have remained living with John in the family home, and Jane has had parenting time with the Children every other weekend from Friday after school until Sunday at 7:00pm.

The rest of the recitals will continue in the same way. Other recitals might describe the make, model, and value of each party's car, the address and value of the family home, the credit cards owned by the parties and the amounts owing on them, and so on. Essentially, every fact that is important to the agreement should be put into the recitals to the agreement.

By the way, the bits where you see a capitalized word in brackets between quote marks, like this

(the "Date of Separation")

are called *defined terms*. These are very helpful because you can use a defined term as a shorthand way of referring to the same thing throughout an agreement. Instead of saying "the house owned by Jane and John at 123 Main Street in Anytown, British Columbia" every time you need to talk about the house, you could say "the house owned by Jane and John at 123 Main Street in Anytown, British Columbia (the "Family Home")" once, and whenever you need to mention the property after that you can just say "the Family Home."

The operative clauses

The operative clauses of an agreement are the nuts and bolts of the agreement. They are the legal terms of the agreement and describe what each party's rights and obligations are. In the case of a separation agreement, the operative clauses might look like this:

JANE AND JOHN AGREE THAT:

1. Jane and John will live separate from each other.

2. Neither party will molest, annoy, or harass the other or their friends, relatives, and associates.

3. Except as is specifically provided in this Agreement, Jane and John will each keep all property presently in their possession and control as their own property, free and clear of any and all claim by the other.

THE CHILDREN

4. Jane and John are the guardians of the Children, and John will have the Children's primary residence.

5. Jane and John will exercise all parental responsibilities with respect to the Children in consultation with each other. Jane and John will make every effort to agree on decisions that need to be made concerning the Children, and will make their decisions in the best interests of the Children. However, in the event that Jane and John cannot agree on a particular decision, John will have the right to make that decision.

6. Jane will have parenting time with the Children every Wednesday night, from the end of school or 4:00pm until 8:00pm, and on every other weekend from the end of school or 4:00pm on Friday until the following Sunday at 8:00pm.

7. Jane will have additional parenting time with the Children for one-half of the Children's winter school holiday, the whole of the Children's spring school holiday, and for two two-week periods during

> the Children's summer school holiday.
>
> CHILD SUPPORT
>
> 8. Jane will pay child support to John in the amount of $525 on the first day of each and every month, continuing for so long as the Children remain "children" as defined by the *Family Law Act*.

The rest of the operative clauses will continue in the same way. Other paragraphs might deal with specific property such as a car or the family home, the payment of debts, and the sharing of the children's expenses. The operative clauses might also say who will pay what bills, whether and for how long spousal support will be paid, who will pay for the divorce (if the people are married), which laws (e.g. *Divorce Act* or *Family Law Act*) will govern the interpretation of the agreement, and so on.

The signatures

The last part of a family law agreement is where each of the parties will sign their names in the presence of a witness. The parties can sign the agreement at the same time or separately, at different times, and in different locations. Either way, each party's signature must be witnessed, and the witness, after seeing the party sign the agreement, must sign their own name as a witness to the agreement. The witness usually provides some other information, typically their full name, address, and occupation.

> SIGNED by Jane)
> on March 20, 2022,)
> at Anytown, BC,)
> in the presence of:)
>)
> _____) _____
> Signature) JANE DOE
> _____)
> Name)
> _____)
> Occupation)
> _____)
> Address)
> _____)

This would be repeated for John's signature and that of John's witness.

The witnesses to the parties' signatures do not become parties to the agreement, they're not bound by the agreement, and the agreement cannot be enforced against them. The signature of the witness simply says that they saw the particular party sign the agreement, in case someone ever denies signing the agreement.

It is also a good idea for each of the parties and the witnesses to initial each page of the agreement, other than the page with the parties' signatures. This helps stop people from claiming that a page of the original agreement was later replaced by a page with different terms.

The formatting of the final agreement document should be looked at to make sure that the last page with all of the signatures also includes at least one or two of the operative clauses at the top. You don't want the signatures alone on a page. For example, if your separation agreement has 13 pages containing 30 operative clauses, page 13 should have operative clause 30 directly above the signatures.

For a quick summary of how to execute a family law agreement, see the *Helpful Guides & Common Questions* part of this resource for How Do I Execute a Family Law Agreement?.

Note about oral agreements

Oral agreements are possible, but do not offer nearly the same protection, certainty, or overall purpose as a written agreement. Oral agreements alone should be avoided and are not a practical alternative to proper written agreements.

For one thing, proving the existence of an oral agreement — especially when the other person disputes you — is a complex and risky task, and you need evidence.

Secondly, if there's a written agreement that deals with property, section 94(2) of the *Family Law Act* says that a judge cannot make a property division order without first hearing an application to set aside all or some of the written agreement. Applications to set aside written family law agreements are made under section 93, and setting aside any portion of a written agreement requires the person applying to prove one of the situations under section 93(3) applies:

- a spouse failed to disclose significant property or debts,
- a spouse took improper advantage of the other spouse's vulnerability,
- one of the spouses did not understand the nature or consequences of the written agreement, or
- the contract would be voidable under the common law rules around contracts.

If the applicant cannot show one of those situations existed when the written agreement was entered into, then they can try to have it set aside for being *significantly unfair* under section 93(5), although those claims are difficult to succeed with.

Ultimately, a valid written agreement that satisfies the criteria under section 93(1), meaning it's not only in writing but signed and witnessed, is a significant hurdle that stands in the way of an applicant who wants to get the court to issue an order respecting property division.

Oral agreements, on the other hand, do not restrict a court from making a property division order. Oral agreements become but one factor that a court may consider under section 95 in determining that an equal division of family property is *significantly unfair*, and can be used to argue for division of excluded property under section 96. As the court said in *Tereposky v. Fooks* [4], 2023 BCSC 1989, "Informal agreements regarding the division of assets and the spouses' financial arrangements during the relationship *may support a finding of significant unfairness*" (emphasis added). Given this, it is better for parties to make a written agreement than to attempt to rely on an oral agreement.

Negotiating considerations

For many couples, negotiations begin and end over a cup of coffee at the local Tim Hortons. This is fine, providing that everyone is relatively friendly and the parties are approaching their negotiations from a relatively level footing. The court will respect the agreements that negotiations like these produce, on the basis that people are free to make their own bargains and to contract to whatever they like.

The views of the court

Problems can arise when negotiations aren't completely fair. In a 2003 case from the Supreme Court of Canada, *Miglin v. Miglin* [5], [2003] 1 SCR 303, the court held that family law agreements should not be considered under exactly the same standards that are applied to ordinary commercial contracts because family law agreements are usually negotiated at "a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable." Some of these vulnerabilities were described in a 2000 case from Ontario, *Leopold v. Leopold* [6], 2000 CanLII 22708 (ON SC):

> "One party may have power and dominance financially, or may possess power through influence over children ... often both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other. The complex marital relationship is full of potential power imbalance."

In a 2009 case, *Rick v. Brandsema* [7], [2009] 1 SCR 295, the Supreme Court of Canada added another factor to this list: incomplete or misleading financial disclosure. In this case, the court noted that parties can only give their genuine and informed consent to an agreement if they have the information they need to decide if the agreement is acceptable.

Potential unfairness, then, can come from:

- exploiting a party's emotional or psychological vulnerability,
- influence over a party through dominance or oppression,
- control over the family finances,
- influence over the children's allegiances, or
- access to or control over the release of financial information.

Where unfairness is found, the court will be more likely to set aside an agreement or to make an order on terms different than those set out in an agreement. As a result, people negotiating family law agreements must take special care to ensure that everyone is on a level playing field and are negotiating from positions of relative equality. Here are some things that can help:

- **Independent legal advice:** Make sure everyone has legal advice about the meaning and consequences of the agreement from their own lawyers. Have the lawyers who provided the independent legal advice witness the parties' signatures on the agreement. Have the lawyers sign certificates saying that they provided legal advice to their clients.
- **Respect vulnerabilities:** Stop negotiations when someone is too upset to continue or appears to be compromised in any way. If there is any doubt that a party is not in their right mind, respectfully stop the negotiation and come back to the table later. Consider the need for counselling or therapy before continuing.
- **Make full disclosure:** Always make full disclosure of all important financial information, whether disclosure has been requested or not. Have documentation available of current income, past income, bank and investment account balances, outstanding debts, property values, values of shares and options, art and jewelry appraisals, and so on.
- **Never lie:** Intentionally misleading someone about the value of something, like the amount of a debt, past income and future income expectations, or any other relevant fact, will always undermine the strength of an agreement. Be scrupulously honest and transparent at all times.
- **Know the law:** The *Divorce Act* and the *Family Law Act* say when and why spousal support and child support should be paid. The *Divorce Act* and the *Family Law Act* talk about the time children should have with their parents and how their parents make decisions affecting them. For married spouses and unmarried spouses, the *Family Law Act* talks about how property and debt should be divided. Know how the law treats these different subjects and ensure that your agreement doesn't stray too far from the basic law.

The tests under the *Family Law Act*

Unfairness is a key element of the tests under the *Family Law Act* to set aside the parts of agreements about the division of property and debt and about spousal support, as we saw under section 93(3), reproduced above.

Under section 44(4) of the act, the court can set aside the parts of agreements about parenting arrangements if the parenting arrangements are not in the best interests of the child:

> On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

The same test is used to set aside the parts of agreements about contact.

Under section 148(3), the court can set aside the parts of agreements about child support if it would make a different order:

> On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

Section 150 is the part of the *Family Law Act* dealing with how child support is calculated.

Drafting considerations

It is always best to have a lawyer prepare any sort of contract, including family law agreements, that you intend to sign. While the Self-Counsel Press forms will likely be considered to be legally binding, a family law lawyer will be best able to advise you of the duties and obligations involved in the contract, the rights you might be giving up by entering into the contract, and other unexpected but critical issues the agreement might involve, such as:

- income tax consequences,
- the transfer of property,
- dividing property located outside of British Columbia, or
- liabilities to third parties and creditors.

If you can't or don't want to hire a lawyer, here are a few things you will want to keep in mind.

Don't use "legalese"

Some people are tempted to use words that sound particularly legal, like using the word "issue" to refer to children. Avoid this at all costs, and try to use plain language to express the content of your agreement. Words like "issue" can have a particular legal meaning – in this case first-generation, directly-descended heirs — that are often at odds with what people think the term means. As a result, if you use legalese there is a risk that your contract won't wind up meaning quite what you think it means.

Be as clear as possible

Ask yourself these questions:

- What would a complete stranger think of your agreement?
- Would the stranger be able to understand what you mean?
- Are any parts of the agreement vague or capable of having more than one meaning?
- Do you understand what the agreement means?

If a term of your agreement has more than one possible interpretation, it may lead to future conflict between yourself and the other party. If there are two cars, make sure each car is identified separately and distinctly, using defined terms like "Jerry's Ford Pinto" and "Mary's Pontiac Sunfire," and always refer to those cars in that way, and never just as "the car." If a term might mean more than one thing, change it to be more precise and more specific!

Also, remember that while you and your partner may know exactly what "the old spoons" might mean, a court may not, especially if there are a lot of different sets of spoons involved. It's best to be specific, like "the Teaspoons of the World silver spoon collection Jerry inherited from his grandmother Mabel."

Avoid agreeing to agree

An agreement that requires a further, future agreement — "the household furniture will be divided as Mary and Jerry agree" — is open to further, future conflict. Whenever possible, try to limit an agreement to all that can be agreed upon at the moment and try to agree on as much as possible.

Remember the loose ends

It is always best to tie up any loose ends. This may require some thought as it isn't always obvious what else needs to be included. If a house has to be sold, for example, who will list it and hire the realtor? Who will live in it until the sale? How will the list price be chosen? Under what conditions will the list price be reduced? Are there any repairs or improvements that need to be made, and if so who will do them and how will they be paid for? How will the sale proceeds be dealt with? What debts will be paid from the sale proceeds? These things should all be specified, where at all possible.

Be realistic

You've got to live with the agreement; make sure it is something you can live with, not just now but in three or five years. Make sure that the obligations you must fulfill under the agreement are obligations that you can reasonably fulfill. Promising to pay off a credit card within a year, for example, isn't always the easiest thing to do and it isn't always practical.

Sometimes people who have separated are desperate to have done with it, to get a deal wrapped up and signed. If you feel rushed into an agreement, step back and take two (or twenty-two) deep breaths. The world will not end if you take a moment or a week to think about something. It is critical that whatever you wind up agreeing to is something that you will still be okay with next month, next year, and in 10 more years. It can be very difficult to change an agreement in the future, especially one about the division of property or debts, if only one of the parties wants the agreement to be changed. Be patient and take your time.

Use sample clauses with caution

Before copying a term from someone else's agreement into your own agreement, make sure you fully understand what that term means. A clause that suits one couple in one situation may be entirely inappropriate for another couple. It is all too easy to adopt a term that sounds good or appropriate, without fully considering what that term means. Be cautious, be prudent, be careful.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]

Links

- Court Orders [8] from Legal Aid BC
- Thinking about leaving? [8] from Legal Aid BC
- Parenting Apart [11] from the BC Ministry of the Attorney General
- Parenting Arrangements After Separation or Divorce [19] from the Canada Department of Justice
- Legal forms and documents [9] from Legal Aid BC
- I've been served with a court form [10] from Legal Aid BC

Resources

- Marriage Agreements and Cohabitation Agreements [6] from Dial-a-Law by the People's Law School
- "Legal forms & documents" [11] from Legal Aid BC
  - Under the section "Agreements" see "Making an agreement after you separate", and "Who can help you reach an agreement?"
- "Living Together or Living Apart" [14] from Legal Aid BC
  - See chapter 2 on making agreements
- "Separation Agreements: Your Rights and Options" [13] from Legal Aid BC and West Coast LEAF
- "Coping with Separation" handbook [15] from Legal Aid BC
- Family Law in BC: Quick Reference Tool [25] from Legal Aid BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

References

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[2] http://www.courthouselibrary.ca/about/libraries.aspx
[3] https://www.courthouselibrary.ca/catalogue-item?cid=7280
[4] https://canlii.ca/t/k15d5
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[6] http://canlii.ca/t/1w9mm
[7] http://canlii.ca/t/22hw5
[8] https://www.clicklaw.bc.ca/resource/4645
[9] https://www.clicklaw.bc.ca/resource/4653
[10] https://www.clicklaw.bc.ca/resource/4652
[11] http://www.clicklaw.bc.ca/resource/4653

Cohabitation and Living Together Agreements

Cohabitation agreements are contracts signed by couples who plan to live together or who are already living together. Cohabitation agreements typically deal with things like how property and debt will be divided or whether spousal support will be paid if the relationship ends. Cohabitation agreements can also deal with things during the relationship, like how the housework is distributed and how the household expenses are paid. There is no legal requirement for people to sign a cohabitation agreement when they decide to live together.

This section talks about when and why cohabitation agreements are usually signed and the legal requirements of valid cohabitation agreements.

Entering into a cohabitation agreement

Cohabitation agreements, also known as "living together agreements," are usually signed before or shortly after a couple starts living together. A couple may enter into a cohabitation agreement with the intention of addressing things that might happen during the time they live together, the time they *cohabit*, but cohabitation agreements are most often intended to address the issues that might arise if their relationship breaks down.

It is important to know that there is no law that says you must sign a cohabitation agreement if you're living with someone or plan on living with someone.

The person you're planning on living with can't force you to sign a cohabitation agreement either. Deciding not to sign a cohabitation agreement might end your relationship, or stop you from living together, but that's your choice. You don't have to sign a cohabitation agreement.

Unmarried people and cohabitation agreements

The big difference between marriage agreements and cohabitation agreements is that people who sign a cohabitation agreement aren't married and may not intend to get married, or at least not just yet. Likewise, they may become unmarried spouses if they live together for long enough or they may not. As a result, it's important to understand exactly how the legal status of unmarried spouses differs from both the legal status of other unmarried couples, and from the legal status of married spouses, before you even start to think about a cohabitation agreement.

Married people have been legally married, either by a civil ceremony performed by a marriage commissioner or in a religious ceremony performed by a religious official, and are "spouses" under the *Family Law Act*. Married spouses who go to court are entitled to ask for orders under the *Family Law Act* about the division of property and debt, spousal support, and, if they have children, orders about parenting arrangements and contact.

An unmarried couple will become "spouses" for the purposes of the *Family Law Act* if:

- they've lived together in a marriage-like relationship for two years, or
- they've lived together in a marriage-like relationship for a shorter period of time and have a child together.

Unmarried spouses who have lived together for at least two years and go to court are entitled to ask for orders under the *Family Law Act* about the division of property and debt, spousal support, and, if they have children, orders about parenting and contact. Their rights are exactly the same as married spouses, except that it's only married spouses who must get a divorce to end their relationship. Married couples should read the discussion on Marriage Agreements in the next section of this chapter.

Unmarried spouses who have a child and have lived together for less than two years are only entitled to ask for orders about spousal support and, if they have children, orders about parenting and contact. They can't ask for orders about the division of property and debt under the *Family Law Act*.

In some situations, an unmarried couple can become spouses for the purposes of the *Family Law Act* even if they do not live together in the same house all of the time. In other situations, an unmarried couple may not become spouses

if, even after living together for two years, their relationship isn't "marriage-like." If you are not sure about whether you would be a spouse for the purposes of the *Family Law Act*, it is a good idea to get legal advice about this issue as part of deciding whether you need an agreement.

An unmarried couple who aren't spouses under the *Family Law Act* can only ask for orders about parenting and contact. They can't ask for orders about the division of property and debt or spousal support under the *Family Law Act*.

For the purposes of this discussion, the critical distinction between unmarried spouses who have lived together and other unmarried couples lies in the different legal issues that arise when these different sorts of relationship come to an end. Here's a summary:

	Unmarried Spouses (together for two years or more)	**Unmarried Spouses (together for less than two years but have a child)**	**Other Unmarried Couples**
Divorce			
Guardianship	Yes	Yes	Yes
Parental responsibilities and parenting time	Yes	Yes	Yes
Contact	Yes	Yes	Yes
Child support	Yes	Yes	Yes
Spousal support	Yes	Yes	
Property and debt	Yes		
Personal protection orders	Yes	Yes	Yes
Property protection orders	Yes		

Legal issues about the care and financial support of children born to unmarried people are fairly straightforward, since these issues mostly depend on whether someone is a *parent*, not on the nature of the relationship between the parties. Whether the parents are also "spouses" doesn't matter.

Deciding whether a cohabitation agreement is appropriate

The most common reason why a couple signs a cohabitation agreement is to protect their separate property and income, so that each person's property going into a relationship is preserved and stays theirs if the relationship comes to an end. Sometimes one person wants to protect property from claims by the other person; sometimes a person will want to protect property from the other person's debts. Generally speaking, most couples who are thinking about executing a cohabitation agreement want a "I'll keep what's mine, you'll keep what's yours" sort of deal, and that's fine.

A couple might also enter into a cohabitation agreement to address spousal support if the relationship comes to an end. Sometimes a person will want to guarantee a certain minimum payment, but most often people want to be protected from having to pay spousal support at all. That's fine too, it happens all the time.

Cohabitation agreements are usually entered into when:

- the relationship is expected to be a long one,
- one or both parties have a substantial amount of property going into the relationship,
- one or both parties have significant debts going into the relationship,
- one of the parties has significantly more income than the other,
- one or both parties expect to acquire property during the relationship from, for example, a business, an inheritance, a court award, a gift, or employment income,

- one or both parties are bringing a child into the relationship, or
- the parties expect that spousal support may be an issue if the relationship ends.

Cohabitation agreements are generally not appropriate when:

- the couple are young,
- neither party has significant property or debt going into the relationship,
- neither party is bringing any children into the relationship, and no children are expected right away, and
- both parties are working out of the home and expect to continue working out of the home.

On top of these considerations, the *Family Law Act* also says that an agreement made before the parties have separated cannot deal with:

- parental responsibilities and parenting time, or
- child support.

Cohabitation agreements can also be useful to set rules for how the parties will manage things during the relationship, although this type of cohabitation agreement is fairly rare. When a cohabitation agreement is needed to deal with those issues, the parties' financial positions and plans for the future may not be as important.

The usual sorts of things a household management type of cohabitation agreement might be intended to address include:

- Who will pay for the household expenses? Will each party pay for a specific set of bills, or will the parties share all the bills, perhaps in a set amount?
- Will the parties keep separate bank accounts, or will they have a joint account for household expenses? If there is a joint account, how will each party contribute to the account?
- Who will do the household chores? Will each party be responsible for a list of particular tasks?
- How will children brought into the relationship be cared for? Will the other party assume any parenting tasks or adopt a parenting role?

If, at the end of the day, a cohabitation agreement is appropriate and desirable, the parties will negotiate the terms of the agreement and someone, whether a lawyer or one of the parties, will draft the written agreement. As with all family law agreements, it's important that both parties get independent legal advice about what exactly the agreement means, how it affects their present rights and responsibilities towards one another, and how it will affect those rights and responsibilities if their relationship comes to an end. Getting independent legal advice also strengthens the agreement by preventing one spouse from saying "I didn't know what it meant!" if the agreement is challenged later on.

Finally, a good cohabitation agreement should specify what will happen if the parties marry. The agreement could continue in effect after the marriage, terminate when the parties are married, or be reviewed and revised by the parties at the time of the marriage. In any case, the prospect of marriage and its impact on the cohabitation agreement should be dealt with in some manner.

Avoid do-it-yourself cohabitation agreement kits

Staples, Chapters, London Drugs, and other stores generally carry a wide range of DIY legal products, from doing your own will to getting your own divorce.

In my view, most of these do-it-yourself kits are fine for most people most of the time. However, cohabitation agreements can be complicated and must be drafted with a good knowledge of family law, about cohabitation agreements in particular, and the general law applicable in British Columbia. Using a do-it-yourself cohabitation agreement kit is not always a good strategy.

If you think that you absolutely must have a cohabitation agreement, it's well worth spending $1,500 to $4,000 to have a lawyer write it up for you, rather than spending $15,000 to $40,000 on lawyer's fees down the road if the agreement is flawed.

Legal and formal requirements of a cohabitation agreement

The point of entering into a cohabitation agreement is so that, at some later time, the contract will be enforced by a judge if someone fails to live up to the responsibilities they've agreed to. As such, a cohabitation agreement, just like any other family law agreement, must conform to certain basic rules in order to be legally binding and enforceable, including these:

- A cohabitation agreement must be in writing. While oral agreements have been upheld by the courts, it can be very difficult to establish the terms of the agreement, a judge is not prohibited from making orders about property division that contradict a merely oral agreement, and oral agreements cannot be enforced until a court has determined what the terms of the agreement are.
- The cohabitation agreement must be signed by each party and should be signed in the presence of a witness. Although an unwitnessed written agreement can be treated like a witnessed written agreement where the court finds it "appropriate to do so in all of the circumstances", it is a very good idea to have a witness so that they can confirm that the parties signed the agreement, in case one of them denies signing it in the future. As well, sections 94 and 165 of the *Family Law Act* prevent the court from making orders about property and debt or spousal support that have been addressed in a written and witnessed agreement unless the written agreement is aside.
- Neither party should be under a legal disability, like being under the age of majority or not being of sound mind, when signing the agreement. However, children who are parents or spouses may enter into a binding agreement.
- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these simple formalities of a family law agreement, you might want to think about certain other principles of contract law like these:

- The parties must each enter into the agreement of their own free will, without any coercion or duress by the other party, or by anyone else for that matter.
- Both parties must make full and complete disclosure of their circumstances going into the agreement. This disclosure should include complete information about each party's income and each party's assets and debts.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may at some point in the future be interpreted by the court in favour of the party who didn't have the lawyer.
- The court will attempt to interpret and give a specific meaning to ambiguous terms of a contract wherever possible, rather than just setting the agreement aside.
- If a term of a cohabitation agreement is found to be invalid, only the invalid part of the agreement will stop being in effect. The remainder of the agreement will continue to be binding on the parties.

Aside from these considerations, it's also important to remember that cohabitation agreements that deal with property and debts or issues like spousal support are usually only meant to be used when the relationship comes to an end, at some unknown time in the future. As a result, it can be difficult to guess what each party's situation will be like when the agreement begins to operate and whether it will still be appropriate and fair. Because of these problems, hiring the services of a lawyer to prepare a cohabitation agreement is highly recommended. Crafting a solid cohabitation agreement is a tricky business at the best of times.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]

Links

- "Legal forms & documents" [1] from Legal Aid BC
  - Under the section "Agreements" see "Making an agreement when you live together"
- Marriage Agreements and Cohabitation Agreements [2] from Dial-a-Law by the People's Law School

Resources

- "Living Together or Living Apart" [14] from Legal Aid BC
  - See chapter 2 on "Living Together - Making Agreements"
- "Starting Relationships" video [12] from JP Boyd, QC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

References

[1] https://clicklaw.bc.ca/resource/4653
[2] http://www.clicklaw.bc.ca/resource/1259

Marriage Agreements

Marriage agreements are contracts signed by people either before they marry or shortly afterwards. Most marriage agreements are prepared and signed well before the date of that marriage, and that kind of approach to timing is usually a very good idea. Marriage agreements are normally intended to deal with some of the legal issues that may arise if the marriage breaks down, but they can also deal with how day-to-day things will be handled during the marriage.

This section discusses when and why marriage agreements are usually entered into, the legal requirements of a valid marriage agreement, and the possible subjects of a marriage agreement.

Entering into a marriage agreement

While a couple might enter into a marriage agreement with the intention of addressing things that could happen during the course of their marriage, more often these agreements are intended to address the issues that may arise if the marriage breaks down. Marriage agreements are binding on the parties the way any other legal contract is binding on people. They can be enforced by the courts if someone tries to avoid or change an obligation they have agreed to.

Most couples who marry do not have a marriage agreement. In fact, there is no law that says you must sign a marriage agreement if you're married or planning to marry someone.

The person you're planning on marrying can't force you to sign a marriage agreement either. Deciding not to sign a marriage agreement might end your relationship and the chances that you'll actually get married, but that's your choice. You don't have to sign a marriage agreement.

When a marriage agreement is a good idea

Marriage agreements are usually appropriate when:

- one or both of the parties have a substantial amount of property going into the marriage,
- one of the parties expects to acquire substantial property during the marriage, through, for example, a business, an inheritance, a settlement or court award, or a gift,
- the parties want to avoid some of the stress and anger that can come after separation by deciding in advance how certain difficult issues, like the division of property and debt, will be dealt with,
- one or both of the parties experienced an ugly court battle leaving a previous relationship,
- one or both of the parties will be bringing children from a previous relationship into the marriage, or
- one of the parties is entering the marriage with substantial debt.

In most cases, people generally want to protect the property that they're bringing into the marriage and avoid the scheme for dividing property and debt set out in the provincial *Family Law Act*; many people are looking for an "I'll keep what's mine, you'll keep what's yours" sort of deal, and that — or any other reasonable kind of arrangement — is precisely what you can get with a marriage agreement.

When a marriage agreement might be a bad idea

A marriage agreement may not be appropriate when:

- neither party has significant property,
- neither party has significant debts,
- both parties are relatively young and expect their marriage to be permanent, and
- neither party is bringing any children into the marriage from another relationship.

In circumstances like these, there really isn't much point to having a marriage agreement. There aren't any kids to worry about and neither party has any assets to protect going into the marriage. What purpose would a marriage agreement serve?

On top of that, the *Family Law Act* also says that an agreement made before the parties have separated cannot deal with:

1. parental responsibilities and parenting time, or
2. child support.

Marriage agreements are odd things anyway, as they tend to lend an unpleasant and sometimes petty dimension to what ought to be a joyous occasion. If there's no good reason to have a marriage agreement, don't have a marriage agreement.

Negotiating a marriage agreement

If a marriage agreement is appropriate and desirable, the people involved will negotiate the terms of the agreement and one or both of the parties will draft a written agreement. As with all family law agreements, it is important that both parties make complete financial disclosure and get independent legal advice about what exactly the agreement means, how it affects their present rights and responsibilities towards one another, and how it will impact on those rights and responsibilities if the marriage comes to an end. Getting independent legal advice makes the agreement harder to change later on by preventing one spouse from saying "I didn't know what it meant" or "she had the lawyer, not me."

Remember what section 93(3) of the *Family Law Act* says about the test to set aside agreements for the division of property and debt (the same principles apply to agreements about spousal support under section 164(3)):

> (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 ... 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.

Marriage agreements should be signed well in advance of the marriage ceremony. If an agreement is being negotiated on the brink of the wedding, the court may be concerned about the fairness of the circumstances in which the agreement was negotiated and made. The emotional stress involved in arranging and potentially cancelling the wedding might be found to mean that someone was coerced into signing the agreement.

On the other hand, there's nothing wrong with signing a marriage agreement after the ceremony, except that the spouse who wants the agreement loses a fair bit of bargaining power once the wedding is done.

Avoid do-it-yourself marriage agreement kits

Bookstores and news stands often carry a wide range of DIY legal products, from doing your own will to getting your own divorce.

In my view most of these do-it-yourself kits are fine for most people most of the time. They are not fine for marriage agreements. Marriage agreements can be terribly complicated, more so than separation agreements, and must be drafted with a good knowledge of family law in general, and marriage agreements in particular. Using a do-it-yourself marriage agreement kit is really not a good strategy.

If you figure that you absolutely must have a marriage agreement, it's well worth spending $1,500 to $4,000 to have a lawyer draw it up correctly for you, rather than spending $15,000 to $40,000 on lawyer's fees down the road if the agreement is flawed.

Legal and formal requirements of a marriage agreement

The point of entering into a marriage agreement is so that, at some later time, the contract will be enforceable in court if the parties fail to live up to it. As such, a marriage agreement, just like any other family law agreement, must conform to certain basic rules, including the following:

- A marriage agreement must be in writing.
- The agreement must be signed by each party and should be signed in the presence of a witness. Although an agreement made without a witness can be valid and binding, it is a very good idea to have a witness so that they can confirm that the parties signed the agreement, in case one of them denies signing it in the future. As well, sections 94 and 165 of the *Family Law Act* prevent the court from making orders about property and debt that have been addressed in a written and witnessed agreement unless it sets the agreement aside.
- Neither party should be under a legal disability, like being under the age of majority or not being of sound mind, when signing the agreement. However, children who are parents or spouses may enter into a binding agreement.
- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these simple formalities of a family law agreement, you might want to think about certain other principles of contract law like these:

- The parties must each enter into the agreement of their own free will, without any coercion or duress by the other party, or by anyone else for that matter.
- Both parties must make full and complete disclosure of their circumstances going into the agreement. This disclosure should include complete information about each party's income and each party's assets and debts.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may at some point in the future be interpreted by the court in favour of the party who didn't have the lawyer.
- The court will attempt to interpret and give a specific meaning to ambiguous terms of a contract wherever possible, rather than just setting the agreement aside.
- If a term of a marriage agreement is found to be invalid, only the invalid part of the agreement will stop being in effect. The remainder of the agreement will continue to be binding on the parties.

Aside from these considerations, it's also important to remember that marriage agreements that deal with property and debts or issues like spousal support are usually only meant to be used when the relationship comes to an end, at some unknown time in the future. As a result, it can be difficult to guess what each party's situation will be like when the agreement begins to operate and whether it will still be appropriate and fair. Because of these problems, hiring the services of a lawyer to prepare a marriage agreement is highly recommended.

The possible subjects of a marriage agreement

A marriage agreement can address any number of subjects, and deal with almost anything that's a concern to one or both spouses. Typical subjects include the following:

- How will the parties own or buy property during their marriage, separately or jointly?
- How will the parties divide their property and debts after the marriage? Will there be any division of property at all?
- Will the parties share in the value or cost of property bought during the marriage, like a car or a house?
- Will the parties have a share in any excluded property brought into the marriage by one of the spouses?
- How will unexpected windfalls like inheritances and lottery wins be dealt with? Will they be shared or kept separate?
- How will the family home and jointly-owned property be dealt with if one of the spouses dies during the relationship?
- How will household chores be shared during the marriage?
- How will household expenses be paid for during the marriage? Will both parties contribute to the bills?
- How will the parties manage any retirement savings during the marriage?
- How will children brought into the marriage from another relationship be cared for during the marriage? Will any of these responsibilities continue after separation?

Except for the restrictions on agreements about parental responsibilities, parenting time, and child support, the possible subjects of a marriage agreement are limited only by your imagination, common sense, and the law of contracts. I've seen some fairly unique marriage agreements over the years, including agreements, likely unenforceable, that talk about the frequency of sex and who will take out the garbage.

However, as a general rule, it's best to deal with the concrete things that exist at the time of the marriage (such as children from a previous relationship, existing debts, and existing property) and things that the couple can reasonably expect to happen during the marriage in the short term (such as receiving an inheritance or a court award). Dealing with things that *might* happen (like new children, a move to a new town, or lottery winnings) is really speculative, and it's almost impossible to know how they should be dealt with if, at some unknown point in the future, the marriage comes to an end.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]

Links

- Legal forms and documents [9] from Legal Aid BC
  - Under "Agreements" see "Making an agreement when you live together"
- Legal forms and documents [9] from Legal Aid BC
  - Under "Agreements" see "Who can help you reach an agreement?"

Resources

- Marriage Agreements and Cohabitation Agreements [6] from Dial-a-Law by the People's Law School
- "Living Together or Living Apart" [14] from Legal Aid BC
  - See chapter 2 on making agreements
- Family Law in BC: Quick Reference Tool [25] from Legal Aid BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

Agreements after Separation

A separation agreement is a contract that records a settlement of the legal issues that arose following the end of a married or unmarried relationship. Unlike marriage and cohabitation agreements, which are made when a relationship starts, separation agreements are made when the relationship is over.

Separation agreements can be an effective and inexpensive way of resolving legal issues that are often very difficult. However, the terms of the agreement must be fair, and the parties must be able to get along well enough to negotiate the deal and then put it into action when it's done.

This section provides an introduction to separation agreements, discusses how separation agreements are formed, and describes the legal requirements of separation agreements. It looks at the typical subjects of separation agreements in some detail before talking about the effect reconciliation can have on separation agreements.

Introduction

Every separating couple has three options to resolve the legal issues between them:

1. settle the issues out of court through negotiation or mediation, or through some other process like arbitration or collaborative negotiation,
2. have a judge decide what should happen, after spending a lot of money on lawyers and the litigation process, or
3. give up and just walk away from the mess.

It's almost always better to negotiate and settle a dispute than to begin a court proceeding and resolve a dispute by trial. While a settlement usually gives neither party all of what they wish for, it will give them as much of what they want as they can both agree on. Litigation is stressful and expensive, offers no guarantees of success, and can be extraordinarily acrimonious. A negotiated settlement is less stressful, much cheaper, and gives the people involved the best chance of not hating each other at the end of the process.

A couple can reach a settlement at any time, even after a court proceeding has started. Typically, a settlement reached before a proceeding has begun is put into the form of a separation agreement. Settlements reached after the start of a proceeding can also be put into a separation agreement, but more typically the terms of such settlements are put into the form of a *consent order*, an order that both parties agree the judge should make.

Separation agreements can deal with almost any issue a couple have to address, from who will keep the cats, to how the mortgage will be paid, to how the children's post-secondary education will be paid. Separation agreements also offer a lot more flexibility than court orders, as some terms that can be put into an agreement can't be put into a court order. Most importantly, separation agreements can be tailored to meet the specific needs and circumstances of each couple.

Of course, separation agreements aren't for everyone. There must be a certain basic amount of mutual trust and good faith, and each party must have a certain flexibility and a willingness to accommodate the other side. A separation agreement will not be appropriate where a couple are so filled with anger, jealousy, or stubbornness that even a basic level of mutual respect is absent and dialogue is impossible.

Alternatives to separation agreements

Family law disputes can be resolved in a number of different ways before a court proceeding has started, through negotiation, mediation, collaborative negotiation, or arbitration. Settlements reached in these ways are almost always recorded in the form of a separation agreement.

Settlements reached after a court proceeding has started may be recorded as separation agreements if the terms of the settlement are complicated or if there are concerns about whether a term of the settlement can be put into a court order. In that case, the parties may enter into a separation agreement followed by a short consent order that resolves the issues raised in the court proceeding. Otherwise, the settlement of a court proceeding will be recorded as minutes of settlement and a consent order.

Minutes of settlement

Minutes of settlement are a written record of how a court proceeding was resolved. They are reached after a court proceeding has begun and are usually used to describe the terms of a consent order, an order that both parties agree the court should make. Both of the lawyers and each of the parties will sign the minutes of settlement; usually, only the lawyers will sign the final consent order.

Minutes of settlement sometimes have a rough-and-ready feel to them, as they are often used to quickly record a settlement of the legal issues, a settlement that is sometimes reached on the morning the trial is set to start. As a result, minutes of settlement are typically less comprehensive than separation agreements. However, even though they lack the same fine-tuning and detail, minutes of settlement are just as binding upon the parties as a separation agreement would be. Both are contracts and both can be enforced as such.

Minutes of settlement should:

1. be signed by both lawyers and by both parties, although the signature of the parties isn't strictly necessary,
2. deal with each of the legal issues in a conclusive, final manner, and
3. be attached to the draft consent order submitted to the court for its approval.

Consent orders

A consent order is an order that both parties agree a judge should make. Consent orders are only appropriate if litigation has started. It is not necessary to have minutes of settlement signed before the terms of a consent order are agreed to.

When a judge pronounces an order by consent, the order has just the same effect as a final order reached after a trial and is just as binding upon the parties as a final order.

Minutes of settlement and consent orders

The advantage of minutes of settlement is that the minutes can stand alone as evidence of the written agreement of the parties, while the form of a draft consent order, which may reflect the parties' agreement, still requires the court's approval. Moreover, if the terms of a draft consent order are argued about, there may not be any evidence of the agreement — the sort of evidence that is provided by minutes of settlement — which a court can use to decide the matter.

Consent orders have unique advantages of their own, in that it is usually extremely difficult to vary an order pronounced by consent without a serious and unanticipated change in circumstances, and such orders are almost impossible to appeal.

Other final agreements

Any legal dispute a couple has can be resolved by a formal contract of some nature. Separation agreements can be made between married spouses or unmarried spouses and deal with a wide range of issues, from the care of children to the division of property and debt.

Some couples may only have one issue to resolve and the usual comprehensive sort of separation agreement isn't required. People who are just parents and never married or lived together may want a *parenting agreement* that talks about parental responsibilities and the allocation of parenting time. Couples, including unmarried spouses who lived together for less than two years, who only need to deal with child support or spousal support may want a *support agreement* that deals with either or both issues. Couples who only need to resolve who keeps what property and which debts may want a simple *property agreement* that just deals with these two issues.

Family law agreements can also involve more people than the adults who were involved in a relationship. Separated parents might sign an agreement for contact with grandparents who want to see their grandchildren. A separating couple might sign a loan agreement or promissory note with a friend or family member to whom they owe money.

Entering into a separation agreement

A separation agreement can be negotiated and signed at any time once a married or unmarried relationship has broken down. A separation agreement can be signed after a court proceeding has been started, or before one has even been considered.

The basic process

The process for entering into a separation agreement is fairly simple. The parties to the agreement talk about the legal issues resulting from the breakdown of their relationship and try to come up with resolution of each issue that they are each as happy with as possible, hopefully after getting some advice from a lawyer. They take careful notes, recording how each issue was resolved, and then turn those notes into a longer, more formal written agreement that they each date and sign.

The process of reaching an agreement is a process of negotiation: each party usually has a pretty good idea of how they would like to see things resolved, and then, following the exchange of these ideas, a compromise is reached that represents a blending of the two positions to some extent. It's important to understand that neither party is likely to get all of what they want on all of the legal issues. The negotiation process requires a bit of give and take from everyone involved. It may take a bit of compromise on one issue to get a better result on another issue.

Once a resolution is reached on each of the legal issues, one of the parties will write down how each of the issues was settled in a formal written agreement. Each of the parties should check the written agreement to make sure that it accurately reflects their settlement, check whether anything was left out, and make sure that there are no other issues that need to be discussed and included.

Preparing the written agreement can be challenging. While kits are available that can guide you in drafting an agreement, I recommend that you hire a lawyer to handle the drafting when the content of your agreement is anything other than completely straightforward.

When everyone is happy with the written agreement, they should each take a copy of the agreement to their respective lawyers, or to any lawyer for that matter, to get *independent legal advice* about the agreement. The lawyers they speak to will explain:

- the meaning and effect of the agreement,
- the obligations they have to the other party under the agreement,
- the obligations the other party has to them under the agreement,
- any weaknesses in the drafting of the agreement, including any important terms the agreement has left out,
- whether the terms of the overall settlement are fair or unfair, and

- the options that are available to them if they decide not to sign the agreement.

Independent legal advice is critical for three main reasons:

1. If you are entering into an agreement that will help you avoid court, you need to know how that agreement affects the rights you would have had if you had decided to go to court instead.
2. You have to clearly and completely understand the obligations and the rights the agreement gives you.
3. Getting the advice will stop either party from claiming, later on, that they didn't know what the agreement meant or that they were at a disadvantage because the other party's lawyer drafted the agreement.

After each party has had independent legal advice about the agreement, they'll sign the agreement or, as lawyers say, they'll *execute* the agreement, if they're still willing to do the deal. Family law agreements need to be signed in the presence of a witness, who, after watching the party sign the agreement, signs the agreement themselves. Someone who witnesses an agreement does not become a party to that agreement and isn't responsible for seeing that the agreement is followed. The signature of a witness on an agreement merely says "I know Mr. Fong and I saw Mr. Fong sign the agreement."

Normally, the lawyers who provided the independent legal advice will witness their client's signatures, but anyone can witness a person's signature, as long as the witness isn't under the age of 19 and doesn't have an interest in a party signing the agreement.

If a party had independent legal advice, the lawyer who gave the advice will usually also sign another piece of paper, attached to the agreement, which confirms that: the party received legal advice about how the agreement affects their legal interests; the party understood the terms of the agreement; and, the party wasn't forced into signing the agreement. This paper is called a *Certificate of Independent Legal Advice*.

Normally, four separate original copies of a separation agreement are executed. This is so that the parties and their lawyers each have an original copy of the agreement. Sometimes, an additional original copy is executed in case the agreement is filed in court.

If you are negotiating an agreement and have a lawyer

Even if you have a lawyer, it can be extremely tempting to work something out with your ex on the side. If you feel even remotely tempted to do this, call your lawyer! Make sure your lawyer knows that you're trying to explore settlement options with your ex, and make sure you understand what to say and, more importantly, what *not* to say.

Nothing is quite as frustrating for lawyers as finding out that their client has negotiated an unfair, inadequate or prejudicial agreement without their input. While you, the client, are free to do as you want and can make any deal you want, be warned that you may find yourself settling for worse terms than what your lawyer might have been able to negotiate for you, or terms that are worse than the results you might have obtained at trial. Remember that you may be stuck with any agreement you make, whether it's a good agreement or a bad one.

Call your lawyer before you sign or initial anything. Please. This is what you're paying them for.

Formal requirements of separation agreements

A separation agreement is a contract, the same as the contract you might have with your employer, the people you buy a house from, or your landlord. On the other hand, family law agreements are special, different from commercial contracts, because they deal with legal issues that are covered in the provincial *Family Law Act* and the federal *Divorce Act*. As a result, the law dealing with separation agreements is a blend of legislation, the common law relating to family law agreements, and certain parts of the law dealing with commercial contracts.

The whole point of making a separation agreement is so that, at some later time, the contract will be enforceable in court if one of the parties fail to live up to it. As such, the agreement must be capable of being enforced by the court and it must be able to withstand a challenge in court.

Separation agreements must follow certain basic rules in order to be legally binding and enforceable, including these:

- The agreement must be in writing.
- The agreement must be signed by each party.
- While all family law agreements *should* be signed in the presence of a witness, under sections 93(1) and 163(1) of the *Family Law Act*, agreements about property, debt and spousal support *must* be signed by a witness to prevent the court from making orders about property, debt and spousal support without the court cancelling the agreement first.
- Neither party can be under a legal disability when they sign the agreement. However, children who are parents or spouses may enter into a binding agreement.
- The agreement must clearly identify the parties and the nature of their rights and obligations to one another.

In addition to these rules, you might want to think about certain other principles of contract law, including these:

- The people who sign an agreement must each enter into the agreement of their own free will, without any pressure by the other party, or by anyone else for that matter.
- Where an agreement is prepared by one party's lawyer and the other party doesn't have a lawyer, any portions of the agreement that are vague may at some point in the future be interpreted by the court in favour of the party who didn't have the lawyer.
- The court will attempt to give effect to a contract wherever possible, that is, they will attempt to give meaning to the terms of a contract rather than declare it void.

Family law agreements are also subject to other principles that don't necessarily apply to commercial contracts:

- The parties must make full and complete disclosure of their financial circumstances going into agreements about child support, spousal support, property and debt.
- If one term of a separation agreement is void, then the court will cancel only that term of the agreement and the other terms will continue to be in force and binding on the parties.
- A separation agreement will not be considered to be invalid just because one party doesn't comply with a term of the agreement. In other words, you can't say the whole agreement has been broken and should be cancelled just because the other party didn't do something they were supposed to do.
- While the parties can later agree to do something different than what their agreement says about a particular issue, the remainder of the agreement will continue to be in force and binding on the parties.

It's important to know that the courts will rarely if ever uphold an agreement that attempts to avoid a statutory obligation. Child support, for example, is a positive, almost absolute, obligation all parents have toward their children. The court will not follow an agreement which says a parent will never have to pay child support.

It's also important to know that the courts can uphold an oral agreement, but there are significant disadvantages to them as compared to written agreements (including how legally binding they are on a judge). See the note about oral agreements in the introductory section on Family Law Agreements within this chapter. If, as in *Voitchovsky v Gibson* [1], 2022 BCCA 428, there is evidence that both parties clearly understood the essential terms of the oral agreement, showed intention to be bound by those terms, and conducted themselves over the years in way that was consistent with the oral agreement, then the court may determine there was an agreement. However, it's easy to disagree about whether an oral agreement was ever reached, and if so on what terms. It's always best to put agreements in writing.

The possible subjects of a separation agreement

The potential subjects of a separation agreement are limited only by common sense and what the law will allow. That said, it's always best to be as realistic as possible when drafting a separation agreement. Will a schedule of payments be too difficult for a party to manage? Will the children be able to adapt to a shared parenting arrangement? Are the parties' responsibilities to one another too complex? Are they too optimistic? Although it's best that all of the legal issues between the parties be dealt with in a separation agreement, the simpler an agreement is,

the better it will usually work in real life.

Children

Issues about parenting after separation are covered by the federal *Divorce Act* for married spouses and by the provincial *Family Law Act* for married spouses, unmarried spouses and other unmarried couples, and anyone else who has an interest in the care of a child.

The *Family Law Act* talks about parents who are the *guardians* of a child and have *parental responsibilities* and *parenting time*, and about people who are not guardians and may have *contact* with a child. The *Divorce Act* uses many of the same terms. It talks about married spouses who have *decision-making responsibilities* and *parenting time*, and people who aren't married spouses and may have *contact*.

Guardianship

Under section 39(1) of the *Family Law Act*, a child's parents are usually the child's guardians as long as they have lived together during the child's life or are a parent as a result of an assisted reproduction agreement. These parents are guardians because the *Family Law Act* says so. They don't need an order or an agreement to make them a guardian.

A parent who has never lived with their child isn't a guardian unless the parent "regularly cares" for the child.

Under section 50, only a parent can become the guardian of a child through an agreement. Agreements likes these are between the parent and all of the child's other guardians. Someone who isn't a parent can't be made a guardian by an agreement. They can only be made a guardian by court order.

Parental responsibilities and decision-making responsibilities

Only guardians can have parental responsibilities for a child under the *Family Law Act*. These responsibilities are listed at section 41:

> (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
>
> (b) making decisions respecting where the child will reside;
>
> (c) making decisions respecting with whom the child will live and associate;
>
> (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
>
> (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
>
> (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
>
> (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
>
> (h) giving, refusing or withdrawing consent for the child, if consent is required;
>
> (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

> (j) requesting and receiving from third parties health, education or other information respecting the child;
>
> (k) subject to any applicable provincial legislation,
>
> (i) starting, defending, compromising or settling any proceeding relating to the child, and
>
> (ii) identifying, advancing and protecting the child's legal and financial interests;
>
> (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Guardians can share one or more of these parental responsibilities, or one or more parental responsibilities can be allocated just to one guardian, so that only that guardian has responsibility for that issue.

Decision-making responsibilities are described much more briefly in the *Divorce Act*. Under section 2(1), "decision-making responsibility" is defined as:

> the responsibility for making significant decisions about a child's well-being, including in respect of
>
> (a) health;
>
> (b) education;
>
> (c) culture, language, religion and spirituality; and
>
> (d) significant extra-curricular activities.

Just like the *Family Law Act*, however, married spouses can share one or more of these decision-making responsibilities, or one or more decision-making responsibilities can be allocated just to one spouse, so that only that spouse has responsibility for that issue. People who are the parents of a child, or who intend to stand in the place of a parent to a child, can apply to court for decision-making responsibilities if they get permission from the court to make the application first.

Parenting time and contact

Parenting time and contact are both about the child's parenting schedule, although parenting time is about a bit more than just the child's schedule. Only guardians have parenting time under the *Family Law Act*; people who aren't guardians have contact with a child. Under the *Divorce Act*, it is usually only married spouses who have parenting time; however, people who are the parents of a child or intend to stand in the place of a parent to a child can apply to court for parenting time, if they get permission from the court to make the application first.

The terms of a child's parenting schedule can be very specific or, where the parties get along exceptionally well with one another, the terms can be as vague as "Uphar will have liberal and generous parenting time with the child."

If there has been a history of difficulty exercising parenting time or contact, or there is even a smidgen of conflict between the parties, it can be important to spell out the child's schedule in more detail to avoid future arguments. The terms of the child's schedule usually spell out when the party will see the child on a week-to-week basis, such as "John will have the child from Friday at the end of school to the following Sunday at 7:00pm, every other week, plus each Wednesday from the end of school until 7:00pm."

Children's schedules can, and probably should, also take into account special days such as:

- the child's birthday,
- Mothers' Day and Fathers' Day,
- the parties' birthdays,
- school holidays, religious holidays and statutory holidays,
- Halloween,

- extended access when there is a statutory holiday or a professional development day at school,
- special events at school, and
- birthdays of the child's friends.

Talking about these and other special days in a separation agreement can be really useful if there is conflict between parents. It lets people anticipate and resolve things that could grow into disagreements in the future.

Other issues that an agreement could talk about also include: communication by telephone and computer, including email, instant messaging, and video conferencing; responsibility for picking up and dropping off the child at school; and, going to the child's extracurricular activities.

Child support

Child support is money paid by one parent to another, usually on a monthly basis, to help cover the day-to-day living expenses of a child. Child support is usually paid by the parent who has the children for the least amount of time to the parent who has the children for the most amount of time. Child support can also be paid when the parents share the child's time more or less equally, if there is a difference between the parents' incomes. In cases like this, the parent with the higher income will pay some amount of child support to the parent with the lower income.

The amount of child support that is paid is almost always the amount required by the Child Support Guidelines, which includes tables that fix the amount of a parent's child support obligation according to the number of children support is being paid for and the income of the person paying support, the *payor*. Child support can sometimes be paid in a different amount if:

- a child is the age of majority or older,
- the payor earns more than than $150,000 per year,
- a child is a stepchild,
- one or more of the children have their primary homes with different parents, or
- the parents share parenting time with the children more or less equally.

On top of the basic amount of child support, both parents can also be required to pay toward those of the children's expenses that qualify as "special expenses" or "extraordinary expenses" under section 7 of the Child Support Guidelines.

A good separation agreement will:

- state the income of each parent at the time the agreement is made,
- state the monthly child support to be paid,
- require the parties to exchange copies of their tax returns and Canada Revenue Agency notices of assessment each year or perhaps every other year,
- provide for a review of child support every year, if the payor's income rises or falls, or if there are significant changes in the parties' parenting arrangements,
- describe those of the children's expenses that the parties agree qualify as special expenses or extraordinary expenses, and say how much each party has to pay toward those expenses, and
- provide for the recalculation of the parties' shares of the cost of the child's special expenses if either party's income rises or falls.

The Guidelines are an extremely convenient way to calculate a party's child support obligations up to the point where one of the exceptions to the Guidelines amounts applies. While separation agreements allow for a little more flexibility in deciding how much child support should be paid if a child is the age of majority or older, the payor earns more than than $150,000 per year, if a child is a stepchild, if one or more of the children have their primary homes with different parents, these exceptions make the annual exchange of financial information even more important.

Spousal support

Spousal support is paid by one spouse to the other to help cover that person's day-to-day living expenses. A separation agreement that talks about the payment of spousal support should be negotiated bearing in mind all of the things the court would have considered in making an order for spousal support.

Typically, a separation agreement that requires spousal support to be paid will include some means of limiting the length of time for which support will be payable. Terms like this might include:

- setting a fixed length of time over which support will be paid, after which the payor will have no more responsibility to pay support,
- agreeing that support will be paid for an indefinite amount of time, but setting one or more dates or circumstances when support will be reviewed,
- setting a series of decreasing payments, so that the recipient receives a lower amount of support as they re-enter the work force,
- agreeing to end support if the recipient enters a new spousal relationship, or
- agreeing that support will be paid in a single, lump sum.

In some situations, of course, permanent support may be required, especially if the relationship was lengthy or if the recipient is unlikely to ever become self-sufficient, perhaps because of illness or disability.

Some agreements also provide that no spousal support will be payable. If you are the spouse who would ordinarily be entitled to receive support, you need to be pretty confident that an agreement to waive spousal support is fair, as it may be very difficult to get support later on if your personal circumstances change.

The division of property and debt

The ways that a separation agreement can deal with the division of family property and family debt are virtually unlimited. Under the *Family Law Act*, each spouse is presumed to keep the property they brought into the relationship and share in the property bought during the relationship. The spouses are presumed to each be half responsible for any debt incurred during the relationship. However, you can make whatever other arrangements you want, as long as you both agree to those arrangements and they're reasonably fair.

When the division of property and debt are issues, it's often helpful to exchange Financial Statements. A Financial Statement, Form F8 of the Supreme Court Family Rules [3], is a helpful court form in which each party describes their income, assets, expenses, and debts on oath or affirmation, like an affidavit. This form can be very useful for each spouse to get a clear idea of the family's financial situation before negotiations start, and you can use the form whether you're already in court or not. You can find links to and examples of a Financial Statement and other forms in Supreme Court Forms & Examples.

A separation agreement should also talk about how debts will be managed. Separating couples typically pay out family debts by selling shared property when there's not enough cash to pay the debt out, which is usually how the mortgage on the family home gets paid out, or they can allocate different shares of the family property to each spouse to compensate for family debt that can't be paid out. When a debt won't be paid out, it's essential to do two things:

1. allocate responsibility for the debt, and
2. provide that the party remaining responsible for a debt will protect the other party from creditors who want them to pay the debt, or will compensate them if a creditor forces them to pay the debt.

Other issues

Arrangements for the care of children, the payment of support, and the division of family property and family debts are the most common issues that come up in family law. There are a whole host of other issues that couples may have to deal with, including a few that can only be dealt with in separation agreements.

The parties' future relationship with each other

Most separation agreements include a whole section devoted to describing how the parties will deal with each other once the agreement is executed. Typically, this portion of an agreement requires the parties, among other things, to:

- not incur debts in the name of the other party,
- not interfere with the personal life of the other party, including interfering with the other party's dating or future spousal relationships, or their relationships with their parents, family and friends, and
- not molest, harass, or annoy the other party.

Some separation agreements will also describe what will happen if the parties reconcile with each other. Most often an agreement will simply say that it will become a marriage agreement or a cohabitation agreement if the parties reconcile, and that it will not cease to be in effect or binding on the parties simply because of the reconciliation.

Life insurance

Where children are involved, it can be a good idea to provide in an agreement that each party will maintain a life insurance policy until the children have all reached the age of majority. Each policy will usually name the other parent as the sole beneficiary of the policy in trust for the benefit of the children, in order to make sure that the kids will be looked after in the event that either party dies. Most agreements that deal with insurance allow the parties to change the beneficiaries of their policies once the youngest child turns 19.

In general, it's only appropriate to include a term about insurance policies if the parents can afford to pay for those policies. Life insurance can get very expensive, especially for older people.

Undisclosed assets

If you have even the slightest doubt that the other party hasn't been entirely honest about the extent of their assets, a term dealing with undisclosed assets can be important. These sorts of terms usually provide that:

- any property that wasn't disclosed when the agreement was executed will automatically be considered to be owned equally by both parties,
- the party that didn't disclose the asset will have to give the other party one-half of the asset's value, and
- the party that didn't disclose the asset will have to pay the expenses the other party incurred in finding the asset, plus a financial penalty.

The effect of reconciliation

Separation agreements don't always contain special terms providing for the reconciliation of the parties and the resumption of their relationship. But if a couple does reconcile, what happens to their separation agreement? Does the agreement stay in force? What happens if the parties separate again?

The general rule here comes from the common law. Without a specific clause preserving some or all of the terms of a separation agreement, the agreement will be void if the parties reconcile and resume their relationship and live as a couple. This rule was upheld in a 2003 decision of the Ontario Court of Appeal, *Sydor v. Sydor* [2], 2003 CanLII 17626 (ON CA), and by the British Columbia Supreme Court in *Alexander v. Alexander* [3], 2013 BCSC 1586. In *Sydor v. Sydor,* the court held that unless a separation agreement contains a term to the effect that the agreement will survive reconciliation, the agreement will be void when the couple reconciles, despite any term of the agreement that says the agreement is a "full, final and conclusive settlement" of all issues arising from their relationship.

The upshot of all this is that if there's a chance that you and your spouse might get back together, and you want your separation agreement to survive your reconciliation, you must put a term to that effect in your separation agreement. Without it, your agreement may be worthless if you reconcile and the relationship breaks down again at some point afterwards.

Separation agreements filed in court

Agreements that are filed in court can be enforced as if they were orders of the court in which they are filed. Among other things, this means that the BC Family Maintenance Agency (formerly the Family Maintenance Enforcement Program) can enforce an agreement for support exactly as it would enforce an order for support.

To find out how to file an agreement, or to see if your agreement has been filed in court, read How Do I File an Agreement in Court?. It's located in the Helpful Guides & Common Questions part of this resource under Separation Agreements.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- Child Support Guidelines [2]
- Supreme Court family Rules [9]

Links

- Legal forms & documents [1] from Legal Aid BC
  - Under the section "Agreements" see "Making an agreement after you separate" and "Who can help you reach an agreement?"
- BC Family Maintenance Agency [20] website from the Government of British Columbia
- Families Change [2] website from the Justice Education Society of BC and BC Ministry of Attorney General
- Legal Aid BC's Family Law website's information page on Separation & Divorce [13]
- Separation and Separation Agreements [4] from Dial-a-Law by the People's Law School
- MyLaw BC Make a Separation Plan Pathway [9] from Legal Aid BC
- Parent Guide to Separation and Divorce [14] from the Justice Education Society of BC
- Going Through Separation [6] from Legal Aid BC

Resources

- "Living Together or Living Apart" [13] from Legal Aid BC
  - See chapter 2 on making agreements
- "Separation Agreements: Your Right to Fairness" [13] from Legal Aid BC and West Coast LEAF
- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- "Separated with Children - Dealing with the Finances: Parent Workbook" [7] from the Justice Education Society of BC
- "Coping with Separation Handbook" [15] from Legal Aid BC
- "How to Separate" online course [9] from the Justice Education Society of BC
- "Ending Relationships" video [17] from John-Paul Boyd, QC
- "Practice Checklist Manual" [4] from the Law Society of BC

- See "Separation Agreement Drafting"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

References

[1] https://canlii.ca/t/jtklq
[2] http://canlii.ca/t/5115
[3] http://canlii.ca/t/g09wr
[4] https://www.lawsociety.bc.ca/docs/practice/checklists/D-3.pdf

Changing Family Law Agreements

After a family law agreement has been signed, one of three things can happen:

1. the people who signed the agreement, the *parties* to the agreement, follow the agreement and everything continues as it should,
2. the circumstances of the parties or a child change, and their agreement must also change, or
3. one of the parties refuses to follow the agreement and the agreement must be enforced by the courts.

This section focuses on separation agreements and talks about how agreements can be changed without going to court, and when the agreements can be set aside by the court. The previous section in this chapter talks about how family law agreements are enforced.

Changing agreements with another agreement

There are almost always two ways of doing something, the hard way and the easy way. In family law, the easy way usually involves talking and negotiation. The hard way usually involves going to court, and is quite a bit more expensive and time-consuming than the easy way.

Any family law agreement can be changed at any time, as long as the parties to the agreement agree to the change. If the parties can't agree on the change, or on the terms of the change, the party who wants the change may have to go to court if the problem is important enough and worth the time and money of a court proceeding. Since the court doesn't have the power to vary an agreement, the best the court can do is to cancel the part of the agreement that has to change and then make an order in place of the part that was cancelled.

Amending agreements

A family law agreement can be changed or updated by a later agreement. If the parties to an agreement both agree that the original agreement should be changed and agree on how it should be changed, the parties can sign a second agreement usually called an *amendment agreement*, an *amending agreement* or an *addendum agreement*.

An agreement changing an agreement needs to talk about the original agreement or no one else will know what agreement the new agreement is changing, and is usually titled something like "Amendment to the Separation Agreement made on 1 April 2022." Amending agreements are usually very short, as the idea is to change just one particular part of an agreement rather than to rewrite the entire original agreement.

The amending agreement must say exactly which particular paragraph of the original agreement is being changed or updated, and then state the new text of that paragraph. Here's an example of a change and an update:

3. The parties agree that Paragraph 23 of the Agreement made on 1 April 2022 will be cancelled and be replaced with the following:

"Michelle will also have parenting time with the children beginning on Tuesdays at 4:00pm or the end of school to the following Wednesday at 9:00am or the start of school, whichever is earlier."

4. Michelle's income is $45,000 per year as of the date on which this Amending Agreement is made. The parties agree that Michelle's child support obligation, set out at Paragraph 28 of the Agreement made on 1 April 2022, will be $423 per month, beginning on the first day of the month following the month in which this Amending Agreement is made.

Just like the original agreement, the amending agreement must be signed by each party in the presence of a witness, who watches the party sign the agreement and then signs the agreement themselves. The same person can be the witness for both parties.

Resolving disputes about amendments

A well-written family law agreement will usually provide a way for the parties to resolve disputes arising from the agreement if they can't resolve a dispute by negotiating a resolution on their own. Sometimes an agreement requires that the parties go to court to resolve disputes about the agreement; most often, an agreement will require the parties to try to resolve their dispute out of court through mediation or arbitration.

Mediation is usually the best option if simple negotiation doesn't get you anywhere. In mediation, the parties attempt to negotiate a resolution to their dispute with the help of a neutral third party, a *mediator*, who is skilled in family law issues and works with the parties to get them to a new agreement.

Mediation isn't always appropriate, particularly where the problem is limited to one or two particular terms of an agreement and neither party is willing to bend on the matter. In cases like this, you might want to consider arbitration. The job of an arbitrator is to listen to the evidence and the arguments presented by the parties to the agreement, and then make a decision, called an *award*, that resolves the dispute and is binding on the parties. It is always faster to arbitrate than to litigate, and when both parties have lawyers, it's usually cheaper to arbitrate as well.

See the chapter Resolving Family Law Problems out of Court for more information on Family Law Mediation and Family Law Arbitration.

Challenging agreements by going to court

If you've become unhappy with all or part of your agreement and can't or don't want to resolve the problem through negotiation, mediation or arbitration, you can either try to live with the agreement or you can go to court. If you decide to go to court, you have two choices. You could try asking the court to throw out the entire agreement because it's unfair, because it's invalid, or because of some other fatal problem under the law of contracts. Or, you could try asking the court to cancel just part of the agreement under the *Family Law Act*.

In general, the court will be reluctant to meddle with a reasonable separation agreement. In fact, the Court of Appeal for British Columbia has said that separation agreements should be treated by the courts with "great deference." This is because a separation agreement is a private contract between two parties that was the product of an often lengthy process of negotiation, and the courts are usually unwilling to disturb agreements the parties made themselves without a very good reason for doing so. The courts will be similarly reluctant to change a final order that was the product of a separation agreement.

Cancelling agreements under the law of contracts

Just like commercial contracts, the validity of family law agreements can be challenged under the law of contracts. Someone challenging an agreement can argue that:

- they were under some sort of *duress* or *coercion* when they negotiated or signed the agreement, and didn't enter into the agreement voluntarily, of their own free will,
- the agreement is *unconscionable* — in other words, the agreement is obviously and seriously unfair to a party with no reason for that level of unfairness,
- they signed the agreement without having independent legal advice and didn't fully understand what the agreement meant, and, as a result, they signed it by *mistake*,
- the agreement was signed without *full disclosure* having been made, or
- they were tricked into signing the agreement because *misleading information* had been provided by the other party.

Arguments like these challenge the *validity* of an agreement.

Duress, coercion, unconscionability and mistake

The courts won't enforce an agreement — that is, they won't force the parties to an agreement to follow the terms of their agreement — if one of them had been forced or pressured into signing the agreement. An agreement must be entered into freely and voluntarily. You have to *choose* to sign an agreement.

Likewise, the courts won't enforce an agreement where one of the parties used pressure or a position of power to get the other party to sign an unfair agreement. This can include threats and manipulation, as well as signing an agreement in circumstances of extreme emotional stress, such as just before a wedding, following a hospitalization, or during an emotional breakdown.

Agreements that are hugely unfair can also be found to be unconscionable, as can agreements that a party signed when they were under a fundamental misunderstanding about the nature of the family finances or the extent of a party's assets or debts.

Lack of independent legal advice

A party to an agreement may be able to challenge the validity of their agreement if they didn't have "independent legal advice" before signing the agreement. *Independent legal advice* is advice about an agreement that is provided by a party's lawyer or a lawyer that the party has hired just for the purposes of getting advice about their agreement. The lawyer's advice is about the meaning and effect of the agreement, about the rights and responsibilities a party will have as a result of signing an agreement, and about how the terms of the agreement compare to the probable outcome of the legal issues covered by the agreement had they been argued about in court. Independent legal advice helps to ensure that both parties are on a more or less equal footing when they sign their agreement, and helps to ensure that one party doesn't unintentionally enter into an agreement that is unfair.

There is no legal requirement that someone get independent legal advice before they sign an agreement. In most situations, the absence of independent legal advice will not be enough to overturn an agreement. It might, however, help a party argue that they didn't understand the meaning or the effect of their agreement and, as a result, made a *mistake* when they signed it.

Misleading information and the failure to make full disclosure

When people enter into an agreement, they do so on the assumption that certain important facts are true; that each is earning as much money as they say they are, that each has no more assets and debts than they say they have, and so on. These assumptions are the foundation on which the agreement is built. If one of the parties has failed to make full disclosure of these sorts of important facts, or if one party has lied about or misrepresented these facts, the courts may be willing to overturn an agreement.

You might make, for example, an agreement that you will keep an RRSP worth $100,000 because the other party is keeping a condo that's also worth $100,000. This seems pretty fair, assuming that the condo is in fact worth $100,000 as the other party says. If it turns out that the condo is in fact worth $500,000, the agreement is no longer fair. While you might still have made the deal to keep the RRSP in return for the other party keeping the condo, you could argue that the agreement should be canceled on the basis that you only signed it because of the misleading information provided by the other party.

Cancelling agreements under the *Family Law Act*

The court cannot vary or change agreements that are valid. Instead, under the *Family Law Act*, the court can cancel, or *set aside*, the problematic parts of the agreement and make an order in place of those parts. Section 214 of the act says this:

> (1) If an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement.
>
> (2) A court may incorporate into an order all or part of a written agreement respecting a family law dispute made by the parties to the proceeding and, unless the court orders otherwise,
>
> (a) the order replaces that part of the agreement that is incorporated, and
>
> (b) the remainder of the agreement remains effective.
>
> (3) Unless the court orders otherwise, if an agreement and an order made after the agreement provide differently for the same subject matter,
>
> (a) the order replaces the part of the agreement that provides differently for the same subject matter, and
>
> (b) the remainder of the agreement remains effective.

The legal test that the court must apply to set aside part of an agreement changes depending on the subjects covered by those parts.

Guardianship

The *Family Law Act* doesn't provide a specific test to change an agreement appointing a parent as the guardian of a child. (Only parents can be appointed as guardians by agreement. Other people who want to become a guardian of a child have to apply for a court order appointing them as a guardian.) However, if a problem about a guardianship agreement comes up, you could ask for an order that "provides differently for the same subject matter" under section 214(3), in which case the court order replaces the guardianship agreement.

Under section 37(1) of the act, the court must make decisions about guardianship considering only the best interests of the child. The factors the court must think about are listed at section 37(2) of the act and, when family violence is a factor, at section 38 as well.

Parental responsibilities, parenting time and contact

Under the federal *Divorce Act*, married spouses have *decision-making responsibilities* for their children, and the schedule of their time with the children is called *parenting time*. People who are not married spouses may have *contact* with a child.

Under the provincial *Family Law Act*, guardians, who may or may not be parents, have *parental responsibilities* for raising the children, and the schedule of their time with the children is called *parenting time*. People who are not guardians, including parents who are not guardians, may have *contact* with a child.

Decision-making responsibilities means more or less the same thing as parental responsibilities, although the *Family Law Act* goes into a lot more detail about the sort of decisions that parental responsibilities includes than the *Divorce Act* does. The court will think about agreements that talk about decision-making responsibilities as if the agreement was about parental responsibilities.

Section 44(4) of the *Family Law Act* says this about agreements for parental responsibilities and parenting time:

> On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

Section 58(4) says almost exactly the same about agreements for contact.

The factors the court must think about to decide what is in the best interests of a child are listed at section 37(2) of the act and, when family violence is a factor, at section 38 as well. It's important to read and understand the best-interests factors. If you are asking the court to set aside the parts of an agreement about parental responsibilities, parenting time or contact, you'll need to be able to show why the terms of those parts are no longer in the children's best interests.

Child support

As in all questions about children, the court's only concern is the best interests of the child. The court will rarely interfere with an agreement that requires child support to be paid in an amount determined in accordance with the Child Support Guidelines. The courts will also be reluctant to set aside an agreement that requires more child support to be paid than what the Guidelines require, because it's usually considered to be in the best interests of children to benefit from the payment of as much support as possible. The courts will be much more willing to interfere with an agreement that calls for less child support to be paid than what the Guidelines require.

Section 148(3) of the *Family Law Act* says this:

> On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

Section 150 is the section that says how child support is to be calculated, namely that it is to be calculated according to the Guidelines. As a result, the court will set aside the parts of an agreement dealing with child support if:

- the payor's income has increased since the agreement was signed,
- the payor's income has decreased since the agreement was signed,
- one or more children are no longer living mostly with the parent receiving support,
- one or more children are now spending their time almost equally with the payor and the recipient,
- one or more children are no longer entitled to receive support, or
- the agreement provides for an inadequate amount of child support for some other reason.

If you are asking the court to set aside the parts of an agreement about child support, you'll need to be able to show why the amount of child support paid under the agreement is no longer the amount of support required by the

Guidelines.

Spousal support

Section 164 of the *Family Law Act* talks about when the parts of an agreement about spousal support should be set aside. Under section 163(2), an agreement about spousal support includes both an agreement that spousal support *won't* be paid as well as an agreement that spousal support *will* be paid.

Section 164 provides two legal tests to help the court decide whether an agreement should be set aside. The first test requires the court to look at what happened when the agreement was being negotiated and signed:

> (3) On application by a spouse, the court may set aside or replace with an order made under this Division 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 income, 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 party'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.

That last part, at section 164(3)(d), is about the law of contracts, discussed above.

Even if there are no problems with the circumstances in which the agreement was negotiated and signed, the court can still set aside the agreement if it considers the agreement to be "significantly unfair," considering five factors:

> (5) Despite subsection (3), the court may set aside or replace with an order made under this Division 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) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
>
> (c) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (d) the degree to which the spouses relied on the terms of the agreement;
>
> (e) the degree to which the agreement meets the objectives set out in section 161.

(Section 161 is the section that says why spousal support should be awarded.)

If you are asking the court to set aside the parts of an agreement about spousal support, you can make your argument under section 164(3), section 164(5), or both.

Property and debt

Section 93 of the *Family Law Act* talks about when the parts of an agreement about dividing property and dividing debt should be set aside. Like section 164 on spousal support, discussed above, section 93 provides two legal tests to help the court decide whether an agreement should be set aside. The first test, at section 93(3), requires the court to look at what happened when the agreement was being negotiated and signed and is exactly the same as the test at section 164(3). The second test allows the court to set aside the agreement, even if there were no problems with the circumstances when the agreement was being negotiated and signed, if the agreement is "significantly unfair." However, to determine significant unfairness, section 93(5) requires the court to look at three factors, not five:

> (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.

In an often referred to case from the BC Supreme Court, *L.G. v. R.G.* [1], 2013 BCSC 983, the Court said that the term "significant unfairness" is intended to create greater certainty by limiting when the Court will intervene in situations that are "unjust or unreasonable." In *Remmem v. Remmem* [2], 2014 BCSC 1552, the BC Supreme Court said that in order for there to be "significant unfairness," the unfairness must be "compelling" or "meaningful" with regard to the factors set out in section 93.

These three factors — passage of time, intention to achieve certainty through the agreement, and degree of reliance on the terms of the agreement — could themselves show that an agreement is *significantly unfair*, but the court can also consider these factors in deciding whether or not a significantly unfair agreement should be set aside or left in place. More recently, the BC Court of Appeal in *Azanchi v. Mobrhan-Shafiee* [3], 2021 BCCA 55, said "a court may determine that, despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty."

If you are asking the court to set aside the parts of an agreement about dividing property or dividing debt, you can make your argument under section 93(3), section 93(5), or both.

Cancelling agreements about property under the *Family Relations Act*

Agreements between *married spouses* about property that were made before 18 March 2013, the date when the *Family Law Act* came into force, have to be changed under the *Family Relations Act* [4]. The *Family Relations Act* was the law in British Columbia before the *Family Law Act*. Section 252(2)(a) of the *Family Law Act* says that court proceedings to enforce, set aside, or replace an agreement about property division that was signed before the *Family Law Act* came into force must be started under the *Family Relations Act*.

If the *Family Relations Act* applies to an agreement about property, section 65 of that act says that an agreement that is in writing and witnessed by a third party can be set aside if it would be unfair considering six factors:

> (a) the duration of the marriage,
>
> (b) the duration of the period during which the spouses have lived separate and apart,

> (c) the date when property was acquired or disposed of,
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift,
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

Section 68 of the *Family Relations Act* talks about the variation of agreements that are not in writing or were not witnessed.

However, it's the *Family Law Act* that applies to agreements about property between *unmarried spouses made* that were signed before 18 March 2013. The Supreme Court of British Columbia has decided, in *B.L.S. v. D.J.S* [5], 2019 BCSC 846, that the new law applies to these agreements even though they were signed before the *Family Law Act* was law.

Given the additional issues involved in changing agreements made before 18 March 2013, it's really important that you get advice from a family law lawyer before you do anything.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Family Relations Act* [4] (Repealed)
- Child Support Guidelines [2]

Links

- Spousal support advisory guidelines [9]
- Court orders [8] from Legal Aid BC
  - see section on "Change an order or set aside an agreement made in BC"
- Mediate BC [1] website
- Parenting apart [11] from the BC Ministry of Attorney General
- Parenting Arrangements [19] from the Canada Department of Justice
- Family Mediation [25] from the Justice Education Society of BC
- Guide to Mediation in BC [6] from the BC Ministry of Attorney General
- Mediation, collaborative negotiation, and arbitration [21] from Dial-a-Law by the People's Law School
- Parenting After Separation Course [26] from the BC Ministry of Attorney General
- Resolving Disputes Without Going to Court [24] from Dial-a-Law by the People's Law School

Resources

- "Separation Agreements: Your Rights and Options" [13] from Legal Aid BC and West Coast LEAF
- "All About Mediation" infographic poster [34] from Legal Aid BC
- "Living Together or Living Apart: Common-Law Relationships, Marriage, Separation, and Divorce" [13] from Legal Aid BC
- "FAQ of Mediation" video [7] from Mediate BC
- "An Inside Look at Family Mediation" video [23] from Legal Aid BC
- "A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation" [33] from Mediate BC
- "How Can we Resolve Our Family Law Issue?" [35] from Legal Aid BC
- "Alternatives to Going to Court" [25] from the Justice Education Society of BC

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

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[7] https://www.clicklaw.bc.ca/resource/4082

Enforcing Family Law Agreements

People who sign a family law agreement are signing a *contract*. A contract is an agreement between two or more people that creates an obligation to do or to not do something. Other kinds of contracts include the rental agreement a tenant has with a landlord, the lease agreement you might have with a car company, or the purchase agreement you might have with the people from whom you've bought a house. Contracts can be enforced by the courts when someone doesn't do what the contract requires of them; in fact, that's the whole point of having a contract. You want a document that describes your legal obligations to each other and you want to have a way of making the other party do what they're supposed to do.

This section discusses how family law agreements can be enforced by the courts and by the BC Family Maintenance Agency [1] (BCFMA), an agency of the provincial government that can help with the enforcement of agreements for the payment of child support and spousal support. The BCFMA used to be called FMEP, and may still be called that since it operated for decades as the Family Maintenance Enforcement Program.

Introduction

When someone who has signed a family law agreement doesn't do the things the agreement requires, that person is *in breach* of the agreement. In family law, unlike the law about commercial contracts, a party to an agreement can breach just part of the agreement without being considered to be in breach of the whole agreement. As a result, when someone breaches just a part of a family law agreement, the other party isn't allowed to treat the entire agreement as having been rejected by the breaching party, no matter how important the breach was, and the agreement continues to be binding on both parties.

The *Family Law Act* says this about family law agreements at section 6:

> (1) Subject to this Act, 2 or more persons may make an agreement
>
> (a) to resolve a family law dispute, or
>
> (b) respecting
>
> (i) a matter that may be the subject of a family law dispute in the future,
>
> (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
>
> (iii) the implementation of an agreement or order.
>
> (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.
>
> (4) Subsection (3) applies whether or not
>
> (a) there is consideration,
>
> (b) the agreement has been made with the involvement of a family dispute resolution professional, or
>
> (c) the agreement is filed with a court.

When a term of an agreement is breached, the other party is entitled to take steps to make the breaching party comply with their obligations under the agreement. This is called *enforcing* the agreement. How a separation agreement is enforced depends largely on which particular term of the agreement has been breached. Some terms, like those dealing with child support, are fairly easy to enforce. Other terms, like those dealing with the allocation of parental responsibilities, can be much harder to deal with.

The *Divorce Act* doesn't talk about enforcing family law agreements. Sections 7.3 and 7.7 encourage people to resolve family law disputes outside of court if they can, but the act doesn't give the court any tools to enforce the agreements that may result from resolving a dispute out of court.

Enforcement under the *Family Law Act*

The *Family Law Act* allows certain family law agreements about certain subjects to be filed in court and enforced under the act:

- agreements on *parental responsibilities and parenting time* can be filed under s. 44(3), including agreements that talk about *decision-making responsibilities* instead of parental responsibilities,
- agreements for *contact* with a child can be filed under s. 58(3),
- agreements for *child support* can be filed under s. 148(2), and
- agreements for *spousal support* can be filed under s. 163(3).

Once filed in court, these agreements can be enforced under the *Family Law Act* in the same way as court orders are enforced under the act.

The act has different ways of enforcing orders that change depending on the subject of the order (or the agreement). Where the act provides a particular way of enforcing an order, the order can be enforced under that *specific* enforcement power and by *extraordinary* enforcement powers the act gives to the court. Where the act does not provide a particular way of enforcing an order, the order can be enforced under the act's *general* enforcement powers and under its *extraordinary* enforcement powers.

General enforcement powers

Under section 230 of the *Family Law Act*, the court can enforce an order (or agreement) by requiring a person to:

- post security for their future compliance, usually by paying a sum of money into court,
- pay the expenses the other party incurred as a result of the person's breach,
- pay up to $5,000 to the other party, or to a child or a spouse who was affected by the person's breach, or
- pay up to $5,000 as a fine.

This part of the *Family Law Act* applies to agreements about parental responsibilities, child support, and spousal support.

Extraordinary enforcement powers

Under section 231 of the *Family Law Act*, when no other order will be sufficient to make someone comply with an order (or an agreement), the court can enforce the order (or the agreement) by imprisoning the breaching party for up to 30 days. You will need to prove to the court that no other order will be effective in making the breaching party comply with an agreement, and that's a very high bar to reach. And, because putting someone in jail is such a drastic step, don't expect the court to do this except in the most extreme circumstances.

This part of the act applies to agreements about parental responsibilities, parenting time, contact, child support, and spousal support.

Enforcement under other legislation

While the federal *Divorce Act* doesn't talk about family law agreements, including the enforcement of agreements, other laws do, including the provincial *Family Maintenance Enforcement Act* [2] and the provincial *Personal Property Security Act* [3].

Orders about child support and spousal support

Under sections 148 and 163 of the *Family Law Act*, an agreement about child support or spousal support that has been filed in court can also be enforced under the *Family Maintenance Enforcement Act* [2] and the *Court Order Enforcement Act* [27]. Filing an agreement with the Family Maintenance Agency can be very helpful, as the program provides its services for free and can take some steps, like seizing passports and driver's licences, that lawyers can't.

Agreements about child support or spousal support made outside of British Columbia can be filed in court here under the *Interjurisdictional Support Orders Act* [25], and then be enforced under the *Family Maintenance Enforcement Act*.

Orders about property

Under section 99 of the *Family Law Act*, a party to a family law agreement about property can file a Notice of Agreement in the Land Title Office that will be registered as a charge on the title of a property under the *Land Title Act* [4]. This will stop the property from being sold or mortgaged until the Notice of Agreement is cancelled.

Not all homes are houses attached to a piece of land. Under section 100 of the act, a party to a family law agreement about a *manufactured home* (a structure like a trailer home that is designed to be towed or carried from one place to another) can file a Financing Statement in the Personal Property Registry [5] that will be registered against the manufactured home under the *Personal Property Security Act* [6]. This will stop the manufactured home from being sold until the Financing Statement is cancelled.

Agreements about the care of children

Under the federal *Divorce Act*, married spouses have *decision-making responsibilities* for their children, and the schedule of their time with the children is called *parenting time*. People who are not married spouses may have *contact* with a child.

Under the provincial *Family Law Act*, guardians, who may or may not be parents, have *parental responsibilities* for raising the children, and the schedule of their time with the children is called *parenting time*. People who are not guardians, including parents who are not guardians, may have *contact* with a child.

Decision-making responsibilities means more or less the same thing as parental responsibilities, although the *Family Law Act* goes into a lot more detail about the sort of decisions that parental responsibilities includes than the *Divorce Act* does. The court will enforce agreements that talk about decision-making responsibilities as if the agreement was about parental responsibilities.

Parental responsibilities

An agreement about parental responsibilities can be filed in court under section 44(3) of the *Family Law Act* and be enforced through the act's general and extraordinary enforcement powers.

Parenting time and contact

A written agreement about parenting time can be filed in court under section 44(3); a written agreement about contact with a child can be filed in court under section 58(3). These agreements can be enforced through the specific enforcement powers found in sections 61 and 63, as well as the act's extraordinary enforcement powers.

Denial of parenting time or contact

Under section 61, where someone has been *wrongfully denied* parenting time or contact in the previous 12 months, the court can:

> (a) require the parties to participate in family dispute resolution;
>
> (b) require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs;
>
> (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
>
> (d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;
>
> (e) require that the transfer of the child from one party to another be supervised by another person named in the order;
>
> (f) if the court is satisfied that the guardian may not comply with an order made under this section, order that guardian to
>
> (i) give security in any form the court directs, or
>
> (ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
>
> (g) require the guardian to pay
>
> (i) an amount not exceeding $5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or
>
> (ii) a fine not exceeding $5 000.

The court can enforce agreements for parenting time or contact using its extraordinary power to jail someone, as well as certain other extraordinary powers intended for problems like these. Under section 231(4), where a guardian withholds parenting time or contact, the court can require a police officer to take the child to the person entitled to parenting time or contact. Under section 231(5), where a person with contact refuses to return the child to their guardian, the court can require a police officer to take the child to their guardian.

Under section 62(2), the denial of parenting time or contact is not wrongful under the following circumstances:

> (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
>
> (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
>
> (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
>
> (d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;

> (e) the applicant
>
> (i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and
>
> (ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;
>
> (f) other circumstances the court considers to be sufficient justification for the denial.

Failure to exercise parenting time or contact

Under section 63, where someone *fails repeatedly* to exercise a right of parenting time or contact under an agreement, the court can:

- require the parties to use a dispute resolution process, such as parenting coordination or mediation,
- require one or more parties or the child to go to counselling,
- require the transfer of the child between the parties to be supervised,
- require the person who fails to use their parenting time or contact to pay back any expenses incurred by the other person as a result of their failure,
- require the breaching person to post security, or
- require the breaching person to report to the court.

The court can also enforce agreements about parenting time or contact using its extraordinary power to jail a person.

Agreements for child support and spousal support

When a payor falls behind in their support payments as required by an agreement, or stops making them altogether, they are in *arrears* of support. The good news is that terms about the payment of child support and spousal support are often the easiest parts of an agreement to enforce.

Once an agreement about support is filed in court, the agreement can be enforced using the general and extraordinary enforcement powers under the *Family Law Act*. Under section 148 of the act, filed agreements about child support can also be enforced by the BC Family Maintenance Agency [20]. The agency can enforce agreements about spousal support under section 163.

The Family Maintenance Agency has a free service that can be very effective in encouraging payors to meet their obligations and monitoring their ongoing payments. Their program has a number of tools to collect arrears of support, including a number of tools that aren't available to lawyers who are trying to collect arrears, including seizing payors' passports and driver's licences.

Agreements about property and debt

Where an agreement provides for the division of property and debt and someone doesn't live up to their obligations, the agreement can be enforced by starting a court proceeding in the Supreme Court for *breach of contract*, asking the court to make an order for the "specific performance" of the agreement by the person in breach, plus usually an order for costs.

An order for *specific performance* requires the person breaching a contract to do whatever it is that the contract requires of them, including selling or transferring real property, transferring or surrendering personal property, or paying a debt. An order for costs requires the breaching person to pay some money toward the expenses incurred by the other party to the contract, usually their expenses in connection with the court proceeding they started to enforce the contract.

Resources and links

Legislation

- *Family Law Act* [6]
- *Divorce Act* [7]
- *Interjurisdictional Support Orders Act* [22]
- *Family Maintenance Enforcement Act* [19]
- *Court Order Enforcement Act* [21]
- *Land Title Act* [4]
- *Personal Property Security Act* [6]

Links

- Enforcing Orders and Agreements for Support [7] from Dial-a-Law by People's Law School
- Enforcing Support [8] website from the Department of Justice
- Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement [9] website from the Department of Justice
- BC Family Maintenance Agency website [20]
- Child & spousal support [10] from Legal Aid BC
  - See "Family Maintenance Agency"
- Personal Property Registry website [5]
- Enforce an order or agreement made in BC [11] from Legal Aid BC
- Child Support [12] from Dial-a-Law by the People's Law School
- Court orders & hearings [13] from Legal Aid BC
- Income Disclosure for Child Support Purposes [14] from Canada Department of Justice
- Interjurisdictional Support Orders: FormSelect [15] from BC Ministry of Attorney General

Resources

- "Financial Documents for Family Court" [16] from the Provincial Court of BC
- "Parenting After Separation Handbook: Finances" [17] from the Justice Education Society of BC
- "Families Change: Child Support Resources" [18] video from Justice Education Society of BC and BC Ministry of Attorney General
- "Separated with Children - Dealing with the Finances: Facilitator's Guide" [19] from the Justice Education Society of BC
- "Interjurisdictional Support Orders: Form Support Guide" [20] from BC Ministry of Attorney General
- "Interjurisdictional Support Orders: Forms & Guides" [21] from BC Ministry of Attorney General

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 22 November 2023.

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[17] https://www.clicklaw.bc.ca/resource/4829
[18] https://www.clicklaw.bc.ca/resource/1537
[19] https://www.clicklaw.bc.ca/resource/1530
[20] https://www.clicklaw.bc.ca/resource/1155
[21] https://www.clicklaw.bc.ca/resource/1883

Children & Parenting

Children and Parenting after Separation

When parents separate, they have to make decisions about four important issues: where the children will live; how parenting decisions will be made; how often each of them will see the children; and, how the children will be provided for. This chapter reviews the first three of these issues in detail. The fourth issue is covered in the Child Support chapter.

This introductory section provides an overview of the law on parenting after separation, and looks at traditional and developing concepts in this area of the law. It also discusses the interests that grandparents and other people, including people who are the guardians of children but not their parents, might have regarding the care of children.

Other sections of this chapter look more closely at some of the non-legal issues involved with the care of children, including:

- the rights of children and youth in family law disputes between their parents,
- parenting apart,
- the basic principles of parenting after separation, including guardianship, parenting arrangements and contact under the *Family Law Act*, and parenting arrangements and contact under the *Divorce Act*,
- what happens when a parent wants to move away after separation, with or without a child,
- children who resist seeing a parent after separation, and
- making changes to orders, awards and agreements about children.

Other legal issues relating to parenting and parenting after separation, including family violence, naming children, and adopting children are discussed in other sections of this resource.

Introduction

There are two laws that talk about parenting after separation: the federal *Divorce Act* and the provincial *Family Law Act*. Both laws allow parents and other people to apply for orders about where the children will live and how much time each person will have with the children if they can't make an agreement about these issues themselves. Whenever the court is asked to make a decision about issues like these, the court's only concern is the wellbeing of children and the sort of parenting arrangements that are most likely to be in their best interests. The other Parenting after Separation section in this chapter talks about how the court makes these decisions and the laws that apply to parents and other people responsible for children's care in different situations.

The Parenting Apart section talks about some very important issues that don't involve legislation or the court, but are equally important:

- how to protect children from conflict between their parents,
- how to develop parenting plans, and
- how to locate resources for separating and separated parents.

When parents separate, there's a lot more at stake than just where the children are going to be living tomorrow. Parents have an obligation to think in the long-term, and take a perspective that looks years down the road. How is their conflict going to affect their children? How can both parents maintain meaningful roles in their children's lives? How will the children adapt to the separation? When the children are older and look back on their childhood, what will they think of their parents' separation? And, perhaps most importantly, how can the children best be helped to grow and mature into adults with families of their own?

There's a lot more involved in making decisions about parenting after separation than what you'll find in the *Divorce Act* and the *Family Law Act*. The romantic relationship between the parents may be over, but they'll always be parents, no matter the nature of their relationship with each other. Separated parents have a duty to their children to try to overcome their differences and always put their children first, no matter how hard it is for them to cope with the emotional and legal issues that arise from the breakdown of their relationship with each other.

Parenting after separation and the law

For married spouses, the law about parenting after separation is governed by the federal *Divorce Act* and the provincial *Family Law Act*. Although married spouses can ask for orders under both the *Divorce Act* and the *Family Law Act*, it's usually best to just pick one act or the other to deal with issues about parenting after separation.

For unmarried spouses and other unmarried parents, the only law that applies is the *Family Law Act*.

Only the Supreme Court can deal with claims about parenting after separation under the *Divorce Act*. Both the Supreme Court and the Provincial Court can deal with claims about parenting under the *Family Law Act*.

The *Divorce Act* and decision-making responsibility and parenting time

The *Divorce Act* talks about parenting after separation in terms of married spouses who have "decision-making responsibility" for their children and have "parenting time" with their children. The *Divorce Act* started using this language on 1 March 2021. Before then, the *Divorce Act* talked about married spouses who had "custody" of their children and "access" to their children. The new language focuses more on the interests of children than the rights of parents, and is very similar to the language used by the *Family Law Act*.

Decision-making responsibilities are the responsibilities parents have to make important decisions on behalf of their children, about things like where the children go to school, how they're treated when they get sick and which sorts of extracurricular activities they'll participate in. Under the old *Divorce Act*, people with custody had the responsibility for making decisions like these. Decision-making responsibility under the *Divorce Act* is a lot like "parental responsibilities" under the *Family Law Act*. (People other than married spouses may be able to ask for decision-making responsibilities when there's already a court proceeding under the *Divorce Act*.)

Parenting time is the schedule of the time that each parent has with their children. Under the old *Divorce Act*, we talked about the children's schedule in terms of "access," but "access" only referred to the schedule of the parent who saw the children the least. Parenting time under the *Divorce Act* means almost exactly the same thing as "parenting time" under the *Family Law Act*. (People other than married spouses may be able to ask for parenting time when there's already a court proceeding under the *Divorce Act*.)

A person who has decision-making responsibilities or parenting time is entitled to get information about the education, health and wellbeing of their children from anyone who has that information. A person who has parenting time is also entitled to make day-to-day decisions about the children during their parenting time, including emergency decisions.

Orders about decision-making responsibilities and parenting time are called "parenting orders." Agreements about decision-making responsibilities and parenting time are called "parenting plans."

If you have an old agreement or order that talks about custody and access, you don't need to get a new agreement, award or order. What you need to do is understand how the new language applies to your agreement, award or order:

- **Custody:** If you have custody of your children, whether you had sole, joint or shared custody of your children, you now have *decision-making responsibilities* for your children. However, if your agreement or order limited the sort of decisions you could make on behalf of your children, those limits still apply.
- **Access with custody:** If you have custody of your children and access to your children, you and their other parent now have *parenting time* with your children and *decision-making responsibilities* for your children. The time the children are with you is now your parenting time, and the time the children are with their other parent is the other

parent's parenting time. However, if your agreement or order limited the sort of decisions you could make on behalf of your children, those limits still apply.

- **Access without custody:** If you have access to your children but not custody of your children, you have *parenting time* with your children but you don't have any *decision-making responsibilities* for your children.

It's important to know that the language in the updated *Divorce Act* doesn't give anyone any more rights than they had before.

The *Divorce Act* and contact

"Contact" is the time that people other than married spouses have with children. People other than married spouses can ask for contact with children when there's already a court proceeding between the spouses under the *Divorce Act*. Contact under the *Divorce Act* means almost exactly the same thing as "contact" under the *Family Law Act*.

The court can make orders about contact when the children's parents are already involved in a court proceeding under the *Divorce Act.*

The *Family Law Act* and guardianship, parental responsibilities and parenting time

The *Family Law Act* puts the emphasis on people who are *guardians*, rather than on people who are *parents*. Guardians are usually, but not always, the parents of a child. A child's guardians might also include:

- people who are parents because of an assisted reproduction agreement,
- people other than parents who are appointed by the court as guardians, and
- people who are appointed by a guardian as guardians when the appointing guardian dies or becomes too sick to perform the responsibilities of a guardian.

Guardians have "parental responsibilities" for their children and have "parenting time" with their children.

Parental responsibilities are the responsibilities guardians have for making important decisions on behalf of their children, about things like where the children go to school, how they're treated when they get sick and which sorts of extracurricular activities they'll participate in. Only guardians can have parental responsibilities. Parental responsibilities under the *Family Law Act* are a lot like "decision-making responsibility" under the *Divorce Act*.

Parenting time is the schedule of the time that each guardian has with their children. Only guardians can have parenting time. Parenting time under the *Family Law Act* means almost exactly the same thing as "parenting time" under the *Divorce Act*.

A guardian who has parental responsibilities is entitled to get information about their children, including information about the children's education and health. A guardian who has parenting time is also entitled to make day-to-day decisions about the children, including emergency decisions, and has the care, control and supervision of the children during their parenting time.

Agreements, awards and orders about parental responsibilities and parenting time are called "parenting arrangements."

The *Family Law Act* and contact

"Contact" is the time that people other than guardians have with children, including the time of parents who are not guardians. Contact under the *Family Law Act* means almost exactly the same thing as "contact" under the *Divorce Act*.

The best interests of the children

Whenever the court considers issues involving children, its first and foremost concern is the best interests of the children, not whatever the particular wishes of a parent might be, no matter how well-intentioned that parent is. It's not about you; it's about your kids. As a result, in any application concerning children you must show that the

outcome you're looking for is the outcome that is in your children's best interests.

Sections 16.1 to 16.6 of the *Divorce Act* are about parenting orders and contact orders. Section 16 is about the best interests of children and says this:

> (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (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.
>
> (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.

If family violence is present, and is a factor under section 16(3)(j), section 16(4) provides a list of additional factors to help the court assess the impact of the family violence:

> (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

> (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.

Part 4 of the *Family Law Act* is about parenting arrangements and contact orders. The parts of the *Family Law Act* that talk about children's best interests and family violence are very similar to section 16 of the *Divorce Act*. Section 37 of the *Family Law Act* is about the best interests of children and says this:

> (1) In 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.
>
> (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (a) the child's health and emotional well-being;
>
> (b) the child's views, unless it would be inappropriate to consider them;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
>
> (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
>
> (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

If family violence is present, and is a factor under sections 37(2)(g) and 37(2)(h), section 38 provides a list of additional factors to help judges and arbitrators assess the impact of the family violence:

> For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:
>
> (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.

As a result of these sections, when the court has to make orders about decision-making responsibilities, parenting time and contact under the *Divorce Act*, or parental responsibilities, parenting time and contact under the *Family Law Act*, it must take into account a whole range of factors, including:

- What are the child's views and preferences, assuming the child is old enough to express them?
- Who looked after the child most of the time during the marriage?
- Does the child have a stronger bond with one parent than the other?
- How much will each parent work to encourage the child to spend time with the other parent, and support the child's relationship with the other parent?
- What plans do the parents have to look after and care for the child into the future?
- How well can the parents cooperate and communicate with each other?
- How will the proposed order affect the child?
- Is the proposed order in the child's long-term best interests?
- Will the proposed order disrupt the child's present life? Is there an established routine, a *status quo*, that the child has already settled into?
- Will the proposal disrupt the child's schooling, or reduce the child's time with their friends and family?

- Has there been family violence, and how has the family violence impacted the family and the wellbeing of the child?

If you are asking for an order or award about parenting after separation, it is very important that you have read and understand the best-interests factors, and that you think about how you can give evidence to the court about the different factors.

Children's experiences of separation

The end of an important relationship is always difficult for parents. It can be just as difficult, if not worse, for their children. How children cope with the end of their parents' relationship has to do with two things: the age and maturity of the children, and how their parents manage the breakdown of their relationship.

Let's move away from the law for a bit and talk about how children experience the separation of their parents. This is an important subject that we'll return to in the Parenting Apart and Children Who Resist Seeing a Parent sections of this chapter.

Children don't see things in terms of guardianship, parental responsibilities and parenting time when their parents' relationship ends. All they know is that something has gone wrong. Their parents are yelling at each other a lot, and then, one day, one of them isn't there anymore. Very young children won't understand these adult problems. Children who are in primary school will have a better idea, since they'll have friends whose parents have separated and others whose parents were never together in the first place. Tweens and teens may have a more grown-up grasp of things, as they'll likely have lost relationships of their own and can appreciate the idea that their parents' relationship has also ended. How children cope with their parents' separation changes as they grow older and more mature and gain more life experience.

Things are a lot different for parents. A significant, often lengthy relationship has ended, and in the midst of all of the emotions that go along with that — grief, anger, jealousy, love, and loss — they suddenly find themselves opposed in interest to the person they once loved. They might also find themselves having to deal with some extremely difficult legal issues about some of the things that are most important to them, like their children. It's even worse when parents wind up fighting about these things in court.

Litigation can have a very profound impact on people. At its core, litigation is an adversarial process. Each parent is fighting the other in order to "win," and where there's a winner there's always a loser. This sort of approach to resolving disputes often polarizes parents and encourages them to take extreme positions. In circumstances like these, it can be easy to forget how important it is that the children maintain a positive, loving relationship with each of their parents. It's also easy for each parent's view of the other to become clouded by hatred, malice and spite, to the point where nothing the other parent can do is ever right. Attitudes like these are almost impossible to shield from children. Whether intentionally or unintentionally, the children are inevitably exposed to these negative views which, without intervention, can come to colour the children's own views of the other parent.

Of course, lots of parents are able to separate like, well, adults. They get counselling when counselling is required, and sometimes get that counselling together. They're mature, treat each other with courtesy and respect for the most part, and acknowledge each other's strengths as people and as parents. These parents don't have a lot of conflict from which the children need to be protected, and how they resolve disagreements can become a helpful model for the children when they have to address problems of their own.

The impact of separation by age

How children experience the separation of their parents depends not only on the level of conflict between their parents, but also on their age, stage of development and maturity. **Infants** won't understand what's going on when their parents separate, but they will be aware of anger and hostility and be distressed if they're in the middle of yelling and fighting. (Don't think that your baby isn't impacted by your arguments just because they don't understand what you're saying!) They'll also be aware of the absence of a parent if one of them moves out. For children of this

age, it's particularly important that the parent who's moved out sees the children frequently, usually for shorter periods of time.

Toddlers will also be aware that a parent is missing, but won't understand why. They are likely to experience anxiety from the change in their home environment, and may have setbacks in their development. A toddler who has been potty trained, for example, may need pull-ups again. Any lost milestones, however, will eventually be regained. As with infants, it's really important that the parent who's moved out sees the children frequently. However, these children will be able to spend longer periods of time with the parent who's moved out, possibly including overnights.

Preschoolers will know that a parent is missing, however their understanding of why the parent is missing will be fuzzy. Children of this age are used to being the centre of attention and may come to believe that something they did caused the separation, and feel guilty as a result.

Children between the ages of 6 to 8 will have a better grasp of what's going on. These children are getting much better at expressing their feelings, but, now that they're in a social environment with other kids at school, they're also learning to hide and mask their feelings, to lie when lying is useful, and to say things that they think other people want to hear. It can be difficult to know exactly how these children are dealing with their parents' separation.

On the other hand, **children aged 9 to 12** are usually angry about their parents' separation and its impact on their lives. They may interpret the separation of their parents as also a rejection of themselves, usually by the parent who's moved out.

Teenagers will have a much more adult understanding of their parents' separation and often appreciate why their parents' relationship didn't work out. However, while teenagers are developing important skills like empathy and have a deepening appreciation of the complexities of interpersonal relationships, they often develop a moral compass that's rigid and uncompromising. They are likely to blame their parents for separating, and the upheaval in their personal lives, especially if it means that they've had to move or change schools. Teenagers can be highly judgmental toward the parent they see as responsible for the separation.

The bad news about separation

Separation is difficult for all children, no matter how well adjusted they and their parents might be. At the most basic level, the separation of a child's parents produces a tremendous change in their family; ever since they can remember, both parents were there and present in their lives, and then, one day, that changes. If that fundamental bedrock feature of their lives can change, what else can change? Anxiety, anger and frustration are pretty understandable responses.

Unfortunately, the social science about the impact of separation shows that children who have experienced the separation of their parents are at high risk of depression, self-harming behaviours, falling behind in school and dropping out of school, promiscuity and pregnancy as teens, misuse of drugs and alcohol, eating disorders, and a bunch of other things. They're also at higher risk of separation and divorce in their own relationships as adults. However, social science also tells us that the impact of parental conflict on children is even worse than the impact of separation. You sometimes hear people in unhappy relationships talking about how they're "staying together for the kids." That's an important point, and shows that these people have placed their children's wellbeing and happiness above their own, but if these people are engaged in high levels of conflict, staying together may be worse for the children than separating.

The good news about separation

While it's true that separation has an important impact on children of all ages, the good news is that parents can mitigate the likelihood of negative outcomes, like the children falling behind and school and the other things just mentioned. In fact, handling a separation well can help children adjust to the change and even help them develop resiliency. It's important to know that parents' behaviour during their separation can have a huge impact on the children's relationships with each of them, and on the children's expectations for their own future relationships in

terms of trust, intimacy and closeness. As a result, it's important to minimize conflict and choose dispute resolution processes — and lawyers! — that promote cooperation and discourage conflict.

It's also important for parents to recognize when they need help. It often takes longer than people think to adjust to separation, and it's hard for children to adjust to the separation when their parents haven't adjusted themselves. A prominent lower mainland counsellor describes separation and divorce as a wound that must be treated properly in order to heal, and will eventually infect other areas of our lives if it's not treated and is allowed to fester. Proper treatment can help parents cope better with their separation, which in turn will help the children cope better with their parents' separation.

A lot of issues about separation and separating well are discussed in the Separating Emotionally and Behaviour, Boundaries and Privacy after Separation sections of the Separating and Getting Divorced chapter. In the meantime, know that mental health professionals are available who specialize in helping people work through the emotional turmoil that follows the end of a long-term relationship. Look for professionals with the designations *Registered Clinical Counsellor* (RCC), *Certified Canadian Counsellor* (CCC), *Registered Psychologist* (RPsych) or *Registered Social Worker* (RSW).

- The website counsellingbc.com [3] offers a list of subscribing counsellors by area of practice.
- The BC Association of Clinical Counsellors [4] also maintains a referral list of its members.
- The BC Association for Marriage and Family Therapy [5] has a referral list and helpful information about how to choose a counsellor.
- The website findasocialworker.ca [1], from the BC Association of Social Workers, has a tool to find a social worker.

Key legal concepts about parenting after separation

Figuring out the legal concepts relating to parenting after separation got a lot easier after the federal *Divorce Act* was updated on 1 March 2021. Before it changed, the *Divorce Act* talked about parenting after separation in terms of "custody" and "access," which were a difficult fit with the provincial *Family Law Act*, which uses terms like "parental responsibilities," "parenting time" and "contact." Now the *Divorce Act* uses the terms "decision-making responsibilities," which are a lot like parental responsibilities, as well as "parenting time" and "contact." However, it's still only the *Family Law Act* that talks about *guardianship*, and that's because making laws about guardianship is a provincial responsibility.

Guardianship

"Guardians" are people who are responsible for the care of someone else, usually someone under a legal disability (like being under the age of majority or being mentally incompetent) or someone who couldn't otherwise care for themself (because of advanced age, physical illness or mental illness). Guardians can be responsible for managing all of someone's affairs or just some of them. Guardians are appointed under a written agreement, like a power of attorney or a living will, or by a court order, like an order making someone a litigation guardian for a person who is underage.

In family law, a guardian is someone who is responsible for making decisions for a child, both big decisions, like deciding where the child will live or how they get treated when they're sick, and smaller decisions, like giving consent for a school field trip or deciding which after-school sports they'll play. Guardians are also responsible for looking after their children, making sure they're fed, clothed and have a place to live, and making sure they go to school for as long as the law requires.

Under British Columbia's old *Family Relations Act*, which was the law in this province before the *Family Law Act* was introduced in 2013, separated parents would ask for orders appointing them as the guardians of their children, along with orders about having custody of their children. Parents could be the "sole guardians" of their children,

which meant that only they could make decisions on behalf of their children, or have "joint guardianship" of their children, which meant that both of them were responsible for making decisions on behalf of their children.

The *Family Law Act* changed this. Instead of having to ask to be appointed as the guardians of their children after separation, parents are usually presumed to be their children's guardians, both while their relationship is intact *and* after they separate. And, just like under the *Family Relations Act*, people who are not the parents of a child can still be appointed as a guardian of the child. Since not all parents are automatically the guardians of their children, and since people other than parents can still be made the guardians of a child, this means that what's important under the *Family Law Act* is being a *guardian*, not being a *parent*.

Under the *Family Law Act*, people who are the guardians of a child have "parental responsibilities" for the child and "parenting time" with the child, whether a guardian is a parent of the child or not. The rights and responsibilities are the same. A parent who is *not* a guardian of their child may have "contact" with their child, but does not have parental responsibilities for their child or parenting time with their child. We'll talk about these concepts in more detail in this section and in the other sections in this chapter.

Parental responsibilities and decision-making responsibility

Parental responsibilities and decision-making responsibility are all about the job of parenting children. "Parental responsibilities" is the term used by the provincial *Family Law Act*; "decision-making responsibility" is the term used by the federal *Divorce Act*. They both mean pretty much the same thing. Remember that the *Divorce Act* primarily applies to people who are, or used to be, married to each other, while the *Family Law Act* primarily applies to parents, regardless of whether they are married spouses, unmarried spouses, just dating or something else.

Parental responsibilities and decision-making responsibility are both about making decisions on behalf of children. The big difference between the ideas is that parents exercise parental responsibilities during their relationship and after it breaks down, while decision-making responsibility only becomes important when married spouses go to court after they separate. But whether we're talking about parental responsibilities or decision-making responsibility, parents and guardians of a child must always exercise their authority in the best interests of their child.

If the parents can't agree on how to share parental responsibilities or decision-making responsibility, judges can make orders about how they'll be shared. These orders can be general or very specific. Sometimes the court will make a general order that parents will share parental responsibilities or decision-making responsibility and must consult each other before making a decision about a child. Sometimes the court will make a specific order that only one parent will have parental responsibilities or decision-making responsibility, or make an order that each parent will have the exclusive authority to make certain decisions about the children but not others. An order like this might say that one parent has sole responsibility for making health care decisions, for example, while the other has sole responsibility for making decisions about education, but that they both have responsibility for making decisions about their child's extracurricular activities.

The different kinds of decisions that fall under *decision-making responsibility* are listed in section 2(1) of the *Divorce Act*:

> Decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of
>
> (a) health;
>
> (b) education;
>
> (c) culture, language, religion and spirituality; and
>
> (d) significant extra-curricular activities.

This list is what lawyers call a "non-exhaustive list," meaning that the list of decisions in section 2(1) includes some but not all of the possible decisions that someone with decision-making responsibility may have to make. (An

"exhaustive list," on the other hand, is a list that includes all of the possible choices, options or factors that are available.) Other decisions that someone with decision-making responsibility might have to make include deciding where a child will live or deciding whether to give permission for a school field trip.

The *Family Law Act* goes into a lot more detail than the *Divorce Act* does. The list of parental responsibilities provided by the *Family Law Act* appears at section 41:

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

Parental responsibilities and decision-making responsibility are also about the right to get information about children. Under section 16.4 of the *Divorce Act*, someone who has decision-making responsibility also has the right to ask for and get information about the child's wellbeing, including about their education and health, from anyone who has it, including the other spouse. Under section 41(j) of the *Family Law Act*, a guardian may or may not have the right to get information about the child depending on how parental responsibilities are shared between the guardians.

Parenting time

"Parenting time" is the schedule of a child's time between married spouses under the federal *Divorce Act*. Under the provincial *Family Law Act*, it's the schedule of a child's time between the child's guardians. Parenting time means almost exactly the same thing, whether you're talking about the *Divorce Act* or the *Family Law Act*.

(The big difference between "access" under the old *Divorce Act* and "parenting time" under the new *Divorce Act* is that access referred to the schedule of the married spouse with the least amount of time with the child. Quite often, the child would live more with one parent than the other. The parent that the child mostly lived with had the child's *primary residence*, and the other parent had *access* to the child. Orders would usually specify the other parent's schedule of access, assuming that the child would be with the parent with the child's primary residence for the rest of the time. Parenting time, on the other hand, refers to the schedule of the child's time with *both* parents. Each spouse has parenting time with their child, not just one of them.)

If the parents can't agree on how they'll share the children's parenting time, the court can make orders about how parenting time will be allocated between them. Neither the *Divorce Act* nor the *Family Law Act* makes any presumptions about how parenting time should be allocated between parents. All the *Divorce Act* has to say on the subject is that "a child should have as much time with each spouse as is consistent with the best interests of the child," which is *not* a presumption that children's time should be allocated equally between parents or allocated in any other way. The *Family Law Act* says explicitly that there is no particular allocation of parenting time that "is presumed to be in the best interests of a child."

Like all decisions regarding children, the allocation of parenting time must be based on the child's best interests. The best-interests factors under the *Divorce Act* are listed at section 16; the best-interests factors under the *Family Law Act* are listed at sections 37 and 38.

Under section 16.4 of the *Divorce Act*, someone who has parenting time with a child also has the right to ask for and get information about the child's wellbeing, including about their education and health, from anyone who has it, including the other spouse. Under section 16.2, a spouse has the authority to make "day-to-day decisions" about the child during their parenting time. *Day-to-day decisions* are about things like deciding whether to go to the park or to the movies, deciding what clothes the child should wear and deciding when the child should go to bed, as well as emergency decisions. The *Family Law Act* says sort of the same thing in section 42(2):

> During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

Contact

Under the *Divorce Act*, someone who is not a married spouse may have "contact" with a child. Under the *Family Law Act*, someone who is not a guardian may have contact with a child, including a parent who is not a guardian.

Contact is an entitlement to spend time with a child, usually according to a fixed schedule, the way parenting time is usually allocated between guardians. However, that's all contact is, it's just an entitlement to spend time with a child. Someone with contact does not have decision-making responsibility or parental responsibilities for the child. They do not have the right to get information about the child, and they do not have the right to make day-to-day decisions about the child.

If the child's parents and a person seeking contact can't agree on whether and how much contact the person should have with the children, the court can make orders about whether the person should have contact with the children and what the schedule of contact should be. Someone who wants to ask for contact under the *Divorce Act* must get the court's permission to ask for contact first, and the child's parents must already be involved in a court proceeding under the *Divorce Act*.

Like all decisions regarding children, the decision about whether and how much contact a person should have with a child will be based on the child's best interests. The best-interests factors under the *Divorce Act* are listed at section 16; the best-interests factors under the *Family Law Act* are listed at sections 37 and 38.

Parenting orders, parenting plans and parenting arrangements

Under the *Divorce Act*, court orders about parenting time or decision-making responsibility are called *parenting orders*. Agreements and arbitrators' awards about parenting time, decision-making responsibility or contact are called *parenting plans*. Court orders about contact are called, appropriately enough, *contact orders*.

Under the *Family Law Act*, agreements, arbitrators' awards and orders about parenting time or parental responsibilities are called *parenting arrangements*.

Children's relatives and caregivers

People other than a child's biological or adoptive parents may also be interested in a child's parenting arrangements. Typically, these people are a child's blood relatives — grandparents, aunts, uncles, and so forth — although there's no reason at all why someone else, like an unrelated long-term caregiver or neighbour, couldn't also have an important role in a child's life. Most often, however, it's grandparents who want to have a legal role in their grandchildren's lives. Grandparents, extended family members and other adults who are not parents normally get involved in legal disputes about children in only a few situations, usually where:

- one or all of the guardians of a child have died,
- one or all of a child's guardians have abandoned a child,
- there are serious concerns about the ability of guardians to care for their child, or
- they are being refused time with a child, or involvement in the child's life.

Their concerns are about either supervising or managing the parenting of a child, or setting up a schedule that will let them see a child on a regular basis.

No matter how important a grandparent's or other person's concerns might be, the court will place a great deal of weight on the wishes of the parents. In a 2003 case of the Supreme Court, M.(D.W.) v. M.(J.S.) [2], the court said that while it must give "paramount consideration" to the best interests of the child, "significant deference must be accorded the custodial parent and their ability to determine the child's best interests."

The legislation

Two laws might apply to people other than parents who are asking for guardianship of or contact with children.

- **The *Divorce Act*:** This law applies if the child's parents are married and are already involved in a court proceeding under the federal *Divorce Act*. However, to make an application under the *Divorce Act*, you have to get the court's permission first.
- **The *Family Law Act*:** This law applies whether the child's parents are married to each other or not. It also applies whether or not the parents are already involved in a court proceeding under the provincial *Family Law Act*. You do not need the court's permission to make an application under the *Family Law Act*, you can just make your application.

Each law has different rules about how and when non-parents can apply in court, and it's important to understand which law might be applicable.

The *Divorce Act*

Under section 16.1(1)(b) of the *Divorce Act*, someone who isn't a "spouse" may ask the court for a "parenting order." A *parenting order* is an order about "parenting time" with or "decision-making responsibility" for a child. *Parenting time* usually means how the child's time is divided between their parents, but in this context includes time with someone who isn't a parent. *Decision-making responsibility* means the responsibility for making decisions on behalf of a child about important things like the child's healthcare or education. (Parenting time and decision-making responsibility are discussed in a lot more detail in the section Parenting after Separation.) To make this application, you must "stand in the place of a parent" to the child or "intend to stand in the place of a parent," and, under section 16.1(3) you must first get the court's permission before you can make your application.

Under section 16.5(1) of the *Divorce Act*, someone who isn't a "spouse" may also ask the court for a "contact order." A *contact order* is an order about the time that someone who isn't a parent has with a child. This sounds the same as an order for "parenting time," but there are some big differences. Someone with parenting time with a child has the right to make day-to-day decisions about the child, including emergency decisions, and the right to get information about the child's wellbeing, including about their health and education. Someone with contact, on the other hand, has none of these rights. Contact is just about spending time with the child and nothing else. (Contact is also discussed in the chapter Parenting after Separation.)

Because we're talking about the *Divorce Act*, a court proceeding must have already started between married spouses, or formerly married spouses, before someone who isn't a spouse can step in and ask for a parenting order or a contact order, or ask to change a parenting order or a contact order. There must be an existing proceeding between spouses in which the person's application can be made.

The *Family Law Act*

The *Family Law Act* talks about "guardians" who have "parenting time" with and "parental responsibilities" for children, and about people who are not guardians and may have "contact" with a child.

In most cases, a child's parents are the child's guardians, which means that normally only a child's parents are entitled to have parental responsibilities and parenting time with the child. However, someone who isn't a parent can ask the court to be appointed as a guardian of a child under section 51 of the *Family Law Act*. These applications can be difficult and time-consuming, and the court must be satisfied that the appointment is in the best interests of the child. Someone who is applying to become the guardian of a child must fill out a special affidavit required by the Provincial Court (Family) Rules [3] and the Supreme Court Family Rules [3]. The affidavit covers:

- the applicant's relationship to the child,
- the other children currently in the care of the applicant,
- any history of family violence involving the applicant that might affect the child, and
- any previous civil or criminal court proceedings involving the applicant that are related to the best interests of the child.

Someone who is applying to become a guardian must also get a criminal records check, a protection order registry records check, and a records check from the Ministry of Children and Family Development.

People who are a guardian of a child, including people who have been appointed as a child's guardian by court order, may ask the court for an order about the child's "parenting arrangements" under section 45(1) of the act. An order about a child's *parenting arrangements* is an order about "parenting time" with or "parental responsibilities" for a child. "Parenting time" usually means how the child's time is divided between their parents, but in this context includes time with someone who isn't a parent. "Parental responsibilities" means the responsibility for making decisions on behalf of a child about important things like the child's healthcare or education. (Parenting time and parental responsibilities are discussed in a lot more detail in the section Parenting after Separation.)

Under section 59 of the *Family Law Act*, someone who isn't a guardian may ask the court for a "contact order." A *contact order* is an order about the time that someone who isn't a guardian has with a child. This sounds just like an

order for "parenting time," but there are some big differences. Someone with parenting time with a child has the right to make day-to-day decisions about the child, including emergency decisions. Someone with contact, on the other hand, does not have this right. Contact is just about spending time with the child and nothing else. (Contact is also discussed in the section Parenting after Separation.)

Under section 149(1) and 149(2)(b) of the act, any person may ask the court for an order that a child's parent, stepparent or guardian pay *child support* for the benefit of a child to a "designated person," normally the person the child lives with the most. (Child support is discussed in a lot more detail in the Child Support chapter.) The court must be satisfied that the contact asked for is in the best interests of the child. People who are applying for contact don't need to get a criminal records check, a protection order registry records check or a Ministry of Children and Family Development records check.

If the child's guardians are already in court, a person who isn't a parent of the child can start a court proceeding and ask that the new proceeding be "joined" to the court proceeding between the guardians. They can then ask for orders about guardianship of the child, the child's parenting arrangements, contact with the child or child support for the child.

If the guardians are not already in court, a person who isn't a parent of the child can start a court proceeding against the child's parents or guardians and ask for orders about guardianship, parenting arrangements, contact with the child or child support for the child.

Guardianship, decision-making and parenting time

When grandparents, extended family members and other adults are asking for an order or an award about guardianship, decision-making or parenting time, it's important to know that there is a strong presumption in favour of the wishes of the children's natural or adoptive parents. The court will generally be willing to allow children to remain with their parent or parents unless a strong case can be made that the parents are neglectful and that the children are suffering in their care. To quote from a 1992 Supreme Court case, Reid v. Watts [4]:

> "Parental claims will not be lightly set aside except in clear cases where the welfare of a child cannot otherwise be achieved."

The Supreme Court of Canada, on the other hand, emphasized the children's best interests a bit more strongly in Racine v. Woods [5], a case from 1983:

> "The law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests."

Grandparents and other people who are asking for guardianship, decision-making or parenting time will still face a difficult application, especially where the child's parent or parents are still in the picture, even if they have been actively involved in caring for the children themselves. Because actual, concrete harm must usually be shown before grandparents are awarded guardianship, decision-making or parenting time, it can be critical to gather as much documentary evidence as possible. Some helpful sources include:

- police records,
- the records of social workers involved with the children,
- records from the Ministry of Children and Family Development, and
- a psychologist's report under section 211 of the *Family Law Act*.

Factors that the courts have taken into consideration in awarding guardianship, decision-making or parenting time to people other than parents have included:

- the parents' ill-treatment, mistreatment, and neglect of the children,
- the parents' chronic drug or alcohol use, and having a partying type of lifestyle,
- the instability of the parents' lifestyle and living situation,

- the parents' abandonment of their children, or an existing situation in which someone other than a parent has been primarily responsible for the care of the children, and
- the parents' poor parenting skills.

Don't be too discouraged by the generally pessimistic tone of this discussion. There are quite a few cases in which grandparents have been awarded guardianship, decision-making or parenting time with their grandchildren. It is possible to succeed on an application for guardianship, decision-making or parenting time, although the chances of success depend entirely on the circumstances of each case. For example, in a 2014 Supreme Court decision, Popovic v. Andjelic [6], the child and her mother resided with the maternal grandparents. The child's father lived in another country. After the mother died suddenly, the grandparents applied to be appointed the guardians of the child and the court granted their request. The father also remained a guardian but without parental responsibilities for the child.

Contact

There's a big difference between asking for guardianship, decision-making and parenting time, and asking for contact. In cases about guardianship, decision-making and parenting time, the courts are concerned with the adequacy of the children's living arrangements and their health and welfare, and the enormous responsibility the court may be giving to someone who is not a parent. In cases about contact, the parents are usually guardians, with parental responsibilities and parenting time, and no one is challenging their ability to manage their children's upbringing. The children are usually well and the parents are doing just fine. As a result, the court will usually place an even greater emphasis on the parent's discretion and judgment.

Grandparents and other people do not have a presumptive entitlement to contact with children under either the *Divorce Act* or the *Family Law Act*, but they can certainly ask for an order that they have contact. The 1993 Supreme Court case of Chapman v. Chapman [7] discussed the general rules governing applications for contact by people other than parents:

- The burden is on the applicant to show that the proposed contact is in the child's best interests.
- The child's parents have a significant role and the court should be slow to interfere with the parents' discretion, and should only do so when satisfied that contact is in the child's best interests.
- It is not in the child's best interests to be placed in circumstances of conflict between parents and other people, and contact should not be given where it would only escalate the conflict between the parties.
- People other than parents may also have to show that they offer some positive benefit to the child before contact will be allowed, and they must show that the child's time with them will be in the child's best interests. Normally, grandparents and other people are allowed only the amount of contact with a child that the child's parents will agree to.

Where both parents are still in the picture and have already been arguing about how the child's parenting time will be divided between them, the court will usually require that any contact allowed to grandparents and other family members will be carved out of the child's time with the parent who is their relative. In other words, maternal grandparents will usually have contact during the mother's parenting time with the child, and paternal grandparents will have contact during the father's parenting time with the child. The Provincial Court decision in N.H. v. D.H. [8], a case from 2013, is a good example about how the court thinks about contact.

As with applications for guardianship, decision-making or parenting time, grandparents and other people shouldn't be discouraged by the generally pessimistic tone of this discussion. There are lots of cases in which grandparents have been awarded time with their grandchildren; it *is* possible to succeed on an application for contact!

Child support

When someone other than a parent has an order that results in the child living mostly with them, that person can ask that the child's parents or guardians pay child support to them. The same rules about child support that apply to cases between parents and guardians apply to cases where someone other than a parent is asking for child support, except that grandparents, extended family members and other people can only ask for child support under the *Family Law Act*; they cannot apply under the *Divorce Act*.

Grandparents can also ask for financial support from the provincial government to help meet the cost of caring for any grandchildren in their care. The province of British Columbia pays grandparents who are looking after their grandchildren at the same rate as foster parents. It's not a huge sum, but it's better than nothing.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Federal Child Support Guidelines* [2]
- Provincial Court Family Rules [2]
- Supreme Court Family Rules [9]

Resources

- Legal Aid BC's Early Resolution Centre website [9]

Links

- Ministry of Attorney General's website "Criminal Record Check BC" [10]
- Canadian Police Information Centre (CPIC) [11]
- Kinship Care Help Line [12]
- Clicklaw Common Question on Benefits for Grandparents Raising Grandchildren [13]
- Dial-A-Law Script "Guardianship, Parenting Arrangements, and Contact" [7]
- Legal Aid BC's Family Law website's information page "Children" [14]
- Legal Aid BC's Family Law website's information page "Parenting & Guardianship" [18]
- Legal Aid BC's fact sheet "How to Become a Child's Guardian" [15]
- BC Ministry of Attorney General's website "Support and Resources for Dealing with Separation and Divorce" [16]
- BC Ministry of Children and Family Development's website "Extended Family Program" [13]
- Canadian Bar Association's *Successfully Parenting Apart: A Toolkit* [22]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 10 August 2022.

References

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The Rights of Children and Youth in Family Law Matters

Neither the *Divorce Act* nor the *Family Law Act* talk about parenting after separation in terms of the rights of *parents*, *guardians* or *spouses*. While adults who fit into these categories are entitled to ask for orders about decision-making and parenting time, if they can't reach an agreement about those things on their own, decisions about parenting after separation must be made taking into account only the best interests of the children, including the children's views and preferences.

In a family law dispute about parenting after separation, the people who hold the rights are the children. It's *children* who have the right to be raised and cared for in the best possible way, and it's children who have the right to the best possible arrangements for their parenting after their parents separate.

Introduction

The rights children and youth have in family law disputes can be boiled down into two categories: the *human rights* children and youth have, under Canada's human rights laws and the United Nations Convention on the Rights of the Child [1]; and, the *legal rights* children and youth have as people who are impacted by their parents' dispute, under the federal *Divorce Act* and the provincial *Family Law Act*. Of course, it's important to remember that in British Columbia a "child" is someone who is younger than 19, the age of majority in this province under the aptly-named *Age of Majority Act* [2]. As a result, someone who is a *child* can also be a parent, a guardian or a spouse. The rights of youth who are parents, guardians or spouses are the same rights that adults have who are parents, guardians or spouses.

The human and legal rights of children and youth are just as important as the human and legal rights of adults, perhaps even more important because of the vulnerability resulting from their age. However, it's really important that adults remember that the human and legal rights of children exist for the benefit of children. I have too often seen parents running the "rights" of their children up the flagpole in their family law dispute, trying to use their children's rights to benefit their own position in court or before an arbitrator. This happens most frequently when parents are engaged in an extraordinary degree of conflict with each other.

It is important to recognize and honour children's human and legal rights. It's also important to make sure that parents don't use children's rights just as a way of getting what they want in their legal dispute.

In this section, we'll talk about the human and legal rights of children and youth, and how those rights relate to family law disputes between their parents.

The UN Convention on the Rights of the Child

Children's basic human rights are described in the United Nations Convention on the Rights of the Child [3]. This international agreement was passed by the United Nations General Assembly — the parliament of the United Nations — in 1989 and was signed by Canada in 1991. The convention has the force of law in Canada, and Canadian laws must be interpreted and applied in a way that fits with the rules and requirements of the convention.

The convention describes the basic human rights that all children have, the same way that human rights are described in British Columbia's *Human Rights Code* [4] and in the federal *Canadian Human Rights Act* [5]. In addition to the rights that adults have, the convention says that children also have the right to:

- be free from physical and mental violence, abuse and mistreatment,
- be protected from exploitation,
- know and be cared for by their parents,
- access information and receive an education,
- an adequate standard of living, and
- health care and adequate nutrition.

Article 3 of the convention talks about making decisions according to the best interests of children:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Perhaps most importantly, at least from a family law perspective, article 12 talks about children's right to express their views and preferences to those who are making decisions about their care:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This rule applies to criminal, civil and other court cases, including family law cases, adoption cases, child protection cases and cases about wills and estates. In a 2010 decision of the Yukon Supreme Court, B.J.G. v. D.L.G. [6], the court talked about how the convention applies in family law cases, and said that:

> "There is no ambiguity in the language used. The Convention is very clear: all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give

> decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation"

That's a pretty strong statement. The judge continued and said that, under the convention, children have the right to:

- be informed, at the beginning of the process, of their legal right to be heard,
- be given the opportunity to fully participate early and throughout the process, including being involved in judicial case conferences, settlement conferences, and court hearings or trials,
- have a say in the manner in which they participate in the process, so that they participate in a way that works effectively for them,
- have their views considered in a substantive way, and
- be told about both the result reached and the way in which their views have been taken into account.

However, the number of times these things don't happen is much, much greater than the number of times they do.

The *Divorce Act*

The federal *Divorce Act* talks about parenting after separation in terms of *decision-making responsibility* and *parenting time*. If you look carefully at how the act defines these two terms, you can see that these aren't about the rights of parents but the rights of children and youth to be raised well. Section 2(1) of the act defines "decision-making responsibility" as "the *responsibility* for making significant decisions about a child's well-being." It defines "parenting time" as the time that a *child* spends in the care of a spouse, not the time that a *spouse* spends with their child.

Hearing the views of children

When the court makes decisions about decision-making responsibility and parenting time, section 16 of the *Divorce Act* says that "the court shall take into consideration only the best interests of the child," and "give primary consideration to the child's physical, emotional and psychological safety, security and well-being." Section 16(3) says that "in determining the best interests of the child, the court shall consider all factors related to the circumstances of the child," and then provides a list of eleven specific factors that the court must consider; another eight factors are listed in section 16(4) that need to be considered when family violence is an issue. The section 16(3) factors include:

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

As you can see, this factor supports the obligation under article 12 of the United Nations Convention on the Rights of the Child to give children and youth "the opportunity to be heard" in legal disputes affecting their interests.

It also creates something that lawyers call a "rebuttable presumption." A *rebuttable presumption* means that something is presumed to happen unless someone can show why that thing shouldn't happen. The presumption, in this case, is that a child's views will be taken into account when deciding what is in their best interests. Someone who doesn't want the child's views to be taken into account can *rebut* the presumption by proving that the child's views "cannot be ascertained." But without that rebuttal, the law *requires* children's views to be heard and considered when making decisions about their best interests. Children have the right to be heard in disputes between their parents about decision-making responsibility and parenting time.

Making decisions that are in children's best interests

The other best-interests factors in section 16(3) that have to be considered when the court makes decisions about children are these:

> (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;
>
> (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.

When family violence is an issue, the court must also consider additional factors, listed in section 16(4), to assess the impact of family violence on the best interests of the child under section 16(3)(j). Section 16(7) provides one final factor to consider, in all cases when the court makes decisions about children, and says 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.

Children have the right to be raised as well as possible, while their parents are together and after they separate. Parenting apart can be challenging, but the fact that a child's parents have separated doesn't deprive the child of their right to good parenting. The best-interests factors described in the *Divorce Act* are more than a simple shopping list. If you think about them, each factor is vitally important to the quality of life and the quality of care of children whose parents are living apart. They're not a shopping list, they're a guide to parenting after separation.

Remember that it's the children who have the right to be raised and cared for in the best possible way, and it's the children who have the right to the best possible arrangements for their parenting.

The *Family Law Act*

The provincial *Family Law Act* takes the same child-centred approach as the *Divorce Act*, using the terms *parental responsibilities* and *parenting time*. Like the *Divorce Act*, the *Family Law Act* also says, at section 37(1), that when making decisions about parenting after separation, "the parties and the court must consider the best interests of the child only." The *Family Law Act* provides a list of specific factors to consider at section 37(2). The factors that must be considered when family violence is an issue are listed in section 38.

It's important to know that the duty to make decisions that are in the best interests of children falls on both judges and parents under section 37 of the *Family Law Act*. (Section 19.10(6) imposes the same duty on arbitrators.) Parents have this duty whether they're resolving their disagreements in court or trying to negotiate a resolution out of court.

Hearing the views of children

The section 37(3) best-interests factors include:

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

Like the *Divorce Act*, this provision also supports the obligation to hear from children and youth under the Convention on the Rights of the Child. Like the *Divorce Act*, it also creates a rebuttable presumption that the children's views will be heard. Someone who doesn't want the child's views to be taken into account can *rebut* the presumption by showing that it would be "inappropriate to consider" the child's views. Otherwise, the law *requires* children's views to be heard and considered when making decisions about their best interests.

Making decisions that are in children's best interests

The other factors listed in section 37(2) are these:

> (a) the child's health and emotional well-being;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
>
> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

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

Section 37(3) also says that:

> An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

Like the *Divorce Act*, the *Family Law Act* provides a few additional factors that judges — just judges — must consider to help them assess the impact of family violence under section 37(2)(g) and (h). These factors are listed in section 38.

Again, remember that children have the right to be raised as well as possible, while their parents are together and after they separate. Each of the best-interests factors listed in the *Family Law Act* is vitally important to the quality of life and the quality of care of children whose parents are living apart. They're an excellent guide to parenting after separation.

Remember that it's the children who have the right to be raised and cared for in the best possible way, and it's the children who have the right to the best possible arrangements for their parenting.

Children's involvement in court proceedings

The *Family Law Act* says a few more things about children and youth and their involvement in court proceedings, because the provincial governments control court processes in their province and the *Family Law Act* is a provincial law. The *Divorce Act* doesn't say anything about how or if children should participate in court proceedings beyond the requirement in section 16(3)(e) that their views and preferences be heard in court proceedings.

First, section 201(1) of the *Family Law Act* says that a young person can start or defend a family law case, without needing the help of an adult, if they are:

- 16 years of age or older,
- a spouse, which means that they are married or have lived with someone else in a "marriage-like relationship" for at least two years, or for a lesser amount of time if they've had a child with that person, or
- a parent.

Second, section 202 of the *Family Law Act* allows the court to decide how information from a child should be received when it has to decide what is in the best interests of that child:

> In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:
>
> (a) admit hearsay evidence it considers reliable of a child who is absent;
>
> (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

This section allows the court to consider evidence from other people about what a child has said to them, speak to the child themselves, ask that a mental health professional or a lawyer prepare a non-evaluative views of the child report, or even make special arrangements about how the child could come to court to give evidence. In cases where family violence is an issue, for example, the special arrangements the court can make include having the child appear in the courtroom by video, having the child give evidence from behind a screen, and limiting who can ask the child questions and the sort of questions they can ask.

Finally, the court can appoint a lawyer to represent a child in a dispute between the child's parents under section 203 of the *Family Law Act*, and then give directions about how the lawyer will be paid:

> (1) The court may at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act if the court is satisfied that
>
> (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
>
> (b) it is necessary to protect the best interests of the child.
>
> (2) If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements.

This section is a bit challenging, to be honest. The two-part test that has to be met before the court appoints a lawyer for a child or youth — the conflict between the parents must be so severe that it impairs the parents' ability to act in their child's best interests, and the appointment must be necessary to protect the child's best interests — can be very difficult to meet. (Besides, the parent asking for a lawyer to be appointed has to admit that their own capacity to act in their child's best interests is impaired, not just that of the other parent!) As a result of this difficult test, not to mention the cost of paying for yet another lawyer, lawyers are rarely appointed to act for children.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- United Nations Convention on the Rights of the Child [1]
- *Canadian Human Rights Act* [5]
- British Columbia's *Human Rights Code* [4]

Links

- Society for Children and Youth of BC's Child and Youth Legal Centre [7]
- BC's Representative for Children and Youth [8]
- Hear the Child Society [9]
- Legal Aid BC [10]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 3 July 2022.

References

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[2] https://canlii.ca/t/84gw
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[7] https://www.scyofbc.org/child-youth-legal-centre/
[8] https://rcybc.ca/
[9] http://hearthechild.ca
[10] https://legalaid.bc.ca/

Parenting Apart

This section is all about putting your children first and building good parenting arrangements — arrangments that work for the children and for you. It provides a brief introduction to parenting after separation and talks about a few of the things that you probably want to think about when figuring out the arrangements for parenting after separation that are most likely to be in your children's best interests. It also provides examples of different kinds of parenting arrangements that might help you develop your own.

While the other parts of this chapter, especially the section Basic Principles of Parenting after Separation, discuss the legal issues involved in deciding how children will be cared for after a couple separate, they don't say much about the practical day-to-day issues involved in parenting after separation and options for dividing children's time between their parents' homes. This section will briefly discuss what it means to parent after separation and how separation affects children, but mostly focuses on building good parenting arrangements. It might help to read the section on Separating Emotionally, in the Separating and Getting Divorced chapter, when you're done here.

Introduction

If you've got children and you've separated from your partner, you have three things to consider. First, you've got to get a grip on all the emotional baggage that comes along with the end of a relationship. Second, you've got a pile of legal issues you have to sort through. Finally, but most importantly, you and your former partner have to develop a strategy for parenting your children after the relationship ends.

No matter how pressing the first two issues are, you must remember that the parenting of your children after separation takes priority over everything else. If you think the end of your relationship is difficult for you, imagine how confusing and unsettling it must be for your children. Their needs and best interests must come ahead of your own, and ahead of those of your former partner. This is certainly the view that a judge will take.

You may have found that, during your relationship, issues involving the care of your children just sort of worked themselves out, perhaps smoothly, perhaps not. In general, you will have developed a routine, a routine that you and your partner were comfortable with and one that your children became accustomed to. After separation, that routine just may not be possible anymore, especially if you and your former partner are living in separate homes. Suddenly, the children can't rely on both of you being around the house, or on the day-to-day schedules you used to keep. They can't count on all the little things still happening, like bedtime stories, special breakfasts, and playing catch after school. On top of all that change and uncertainty, the children will be fully aware that something isn't right between their parents, even if they don't quite grasp exactly what's going on.

Separation can also see changes in the roles played by parents. A parent who hasn't been particularly involved with the children may become more involved; a parent who used to be very involved may step back a bit. This can be challenging for some parents, and what needs to be kept in mind is that children need all of the adults in their lives to do their best. A parent becoming more involved is almost always something that is good for children. What harms

children is conflict, and sometimes stepping back, at least for a little while, can reduce conflict.

While this may sound a little preachy, the fact is that no matter how adults are able to rationalize the consequences of the end of their relationship, their children can't. Your job, regardless of your emotional and legal entanglements with the other parent, is to protect your children from your conflict as much as possible, and to develop parenting arrangements that will be in the best interests of your children.

Language

The words we use often shape how we see the world around us. There's a big difference, for example, between saying "Pat lied to me about ..." and saying "Pat was mistaken when he told me that...." In the same way, there's a difference between saying "Tuesday is my access day" and "Tuesday is when I have parenting time with Moesha."

Over the past ten years or so, the courts and policymakers have become increasingly sensitive to how the words used to describe a parent's involvement with their child can impact on both the child's and the parent's perception of their relationship. As a result, shared parenting — an arrangement in which the parents share their children's time equally or almost equally — is becoming increasingly commonplace, even in situations where, twenty years ago, Parent A would be described as the "access parent" and Parent B would be described as the "custodial parent." The phrase "access parent" can often lead to a sense, shared by everyone, including the children, that this parent is somehow a lesser parent, has less of a role to play, or is less important to their child's life. It also encourages the idea that there are winning parents and losing parents when it comes time to determine the best parenting arrangements for a child.

Words like "custody" and "access" are still used in some provinces. These are loaded terms with a lot of extra meanings that aren't particularly helpful to children, or to each parent's view of their roles and responsibilities in the children's lives. This, and a wish to refocus the "rights" involved in parenting on children rather than on parents, are two of the big reasons why the provincial *Family Law Act* talks about the care of children in terms of guardians who exercise *parental responsibilities* and have *parenting time* with their children, and people who are not guardians who have *contact* with a child. They're also why the federal *Divorce Act* was overhauled on 1 March 2021 to get rid of "custody" and "access" and instead talk about spouses who exercise *decision-making responsibilities* for their children and have *parenting time* with them, and people who aren't spouses who may have *contact* with a child. These changes are huge improvements in the legislation about parenting after separation.

A few notes from JP Boyd

I am not a psychologist, a psychiatrist, or a counsellor. As a result, this section should be read with a grain of salt, as it's based largely on my observations of my clients' experiences and a healthy dose of common sense. For the same reason, you are cautioned that this section shouldn't be used as an authority on parenting. The goal of this section is simply to provide some information that may be helpful for parents to consider as they make decisions about parenting after separation.

There are lots of parenting after separation programs [1] offered by trained psychologists and counsellors available throughout British Columbia, as well as some very good online programs [2] developed by the Justice Institute of British Columbia. Other good programs are available from other provinces, including Alberta's Parenting After Separation for Families in High Conflict [3] program. If you are separating or have separated, I highly recommend that you take one of these programs. No matter how good — or bad! — you think your relationship is with your ex-partner, these programs are usually very helpful. Also, in some cases, you may find yourself being ordered to attend a parenting after separation program by the court.

Children and parenting apart

As we discussed in the section "Separating Emotionally," under the Separating and Getting Divorced chapter, separation stirs up a turbulent stew of powerful emotions that can take a surprisingly long time to work through, and often winds up clouding parents' judgment. You can find yourself doing things and saying things you never thought you would, or doing things you promised you'd never do again. In the midst of all of this, you may also find yourself having to resolve critical legal issues that will have a profound effect on your future and the futures of your children.

When a couple have children, they have to accept that they'll remain a part of each other's lives unless their children predecease them, whether they like it or not. They may no longer be partners, but they will *always* be parents. Parental relationships don't end along with romantic relationships. If you've had children together, you're stuck with each other.

It's impossible to emphasize enough how important it is to always put the children first. Having said that, putting the children's needs and interests ahead of your own can be extremely challenging when you're also trying to cope with the intense emotions involved in separation. It can be tremendously difficult to refrain from badmouthing your former partner to the children, never mind putting energy into supporting their relationships with your former partner. However, if you care about your children, you don't really have a choice.

The reality is that it's not separation that messes kids up, it's conflict. Children can be incredibly resilient. But conflict between parents, whether they're still together or have separated, can have serious short- and long-term consequences for children. These consequences can affect their relationship with one or both of their parents, their performance in school and how long they stay in school, their choices about the other kids they hang out with, and their relationships with other people as teenagers and adults. It can also affect how children perceive conflict and how they resolve conflicts of their own.

Community Mediation Ottawa, formerly the Ottawa Center for Family and Community Mediation, has some helpful suggestions about parenting apart:

Things to think about:

- Children can best deal with their feelings surrounding the separation experience in a climate of cooperation.
- Working together as parents means cooperating with the other parent about raising the children. If you can't do this in person, try communicating by phone or by using notes that are exchanged with the child.
- It is a myth that parents who did not get along as a couple cannot work together as parents. They can. It takes time and effort, but parents can redefine their relationship from being a couple to a more business-like relationship of being partners in the parenting of their children.
- Go directly to the other parent for information, an answer, or a solution to a problem. Do not allow the child to be in the middle, to act as a messenger, or act as a spy. If you cannot deal directly with the other parent, use another adult.
- Give the benefit of the doubt to the other parent's motives.
- Don't let yourself get caught in any angry feelings the child may have towards the other parent. Encourage the child to speak about their problems with the other parent to the other parent; don't get caught in the middle.

Children may be harmed if they:

- are restricted or prevented from spending sufficient time with both parents,
- are told that one parent is good and the other is bad,
- are encouraged to take sides, or
- don't feel free to love both parents and also stepparents.

Parents may harm their children if they:

- don't prepare children for changes that will occur,
- burden children with adult problems, such as their legal issues or financial woes,
- compete with or criticize the other parent in front of the children,

- badmouth or blame the other parent in the children's presence or earshot, or
- expect children to comfort them.

In short, you are the parent, and your children have the right to expect you to do the job of parenting them.

Managing conflict

It's easier to say that you'll manage your conflict with the other parent than it is to do. A lot easier. And yet the research about parenting apart and how children adapt to the separation of their parents is full of grim warnings about the serious effects conflict can have on children. No matter how hard it is to manage your conflict, you've *got* to try your best.

Sometimes, a little bit of work on your communication skills helps. Partly, good communication after separation is about leaving the past behind you, at least as far as the end your relationship is concerned, and choosing your words carefully; think not just about *what* you're saying but about how the other parent is likely to *hear* what you're saying. There are also some really effective communication techniques that can improve how you have difficult conversations with the other parent, such as active listening [4], being alert to the assumptions you're making, and being aware of your body language and how it influences what other people think you're saying. Bill Eddy, a lawyer and social worker known for his work with high-conflict families, talks about how poor communication can put people into a defensive "react" mode rather than a constructive "respond" mode. Mr. Eddy says that communications after separation should be brief, informative, friendly and firm, and I recommend his book on the subject, *BIFF: Quick Responses to High-Conflict People, Their Personal Attacks, Hostile Email and Social Media Meltdowns* [5].

Another thing that might help is establishing good boundaries, boundaries that reflect the new relationship you have with the other parent. Robert Emery, a therapist and professor of psychology, says that you should first draw clear boundaries around your relationship with the other parent. Let them know what you're prepared to talk about, what information you're prepared to share, and how and when you're not prepared to communicate. Second, use those boundaries to form a more business-like relationship with your former partner. The two of you may not be friends, but together you are engaged in the "business" of parenting your children. Keep your emotional distance from your former partner and focus on the work you must do together. Finally, he says, you've got to respect the new rules. Don't intrude past those boundaries; keep your discussions focused on parenting. It may be hard not to react when your former partner pushes your buttons, but it's important to try. I also recommend Dr. Emery's book about parenting apart, *The Truth About Children and Divorce: Dealing with the Emotions So You and Your Children Can Thrive* [6].

Something else that might help is limiting how and when you and the other parent come into contact with each other. You might think about whether it would help to reduce the number of transitions that the children have to make between your homes, or whether you can avoid in-person contact with the other parent altogether by exchanging the children through their school — on transition days, one of you drops the kids off at school at the start of the school day, and the other picks them up at the end of the school day — or through a relative, a family friend, or an exchange service. You might think about signing up for an online service like Our Family Wizard [7] that provides a message board, a calendar, and a journal for sharing events in the children's lives.

Once you've got the children's parenting arrangements sorted out, you might also think about hiring a parenting coordinator to help you implement those arrangements. Parenting coordinators work with parents to resolve parenting problems as they arise, help parents put the needs and interests of children first, and improve parents' communication and dispute resolution skills. Parenting coordination is a child-focussed process that is aimed at reducing conflict between parents and the children's exposure to their parents' conflict.

I also encourage you to consider counselling to help you work through the enormous changes in your life that came with the breakdown of your relationship with the other parent, and the difficult mess of emotions those changes are causing. Be sure to look for someone, a social worker, a registered clinical counsellor or a psychologist, who has specific experience helping people deal with issues about separation, parenting and conflict. Counselling is often

completely or partially funded through workplace extended health insurance programs, and free public and community counselling services may also be available. Be sure to look for those too.

Parenting resources

There are quite a lot of public and community resources available to help parents deal with parenting issues, including issues arising while the parents are together. No matter what your circumstances are, if you are having problems, get help. Whether that help involves reading a book or a pamphlet, or going to a seminar, or meeting with a support group, your children are worth it.

Public programs and services

The Parenting After Separation Program [8] is run by the provincial Ministry of Justice. Although it's the mandatory program required of parents at some Provincial Family Court locations, it's open to everyone. A list of the agencies that provide this service is available from the Family Justice division through Clicklaw [9]. You can download the Parenting After Separation Handbook [10] online, in English, simplified Chinese, Punjabi, and French.

The Parenting After Separation program is offered in Cantonese and Mandarin in Surrey, Richmond, and Vancouver; call 604-684-1628. The program is also offered in Punjabi and Hindi in those areas; call 604-597-0205.

Simon Fraser University offers Information Children [11], a fairly broad and extremely useful non-profit program that deals with parenting issues and includes mediation services. This program offers parenting workshops in New Westminster and Burnaby, and has a handy parenting helpline. Contact Information Children through their website [11] or at:

604-291-3548 phone
604-291-5846 fax

The provincial Justice Access Centres [12] may be able to direct you to other helpful parenting resources, and are located across the province. Contact them through Clicklaw's HelpMap [13] or at:

Vancouver: 604-660-2084
Victoria: 250-356-7012

Recommended reading for parents

The federal Department of Justice has a number of excellent resources in the family law section of its website [14] that you may find helpful. You'll find publications and research papers about parenting after separation and on other topics important to children's well-being after their parents separate. These papers are of a uniformly high quality and are well worth the read.

The federal government website has a section on creating parenting arrangements [15] that links to three useful resources:

- Making Parenting Plans [16],
- Parenting Plan Checklist [17], and
- Parenting Plan Tool [18].

The federal Department of Justice's website also has information on helping your kids cope [19] with separation and divorce.

There are lots of good books about parenting apart that will be available at your local bookstore or through online shopping services like Amazon, including these (my favourites are in bold):

- *The Good Divorce: Keeping your family together when your marriage comes apart*, by D. Ahrons
- *Helping your Child through your Divorce*, by F. Bienenfeld
- ***The Truth about Children and Divorce***, by R.E. Emery
- *Healing Hearts: Helping Children and Adults Recover from Divorce*, by E. Hickey and E. Dalton

- ***Helping your Kids Cope with Divorce the Sandcastles Way***, by M.G. Neuman
- *Mom's House, Dad's House: Making Two Homes for Your Child*, by I. Ricci
- *Joint Custody with a Jerk: Raising your Child with an Uncooperative Ex*, by J.A. Ross
- *Helping Children Cope with Divorce*, by A. Teyber

Recommended reading for children

The books that follow are drawn from the suggestions provided by the Vancouver family law firm Henderson Heinrichs and are reproduced with permission.

- *At Daddy's on Saturdays*, by L. Walvoord and J. Friedman (ages 5+)
- *Dinosaurs Divorce: A Guide for Changing Families*, by L. Krasny Brown and M. Brown (ages 4+)
- *Divorce is a Grown Up Problem*, by J. Sinberg (ages 4+)
- *Let's Talk About It: Divorce*, by F. Rogers (ages 5+)
- *On Divorce*, by S. Bennett Stein and E. Stone (ages 3+)
- *What's Going to Happen to Me?*, by E. Leshan (ages 9+)
- *Why Are We Getting a Divorce?*, by P. Mayle and A. Robins (ages 6+)

The website www.familieschange.ca [20] is designed to help children understand and cope with the issues that arise when their parents separate or divorce. The website presents differently for younger children versus teens; both versions are very well put together.

The federal Department of Justice has published a book for 9- to 12-year-olds called *What Happens Next?* [21], available online and in print. The print version is a lot friendlier and is what I'd suggest giving to a child.

Developing parenting arrangements

The terms the legislation uses to describe the plans that parents and judges make about children are a bit of a mess. Under the provincial *Family Law Act*, "parenting arrangements" are arrangements about parental responsibilities and parenting time made after separation, whether those arrangements are in an agreement or in an order. "Parenting arrangements" doesn't include agreements and orders about contact. I suppose those would be called *contact agreements* and *contact orders*, although the legislation doesn't say so. Under the federal *Divorce Act*, a "parenting order" is an order about decision-making responsibility and parenting time, and a "contact order" is an order about contact just like you'd expect. A "parenting plan," on the other hand, is the part of a written agreement about decision-making responsibility, parenting time, or contact. "Parenting plan" doesn't include arbitrators' awards or judges' orders.

What's important, really, is that everyone understands what you're talking about. Although there are important differences between agreements and orders, call the plans for the care of your children after separation whatever you'd like. No one's going to get hung up on the fact that you talked about a parenting plan rather than parenting arrangements or a parenting order as long as you're clear about whether you're talking about an agreement you've made with your former partner, an award made by an arbitrator or an order made by a judge.

In this section, we'll use *parenting schedules* to talk about the allocation of parenting time between guardians, and *parenting arrangements* to talk about the distribution of both parental responsibilities and parenting time between guardians, following the approach taken in the *Family Law Act*.

Parenting schedules

Some mental health professionals and many separating parents believe that the best parenting schedule after separation is for parents to share their children's time equally or almost equally. While that may be true for some children, the federal *Divorce Act* doesn't say that any particular distribution of time is presumed to be in children's best interests, and the provincial *Family Law Act* specifically says that *no* particular parenting schedule should be presumed to be in children's best interests. Section 40(4) of the *Family Law Act* says:

> In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
>
> (a) that parental responsibilities should be allocated equally among guardians;
>
> (b) that parenting time should be shared equally among guardians;
>
> (c) that decisions among guardians should be made separately or together.

The absence of any presumptions about parenting schedules in the legislation, whether for shared parenting time or something else, is intentional. Both the *Divorce Act* and the *Family Law Act* say that decisions about children are to be made considering only their best interests. As a result, parents, arbitrators and judges have to think about is what is best for the particular child in the particular circumstances of their particular family, not what is generally best for children. This is what Justice McLachlan said in Gordon v. Goertz [22], an important 1996 decision of the Supreme Court of Canada:

> "The argument that a presumption would render the law more predictable in a way which would do justice in the majority of cases and reduce conflict damaging to the child between the former spouses also founders on the rock of the *Divorce Act*. The Act contemplates individual justice. The judge is obliged to consider the best interests of the particular child in the particular circumstances of the case. Had Parliament wished to impose general rules at the expense of individual justice, it could have done so. It did not. The manner in which Parliament has chosen to resolve situations which may not be in the child's best interests should not be lightly abjured. Even if it could be shown that a presumption in favour of the custodial parent would reduce litigation, that would not imply a reduction in conflict. The short-term pain of litigation may be preferable to the long-term pain of unresolved conflict. Foreclosing an avenue of legal redress exacts a price; it may, in extreme cases, even impel desperate parents to desperate measures in contravention of the law. A presumption would do little to reduce the underlying conflict endemic in custody disputes."

When it comes to parenting schedules, what parents, arbitrators and judges have to decide is what is best for the children in light of the best-interests factors set out at section 16 of the *Divorce Act* or at sections 37 and 38 of the *Family Law Act*. Sometimes this winds up being a shared parenting schedule, sometimes it doesn't. Among those best-interests factors, some of the more important are:

- the age and maturity of the child, and their ability to be away from a parent, especially for younger children and children who are being breastfed,
- the child's need for stability, especially for younger children and children with special needs,
- the views and preferences of the child, especially for children who are old enough to have an opinion and understand how their parents' separation, and their own preferences, might impact their lives,
- the pattern of the parents' usual time with the child when they were still together,
- each parent's ability to care for the child, including the presence of any family violence,
- the nature of the child's relationship with each parent, and
- the social needs of the child and their involvement with school, extracurricular activities and friends.

Parents, of course, will have additional considerations of their own. Among other things, parents will want to think about:

- how far away they live from each other and how much driving will be involved, especially the length of time the children will be able to handle being stuck in a car,
- how their work schedules can and can't be fitted around the child's parenting needs, including how they'll manage caring for the child on non-instructional school days and on days when the child is sick and has to stay home,
- whether the schedule will regularly require them to pay for other people to look after the child and if so, the amount of time that the child will be in the care of someone other than a parent,
- how they express conflict and the extent to which the child will be exposed to their conflict, especially if the schedule requires frequent exchanges of the child between homes,
- how they'll manage moving the child's belongings between homes, especially bulky things like hockey equipment, and
- whether each of them is flexible enough to accommodate unexpected events in the other parent's life that might require a temporary change in the schedule.

There's nothing wrong with taking things like this into account when you're planning a parenting schedule. It's important to think about how the schedule will work in real life and whether it's actually doable. You probably don't want a schedule that requires you to make a round trip drive from Surrey to North Vancouver, or from Kamloops to Kelowna, four times a week — and the children probably wouldn't like it either — or a schedule that will see the children in daycare when the other parent is a good parent and otherwise available to care for them.

Creating a parenting schedule

There's really no limit to the ways that children's parenting schedules can be arranged, as long as the schedule is in the children's best interests and practical from the parents' perspective. A search online will give you dozens of parenting schedule templates that you might want to think about. What's important is that the schedule works for the children and for their parents.

A lot of the templates you'll see will offer variants based on the parenting skills of each parent. This is an important consideration when you're thinking about the schedule that is most likely to be in the children's interests. While there are many families in which the parents split the task of parenting fairly evenly and both have excellent parenting skills, there are others in which one parent takes on most of the work involved in raising the children, and there are many perfectly good reasons why this might be the case. However, it's not always fair to measure parenting skills based on how the work involved in parenting was split during the relationship. The parent who did the least parenting might, for example, have had a job that supported the family and occupied most of their time, but might otherwise be or want to be an engaged and committed parent. It's important to think about the actual parenting skills of each parent, not just how they divided up parenting responsibilities before separation.

Parenting schedule templates will offer additional variants based on the age of the children. There are many good reasons for this too. A child who is being breastfed won't be able to be away from their mother for very long, and the sort of parenting time the other parent will have will usually need to be short but frequent. A toddler is better able to handle being away from a parent for an extended period of time, say one or two days, but will need to see both parents frequently. A child who is starting school suddenly has a schedule that's got nothing to do with their parents, and a child who is leaving elementary school will not only have homework and extracurricular activities that need to be taken into account, but the beginnings of a social life that is going to become increasingly important to them as they get older. A teenager's social life will be in full bloom and it may be more important to teenagers that they spend time with their friends and in their extracurricular activities than with their parents. The reality is that parenting schedules *have* to change based on the age of the child and, eventually as teenagers, on their wishes as well. The schedule that works for a toddler won't work for a kid in Grade Two, and the schedule that works for a kid in Grade Two won't work for a kid in Grade Eight. That's just how it is.

Schedules for children without shared parenting

Children who don't have a shared parenting schedule — a schedule in which they have an equal or almost equal amount of parenting time with each parent — will have one home where they live most of the time, sometimes called their *primary residence*. They'll spend most of the time with the parent who has their primary residence and spend less of their time with the other parent. This used to be the sort of schedule that almost all children had. For kids who were, say, six years old and older, they would usually have spent every other weekend with the other parent, and maybe also every Wednesday for dinner or an overnight visit. However, there are lots more ways that parenting time can be scheduled for children who have a primary residence.

The Langley Family Justice Center publishes an excellent pamphlet called "Suggested Visitation/Time-Sharing Skills" that they gave to their clients, drawn from Gary Neuman's equally excellent book, *Helping your Kids Cope with Divorce the Sandcastles Way* [23]. The following parenting schedule template is adapted from their pamphlet, and is intended for parents who do not intend to establish a shared parenting arrangement. The schedule varies by the age of the child and by the parenting skills of the parent who doesn't have the children's primary residence.

Age	Basic Recommended Time	Limited Parenting Skills	Good Parenting Skills
Birth to 8 months	2 or 3 weekly visits for 2 to 3 hours each	supervised visits in the primary parent's home	2 weekly visits for 6 to 8 hours each, plus one shorter visit
9 to 12 months	2 or 3 weekly visits for 4 to 8 hours each, plus one longer weekend visit	2 to 4 weekly visits for 3 hours each	2 or 3 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit
13 months to 3 years	1 or 2 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit	1 or 2 weekly visits for 4 to 6 hours each, and possibly one weekly short overnight visit	2 weekly 24-hour overnight visits that are not consecutive, plus one weekly visit for 6 to 8 hours, and a less than equal sharing of holidays
4 to 5 years	1 or 2 weekly visits for 6 to 8 hours each, plus one weekly 24-hour overnight visit	1 or 2 weekly visits for 4 to 6 hours each, and possibly one weekly short overnight visit	2 weekly 24-hour overnight visits that are not consecutive, plus one weekly visit for 6 to 8 hours, and a greater sharing of holidays
6 to 8 years	every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays	one weekly 24-hour overnight visit, plus one weeknight after school until one hour before bedtime, plus 3 two-day visits during the summer	every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays
9 to 12 years	every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays	every other weekend, Saturday morning until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 three-day visits during the summer	every other weekend, from Thursday after school until Monday morning before school, plus one weeknight after school until one hour before bedtime, plus half of all holidays
13 to 18 years	every other weekend, from Friday after school until Sunday evening, plus one weeknight after school until one hour before bedtime, plus 3 consecutive weeks during the summer holiday, and half of all other holidays	every other weekend, Saturday morning until Sunday evening, plus one weeknight after school until one hour before bedtime, plus summer visits set in consultation with the child	every other weekend, from Thursday after school until Monday morning before school, plus half of all holidays

Schedules for children with shared parenting

In a shared parenting schedule, the children will have an equal or almost equal amount of parenting time with each parent. Shared parenting schedules aren't always practical for young children. Some children may be able to start spending a similar amount of time with each parent by the time they enter kindergarten, although each week should be divided so that the child sees each parent frequently. By Grade Two or Grade Three, many children may be able to do a whole week with one parent, followed by a whole week with the other parent. Many parents exchange the child on Mondays or Fridays after school to minimize disruption to the child's school schedule and ensure that the children are able to spend an uninterrupted weekend with each of them. By the time the child is in their early teens, every-other-week schedules can be extended to two weeks with each parent. This will change as the teenager gets older, and their views and preferences will need be taken into account.

There are lots of creative ways to structure a shared parenting schedule. Here are a few examples. Remember to take into account the child's age, the child's schedule of activities outside the home, and the practical doability of a schedule from the parents' perspective.

This is a simple template where the children move between Home A and Home B after two days, move again two days later, and move again three days later, sometimes called a *2-2-3 schedule*. From the point of view of the parents, they have the kids on Monday and Tuesday as well as Friday through Sunday in the first week, and on Wednesday and Thursday in the second week. This makes sure that the children are with each parent every other weekend, but requires them to transition between homes three times each week. On the other hand, the longest period of time they are away from a parent is three days. That's not bad.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	A - 1	**A** - 2	B - 1	B - 2	**A** - 1	**A** - 2
A - 3	B - 1	B - 2	**A** - 1	**A** - 2	B - 1	B - 2
B - 3	**A** - 1	**A** - 2	B - 1	B - 2	**A** - 1	**A** - 2
A - 3	B - 1	B - 2	**A** - 1	**A** - 2		

This next template borrows the basic idea of the 2-2-3 schedule, except that the weekdays the children have with their parents don't change. This schedule, sometimes called a *2-2-5-5 schedule*, makes it easier for kids to know whose home they're going to be at and reduces the number of transitions to one in one week and three in the next week. It also gives the children long stretches of five days with each parent every other week.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	A - 1	**A** - 2	B - 1	B - 2	**A** - 1	**A** - 2
A - 3	**A** - 4	**A** - 5	B -1	B - 2	B - 3	B - 4
B - 5	**A** - 1	**A** - 2	B - 1	B - 2	**A** - 1	**A** - 2
A - 3	**A** - 4	**A** - 5	B -1	B - 2	B - 3	B - 4
B - 5	**A** - 1	**A** - 2	B - 1	B - 2		

This template extends the time that the children are with each parent, and involves two transitions each week. In this template, the transitions happen on Tuesdays and Wednesdays, with the result that each weekend is divided between the parents, with the children spending every Saturday with one parent and every Sunday with the other. The alternating Tuesdays and Wednesdays can make things a little complicated, but the children will always know which home they're going to be at for every other day of the week. This schedule also makes it easier for parents to schedule activities for the children on their own time with the kids.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
A - 1	**A** - 2	**A** - 3	**A** - 4	B - 1	B - 2	B - 3
A - 1	**A** - 2	**A** - 3	B - 1	B - 2	B - 3	B - 4
A - 1	**A** - 2	**A** - 3	**A** - 4	B - 1	B - 2	B - 3
A - 1	**A** - 2	**A** - 3	B - 1	B - 2	B - 3	B - 4

This last template has the children with each parent every other week, and is sometimes called a *week on, week off schedule*. The children only move between home A and home B once per week, and the transition day can be moved anywhere in the week. Moving between homes on Mondays or Fridays after school will usually cause the least disruption from the point of view of the kids and their teachers.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	A - 1	**A** - 2	**A** - 3	**A** - 4	**A** - 5	**A** - 6
A - 7	B - 1	B - 2	B - 3	B - 4	B - 5	B - 6
B - 7	**A** - 1	**A** - 2	**A** - 3	**A** - 4	**A** - 5	**A** - 6
A - 7	B - 1	B - 2	B - 3	B - 4	B - 5	B - 6
B - 7						

Of course, a shared parenting schedule doesn't need to see the children's time shared exactly equally between their parents. Another kind of shared parenting schedule might see the kids with one parent three days each week, and with the other parent for the remaining four days, for example.

Parental responsibilities

We've just finished talking about parenting schedules, which concern the distribution of the children's time between their parents. Now let's talk about the other big part of children's parenting arrangements, parental responsibilities.

Whether we're talking about "parental responsibilities," the term used by the *Family Law Act*, or "decision-making responsibilities," the term used by the *Divorce Act*, we're talking about how parents make important decisions about their children. Just like parenting schedules, there are a lot of different ways that parental responsibilities can be shared by parents:

- both parents could share all parental responsibilities, which will require them to talk to each other when bigger decisions about the kids need to be made,
- one parent could have all parental responsibilities, which will allow that parent to make decisions about the kids without having to consult the other parent,
- both parents could share all parental responsibilities, but one of them will have the final say in case the parents don't agree about a decision,
- parental responsibilities could be divided between parents, so that each parent has the final say about decisions relating to one of their responsibilities in case the parents don't agree about the decision, or
- parental responsibilities could be divided between parents, so that neither parent has to consult the other about decisions relating to one of their responsibilities.

Neither the *Family Law Act* nor the *Divorce Act* say that all parental responsibilities have to be shared equally by both parents or distributed in some other way. While both parents usually wind up sharing all parental responsibilities, remember what section 40(4) of the *Family Law Act* says:

> In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without

limiting that, the following must not be presumed:

(a) that parental responsibilities should be allocated equally among guardians;

(b) that parenting time should be shared equally among guardians;

(c) that decisions among guardians should be made separately or together.

The big factor that tends to determine how parental responsibilities are managed is the level of conflict between parents. Parents who tend to get along relatively well after separation and tend to agree about the bigger decisions in the children's lives will almost certainly share all parental responsibilities, likely with neither parent having the final say about decisions. When parents don't get along at all, and can't talk about anything without getting into a yelling match, that's when you're likely to see parental responsibilities being divided up with one parent having sole responsibility for some or all decisions.

Special issues in planning parenting time

There are lots of stumbling blocks that can crop up in preparing a parenting schedule, and it can be difficult to anticipate all the special days, events and occasions that you might need to address on top of the children's basic week-to-week schedule. Most often, these special days are things like Mothers' Day or Fathers' Day, the children's birthdays, religious holidays, school breaks, and statutory holidays. Other problems can come up when the parenting schedule is ignored by a parent or refused by a child. Some solutions to issues like this are discussed below. More information can be found in other sections in this chapter, especially the Children Who Resist Seeing a Parent section.

Shift work

I'm not going to lie. Figuring out parenting schedules with parents who work shift work is really difficult, especially for parents whose shifts change all the time and parents who get only one or two days' notice of their upcoming shifts.

The point of a parenting schedule is to give everyone, including the kids, a degree of predictability and stability in their lives. A good parenting schedule should be something that each parent can map out on a calendar. You should know, today, at whose house the kids are going to be next October 12th. The kids should know, today, when they're going to change homes next and what they need to take from one parent's home to the other's for their school and extracurricular activities. Shift work rarely lets you do this.

There are no good options for planning a parenting schedule around shift work. At a minimum, the parent with the shift work will need to tell the other parent about their work schedule as soon as they find out about it — the more notice that can be provided the better! — and the other parent must be prepared to be as flexible as possible in accommodating the children's time with the parent. The parent with the shift work must accept that the children and the other parent have schedules of their own that may limit the time the children can spend with them. Both parents need to think about how care for the kids can be arranged when neither of them can do it, since few daycare providers work on a drop-in basis. And both parents must learn to be patient, tolerant and forgiving toward each other.

Weekends

Weekends can be especially important to schedule carefully, and it's usually important that the children's weekends be shared between parents, particularly if the children are going to school. Often a parent who only has the children during the workweek becomes the disciplinarian, since that parent has the burden of telling the kids to go to sleep on time, brush their teeth, do their homework, and so forth. The other parent, on the other hand, becomes the fun parent, since that parent has the kids when they're not in school and can take them to the park, to the movies, and to the

beach. The children should be able to spend weekend time with both of their parents.

It's rarely a good idea to plan a schedule that allocates all weekends to one parent, unless the other parent works on weekends or there's some other very good reason why an arrangement like this works for your family and is in your children's best interests.

Statutory holidays and non-instructional days

Make sure that statutory holidays and other non-instructional school days are taken into account when you work out a parenting schedule. Like weekends, these too are special days when the kids don't have to go to school.

Statutory holidays, like Family Day, Labour Day and Canada Day, are easy to plan for. Most of them happen at a fixed time in the year, and you can look up those that don't online. There are a lot of ways of dealing with statutory holidays. Some parents don't worry about them at all, and just follow the ordinary week-to-week schedule throughout the year, except for the main school holidays, like the spring, summer and winter breaks. Other parents share them so that one parent has a particular holiday in one year, and the other parent has the holiday in the following year. For holidays that fall on Mondays and Fridays, you could also decide that whichever parent has the kids for that weekend will also have them for the Monday or the Friday too. This is a good approach, just be aware that in some years one parent will have more statutory holidays with the kids than the other. Don't worry about it, however, because over the long run things will usually work out to a relatively even sharing of statutory holidays.

Non-instructional days, like professional development days and parent-teacher interview days, are a bit more difficult to plan for. Quite often you won't get the details about what the school's calendar looks like until a month or two before the start of school in September. However, non-instructional days magically tend to fall on Mondays and Fridays, and parents who work outside the home can't always count on being available for the children. Non-instructional days, then, raise two kinds of problems: who will have the kids for a day off school; and, how will the kids be cared for if one or both parents have to be at work.

Special non-holiday days

Don't forget about other special days that aren't public holidays when you're working out your parenting schedule. These include the children's birthdays, the parents' birthdays. Fathers' Day, Mothers' Day, Halloween and some religious holidays. Creating exceptions to the parenting schedule after the fact, to deal with special days you've forgotten about, can create an awful lot of conflict.

- **Fathers' Day and Mothers' Day:** The easiest way of handling Fathers' Day and Mothers' Day is to agree that if Father's Day falls on a Sunday when the children are not with their father, their father will be able to have them for a few hours or the whole day. The same approach works just as well with Mothers' Day, but won't work at all for kids with two fathers or two mothers. In a case like that, the obvious solutions are for everyone to celebrate the day together, if that's possible, to just divide the day in half, or to alternate the day so that each parent has them every other year.
- **Children's birthdays:** There are four basic choices for managing the kids' birthdays. You could just follow the ordinary week-to-week calendar, so that whichever parent the kids are with on their birthday has them for that day, and the other parent makes special plans to celebrate the next time they have the kids. Or, you could decide that you'll each have a couple of hours or a half-day with the kids on their birthdays. You could also decide to rotate the children's birthdays so that they're with one parent one year and with the other parent the next. Or, you could all spend the day with the birthday child together. Whatever you do, don't forget about deciding who is going to be responsible for planning birthday parties!
- **Parents' birthdays:** While some parents don't worry about making sure their kids see them on their birthdays, others do. The easiest way to handle that is to either agree that if a parent's birthday falls on a day when the kids are with the other parent, the birthday parent will be able to have them for a few hours, perhaps for the whole day or perhaps just for dinner. If the birthday falls on a weekend, maybe the birthday parent can spend the entire day

and an overnight with the kids.

- **Halloween:** Do *not* forget to address Halloween in your parenting schedule if you have kids who are ten or younger! The easiest way of dealing with Halloween is to share trick-or-treating duties so that one parent has the kids in even-numbered years and the other parent has the kids in odd-numbered years. In general, the parent who has the kids will take them for two or three hours, just long enough to walk them around the neighbourhood. Don't forget to talk about who will be responsible for costumes!
- **Religious holidays:** Most parents agree to rotate one-day religious holidays, so that one parent has the kids in one year and the other parent has the kids the next. For two-day holidays, like Rosh Hashanah, parents will usually each take one day. For holidays that are a bit longer, parents often split the holiday down the middle. Christmas, for example, is often handled with the parents rotating Christmas Eve to the early afternoon on Christmas Day, and early afternoon on Christmas Day to Boxing Day.

School holidays

The main school holidays are the winter break (usually about two to two-and-a-half weeks), the spring break (a week or two weeks, depending on the school system) and the summer holiday (slightly more than two months). Here are some of the basic options for winter break and spring break:

- the breaks can be divided, so that one parent has the first half of the breaks in one year and the second half of the breaks the next year,
- the parents could decide that one of them will have the kids for all of one break in one year and that the other will have them for all of that break the following year, which is easiest if either of them want to travel with the kids, or
- the parents could just keep following the same week-to-week schedule that would normally apply, without adjusting that schedule for the breaks.

Just like non-instructional school days, however, the problem isn't just dividing up the time the kids will be with each parent, it's also deciding how the kids will be cared for if one or both parents have to be at work. It's great to say that you should have the kids for half their spring break, but if you're going to be at work, how much fun will it be for them?

The summer holiday can be handled the same way as the winter break and the spring break, except we're talking about a much longer period of time. Parents also usually need to cooperate to make decisions about travel and vacations, the children's time with relatives, the children's participation in day camps and overnight camps, and the children's participation in sports during the summer holiday. While parents also need to figure out how the kids will be cared for if one or both of them have to work, remember that there's no rule at all that summers have to be split equally. Other common reasons that summer holidays might not be divided equally include a parent's poor parenting skills or disengaged parenting style, a child who has trouble being away from a parent for extended periods of time, and a parent who usually spends a minimal amount of time with the kids the rest of the year.

If the children will be spending their time equally with each parent during the summer holiday, the easiest way to start planning the holiday is either: to agree that the ordinary week-to-week parenting schedule will run until the end of June and start again on the first of September, so that the time you'll be making special arrangements for are the months of July and August; or, to treat the summer holiday as a 10-week period, starting toward the end of June when school finishes and ending in early September when school starts. (That's the inconvenience that comes from having months that don't come in tidy four-week blocks.) The basic options for dividing the children's time are:

- the parents rotate having the children for a whole week every other week,
- the parents each have the children for a whole week every other week, except that each parent gets a special two- or three-week block with the kids, which is great for road trips and vacations,
- the parents rotate having the children in two-week blocks, depending on the children's ability to be away from each parent for so long,

- the parents split the first and second halves of July and August, with one parent getting the first halves in one year and the second halves the following year, again depending on the children's ability to be away from each parent for so long,
- the children are with one parent for all of July and with the other for all of August, also depending on the children's ability to be away from each parent, or
- the parents could just keep following the same week-to-week schedule that would normally apply, without adjusting that schedule for the holiday.

Really, there are no limits about how the children's time during their summer holiday can be managed other than each parent's work schedule and the children's ability to tolerate not being with a parent for extended periods of time.

Travel outside of Canada

If either parent is likely to take the kids out of the country for any period of time, the children's parenting arrangements should talk about: how long trips like these can last; whether there should be any limits on the places the kids can go; the sort of information that the travelling parent must give to the other parent about the children's itinerary, contact information, and where they will be staying while out of the country; and, whether any health precautions, like vaccinations or buying travel health insurance, must be organized before the trip. The parenting arrangements should also talk about the things that might be necessary for the children to enter another country, including:

- signing travel permission letters,
- applying for passports for the children, and
- storing the children's passports between trips.

Border officials usually want to see proof that the parent travelling with the children has the consent of the other parent to take them into the country. If they're not satisfied that the parent has the other parent's permission, they may send the parent and the kids back to Canada on the very next flight. For their part, airlines often check to see whether the parent travelling with the children has permission to do so, not because this is a legal requirement but because they don't want to be stuck with bringing the parent and the kids back to Canada!

Special challenges in parenting time

Parenting time doesn't always go as smoothly as it could. Some problems come from conflict between parents, others come from problems with a parent's health or behavioural patterns. Others come from the children themselves, like when children resist seeing a parent after separation or refuse to spend time with a parent after separation. These challenges can usually be handled, but they require special arrangments and sometimes support from mental health professionals.

Conditional and supervised parenting time

Children's parenting time with a parent can be *conditional* upon the parent doing something, like buckling the kids into car seats when driving, or not doing something, like not smoking around the kids. If the parent fails to meet any of the conditions of their parenting time, they may not be able to spend time with their children until they do meet those conditions.

In general, there needs to be some fairly serious concerns about a parent's lifestyle or behaviour, and the risk their lifestyle or behaviour poses to the children, before their parenting time will be conditional. As well, the conditions of a parent's parenting time should be no broader and no more difficult than is what is actually needed to address the concerns about that parent and the children's health and wellbeing.

A parenting schedule could also require that a parent's parenting time be *supervised* by someone, including the other parent, a grandparent, another relative or a friend, or even by a person who specializes in supervising parenting time. (There are a number of organizations that provide professional supervision services for a fee.) Just like conditional

parenting time, supervised parenting time should be limited to circumstances where the parent or their behaviour poses a risk to the children. Supervised parenting time is usually intended to be a temporary response to a short-term problem, not a permanent condition of the children's time with a parent.

Children's reluctance or refusal to see a parent

Children can sometimes have difficulty coping with change, whether a change between homes or the change resulting from the breakdown of the relationship between their parents, and may feel anxious when transitioning between homes. Other children may have a stronger relationship with one parent than the other as a result of their experiences growing up, or have a normal preference for one parent over the other for reasons including their age, stage of development and gender identity.

There are many reasons why children may resist spending time with a parent after separation. Some of these reasons, like I've suggested, are fairly commonplace and are experienced to a greater or lesser degree by all children. Other reasons include the special vulnerability of a parent after separation and the children's exposure to family violence. Still other reasons include a parent's interference with the children's relationship with the other parent. (These problems are discussed in more detail in the Children Who Resist Seeing a Parent section.) Regardless of how the parents feel about each other, however, they are both responsible for supporting the children's relationship with each other, including helping the children look forward to their time with the other parent.

It's important to know that there is no age at which children are entitled to decide their parenting schedule or whether they will or won't see a parent, although their views and preferences usually become more important and more influential as they get older. Children and youth should not be responsible for making their own parenting arrangements; that's their parents' responsibility. While a child's views and preferences should usually be heard, there's a difference between a child having a *voice* and a child being entitled to make a *choice*.

If a child is reluctant to see a parent, it's important to know why the child is reluctant to see that parent and then to take steps to address whatever has caused the reluctance. Social workers, registered clinical counsellors, and psychologists who provide services to children and youth will often be able to identify the issues that have resulted in the child's reluctance and suggest ways that the child's relationship with the parent can be better supported, potentially including that each parent and the child receive counselling on an ongoing basis. Counselling is often completely or partially funded through workplace extended health insurance programs, and free public and community counselling services may also be available.

Parents' failure to see a child

Children benefit from stability and predictability; children with special needs especially benefit from stability and predictability. It is disruptive to them and to the other parent when a parent cancels their parenting time at the last minute, or just fails to show up at all. This is an absolute no-no. It sends a message to the children that they don't matter to the parent or that other things, like work, are more important to the parent than they are. As well, both parents need to be able to rely on their parenting schedule; this benefits children by giving them a reliable routine, and it benefits parents by allowing them to plan their lives when they're apart from their children.

Some flexibility from both parents is a wonderful thing, but a situation where a parent is always backing out, cancelling, or changing dates is no good for anyone. Both parents have an obligation to stick to their parenting schedule as much as possible. Sure, things sometimes happen that make it impossible to meet an obligation in a parenting schedule, but being late or cancelling a visit has to be a solution of last resort and can't become a constant feature of the children's time with a parent.

It might be helpful to know that, under section 63 of the *Family Law Act*, if a parent routinely fails to exercise parenting time, the other parent can apply to court to be reimbursed for any expenses they incurred as a result of the parent's failure to exercise their parenting time. The court may also order that: one or both parents participate in a dispute resolution process; one or both parents attend counselling or other services and programs, with or without the

children; exchanges of the child be supervised; or, the parent repay the other parent for travel expenses, lost wages or childcare expenses incurred as a result of the missed parenting time.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Clicklaw Common Question "I'm looking for information about the Parenting After Separation program" [24]
- BC Ministry of Attorney General report *A Summary of Evaluation Feedback from Participants in Parenting After Separation Sessions* (2003) [25]
- Legal Aid BC's Family Law website's information page "Parenting & guardianship" [26]
- Indiana Parenting Time Guidelines [27]
- Justice Education Society's online course "Parenting After Separation" [28]
- Information Children [29] (a non-profit supporting parents with family life challenges)
- Department of Justice's guide *Making plans: A guide to parenting arrangements after separation or divorce* [30]
- Justice Education Society and BC Ministry of Attorney General's website "Families Change" [31]
- Hear the Child Society [9]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd 14 Aug 2022.

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[17] http://canada.justice.gc.ca/eng/fl-df/parent/ppc-lvppp/index.html
[18] http://canada.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/index.html
[19] http://canada.justice.gc.ca/eng/fl-df/parent/kh-ae.html
[20] http://www.familieschange.ca
[21] http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/pub/cal/2013/index.html
[22] https://canlii.ca/t/1fr99
[23] http://www.worldcat.org/title/helping-your-kids-cope-with-divorce-the-sandcastles-way/oclc/42193621
[24] https://www.clicklaw.bc.ca/question/commonquestion/1010
[25] https://www.clicklaw.bc.ca/resource/1204

[26] https://clicklaw.bc.ca/resource/4655
[27] https://www.in.gov/judiciary/rules/parenting/
[28] https://parenting.familieschange.ca
[29] https://www.informationchildren.com/
[30] https://www.justice.gc.ca/eng/fl-df/parent/mp-fdp/index.html
[31] https://clicklaw.bc.ca/resource/1588

Basic Principles of Parenting after Separation

When parents, judges and arbitrators have to make plans about parenting after separation, they're usually making plans about two broad issues: firstly, the schedule of the time that the children will spend with their parents and other important people in their lives; and, secondly, how parents will make important decisions affecting the children, about things like healthcare, extracurricular activities, language instruction, and schooling.

There are two laws that talk about these two issues, the federal *Divorce Act* and the provincial *Family Law Act*. The *Divorce Act* only applies to people who are or who used to be married to each other, but the *Family Law Act* applies to everyone, including people who are or who used to be married to each other, and anyone who has had a child with someone. The good news is that the two laws talk about parenting after separation using fairly similar terms. In general, the time children have with their parents is called *parenting time*, and parents' responsibility for making decisions about their children is called *decision-making responsibility* or *parental responsibilities*. In general, the time people who aren't parents have with children is called *contact*.

This section takes a deeper look at parenting after separation under the *Divorce Act* and the *Family Law Act* than the discussion provided in the first section of this chapter. It talks about who the laws apply to and how people become children's guardians. It talks about how the court makes decisions about parenting after separation, and the different kinds of parenting arrangements that are available.

Introduction

Under the federal *Divorce Act*, the time children have with their parents is called "parenting time," and parents' responsibility for making decisions about their children is called "decision-making responsibility." Under the provincial *Family Law Act*, the time children have with their parents is called "parenting time," and parents' responsibility for making decisions about their children is called "parental responsibilities." However, parenting time under the *Divorce Act* means the same thing as parenting time under the *Family Law Act*, and while there are some differences in how the *Divorce Act* talks about decision-making responsibilities and how the *Family Law Act* talks about parental responsibilities, you can think of them as meaning the same thing.

Unfortunately, this is where the similarities end. The *Divorce Act* only applies to people who are or who used to be married to each other. Under the *Divorce Act*, the people who have parenting time and decision-making responsibility are *spouses*, and a "spouse" might be a parent or a step-parent. The people who have "contact" with children are people who aren't "spouses." People who aren't spouses may, in certain circumstances, ask for parenting time and decision-making responsibility.

On the other hand, the *Family Law Act* applies to everyone, including people who are or who used to be married to each other. Under the *Family Law Act*, the people who have parenting time and parental responsibilities are *guardians*. "Guardians" are usually, but not always, parents. (Stepparents, extended family members and other adults can also ask to be appointed as the guardians of a child.) The people who have "contact" with children are people who aren't "guardians," including parents who aren't guardians.

When the court is asked to make orders about how children are cared for after separation, it will firstly consider whether the person asking for the order is a "spouse," a "parent," a "guardian" or someone else. The answer to this question is about whether the person asking for the order fits within the categories of people allowed to apply for the

order, or, as it's sometimes put, whether the person has the *standing* to apply for the order. The answer to this question changes depending on the legislation the person is relying on, either the *Divorce Act* or the *Family Law Act*.

The law about parenting after separation

Making plans for how children will be raised after the relationship between their parents has ended is about deciding how important decisions about their care and upbringing will be made, and deciding where the children will live and how much time they will have with the important people in their lives. While the parents of a child are usually the people responsible for making these decisions, when parents can't agree, the decision may be made by a judge or by an arbitrator and the rules governing their decision will change depending on the legislation they are required to apply.

The *Divorce Act*

The *Divorce Act* only applies to people who are or used to be married to each other. In addition to divorce, the *Divorce Act* also talks about orders about decision-making responsibility, parenting time and contact with children, and about how those orders can be changed. If married or formerly married people are already involved in a court proceeding under the *Divorce Act*, other people can sometimes also ask for orders about the children in the court proceeding between the spouses.

Only the Supreme Court can deal with claims under the Divorce Act.

Standing

If a claim for orders about parenting after separation is being made under the *Divorce Act*, the parties must be or have been married to each other, and the spouse asking for the orders must have lived in the province in which the court proceeding is started for at least one year before the proceeding started. Because what matters about claims under the *Divorce Act* is that the parties are or were married to each other, this means that one of the parties might be a stepparent or an adoptive parent to the child, and not necessarily a biological parent.

In a court proceeding under the *Divorce Act*, someone who is a spouse can ask for orders that they have "parenting time" with a child or "decision-making responsibility" for a child.

If a court proceeding under the *Divorce Act* has already started, under section 16.1(1)(b) of the act, certain other people can also ask for orders about parenting time and decision-making responsibility. These people must be:

- someone who is not a spouse but is a parent of the child,
- someone who is not a spouse but "stands in the place of a parent" to the child, or
- someone who is not a spouse but *intends* to stand in the place of a parent to the child.

These people could also ask for an order that they have "contact" with the child. In fact, as long as a court proceeding under the *Divorce Act* has started, *anyone* can ask for an order that they have contact with a child.

However, before anyone who isn't a spouse can ask for orders about children under the *Divorce Act,* they must first get the court's permission, called *leave*, before they make their application. Section 16.1(2) says that people other than spouses must get leave before asking for orders about parenting time and decision-making responsibility; section 16.5(2) says that people other than spouses must get leave before asking for orders for contact with a child.

Limitation periods

Some kinds of claims must be made within a certain amount of time, called a *limitation period*, and cannot be made after the limitation period has passed. Under the provincial *Family Law Act*, for example, a spouse must make a claim for spousal support within two years of the date of their divorce or the date their marriage was annulled.

There's a limit to when claims under the *Divorce Act* for parenting time, decision-making responsibility and contact can be made as well. Under the *Divorce Act*, the only young people the court can make orders about are "children of the marriage." Section 2(1) of the act defines a *child of the marriage* as the child of one or both spouses as long as the child is:

- under the age of majority, or
- older but unable to withdraw from the care of their parents because of "illness, disability or other cause."

"Other cause" usually means that the child is still going to school, usually college or university.

Once a young person no longer qualifies as a "child of the marriage," the court cannot make orders for parenting time, decision-making responsibility and contact about that child.

Statutory provisions

These are the important sections of the *Divorce Act* that talk about parenting time and decision-making responsibility:

- section 2: definitions
- section 3: the court's authority to make orders for parenting time and decision-making responsibility when a spouse is asking for a divorce order
- section 4: the court's authority to make orders for parenting time and decision-making responsibility after the court has made a divorce order
- section 5: the court's authority to change orders for parenting time and decision-making responsibility after the court has made a divorce order
- section 6: transfer of court proceedings when the children normally live in another province
- section 6.3: the court's authority to make or change orders for parenting time and decision-making responsibility about children who normally live outside of Canada
- section 16: the court must make orders for parenting time and decision-making responsibility taking into account only the best interests of the child
- sections 16.1, 16.2 and 16.3: parenting time and decision-making responsibility
- section 16.4: someone with parenting time or decision-making responsibility may get information about the child
- section 16.6: including parenting plans in orders for parenting time or decision-making responsibility
- sections 16.9, 16.91 and 16.93: relocation
- section 17: changing orders for parenting time and decision-making responsibility

These are the important sections of the *Divorce Act* that talk about contact:

- section 2: definitions
- section 6.1: the court's authority to make orders for contact
- section 6.3: the court's authority to make or change orders for contact with children who normally live outside of Canada
- section 16: the court must make orders for contact taking into account only the best interests of the child
- sections 16.5: contact
- section 16.6: including parenting plans in orders for contact
- sections 16.9, 16.91, 16.93 and 16.96: relocation
- section 17: changing orders for contact

The *Family Law Act*

Although the *Divorce Act* only applies to people who are or were married to each other, the *Family Law Act* applies to everyone. The *Family Law Act* talks about orders about parental responsibilities, parenting time and contact with children, about how those orders can be changed, and about how those orders can be enforced.

Both the Provincial Court and the Supreme Court can deal with claims under the *Family Law Act*.

Standing

The people who can ask for orders about parental responsibilities and parenting time are *guardians*. Most of the time the parents of a child will be the child's guardians, but other people can be guardians too, including people who have a court order appointing them as guardians and people who are made guardians by a guardian's will. It's important to know that being a parent doesn't automatically mean that you are also a guardian.

If someone who is not a guardian wants to ask for orders about parental responsibilities or parenting time, they must first become a guardian of the child. Guardianship and becoming a guardian are discussed in more detail later in this section.

People who are not guardians can ask for orders about contact with a child.

Limitation periods

Under the *Family Law Act*, the court can only make orders for parental responsibilities, parenting time and contact about young people who qualify as *children*. Section 1 defines a "child" as "a person who is under 19 years of age." Although the act has broader definitions of "child" that can include children who are 19 and older, those broader definitions only apply to the parts of the legislation about parentage and child support.

Statutory provisions

These are the important sections of the *Family Act* that talk about guardianship, parenting time and parental responsibilities:

- section 1: definitions
- section 19.10: the obligation of arbitrators to make decisions about a child taking into account only the best interests of the child
- sections 23 to 33: parentage
- sections 37 and 38: the court must make orders for parenting time and parental responsibilities taking into account only the best interests of the child
- section 39: when parents are and are not guardians
- sections 40, 41, 43 and 49: parental responsibilities
- sections 40 and 42: parenting time
- section 44: guardians' ability to make agreements for parenting time and parental responsibilities
- section 45: the court's authority to make orders for parenting time and parental responsibilities
- section 47: the court's authority to change agreements and orders for parenting time and parental responsibilities
- section 50: agreements about guardianship
- sections 51 and 52: orders about guardianship
- sections 53, 54, 56 and 57: appointing a person as a guardian in a will
- sections 55, 56 and 57: appointing a person as a standby guardian
- sections 61, 62, 63 and 231: enforcing orders and agreements for parenting time
- sections 65 to 71: relocation
- sections 182 to 189: family violence
- section 202: the court's authority to decide how evidence from children is received
- section 203: children's lawyers

- sections 208 and 209: guardianship of Nisga'a and treaty First Nation children
- section 211: parenting assessments

These are the important sections of the *Family Act* that talk about contact:

- section 1: definitions
- section 19.10: the obligation of arbitrators to make decisions about a child taking into account only the best interests of the child
- sections 37 and 38: the court must make orders for contact taking into account only the best interests of the child
- section 39: when parents are and are not guardians
- section 58: agreements about contact
- section 59: orders about contact
- section 60: the court's authority to change agreements and orders for contact
- sections 61, 62, 63 and 231: enforcing orders and agreements for contact
- sections 65 to 71: relocation
- sections 182 to 189: family violence
- section 202: the court's authority to decide how evidence from children is received
- section 203: children's lawyers
- section 211: parenting assessments

Parenting time, contact and child support

A person's time with a child is entirely different and separate from any duty they might have to pay child support. Child support is not a fee paid to get parenting time or contact, nor is it a fee charged in return for allowing parenting time or contact. Child support is paid by one person to another to help the person receiving support, the *recipient*, cover the costs associated with raising the child. Parenting time or contact, on the other hand, is about a child's right to benefit from spending time with an adult, as long as that time is in the child's best interests.

However, there are two circumstances where the arrangements made for parenting time and contact can have an impact on how child support is calculated: when the parents share their children's time more or less equally; and, when each parent has the primary home of one or more of the children. You can read more about child support in the Child Support chapter.

Shared parenting time

Shared parenting time is a term used by the Child Support Guidelines to describe a kind of parenting situation in which the children spend an equal or almost equal amount of time with each parent. Where parents have shared parenting time, the children will usually spend a certain amount of time with one parent at that parent's home and a similar amount of time with the other parent at their home. Shared parenting time can require that the children switch homes every three or four days, every other week, every two weeks, or every month; the amount of time the children spend with each parent will depend on the circumstances of each case, the age of the children, the parents' work schedules, and the schedules of the children's activities.

For many people, child support is calculated using the tables attached to the Child Support Guidelines that say how much child support is payable according to the income of the person paying child support, the *payor*, and the number of children support is being paid for. However, once the payor has the children for 40 percent or more of their time, section 9 of the Guidelines says that the amount of support paid can be a different amount than what the Guidelines tables require. Almost all of the time, the amount paid is less, often a lot less, than what the table says should be paid, on the basis that because the payor has the children for so much of their time, the payor is spending more on the day-to-day needs of the children and the recipient is spending less.

Unfortunately, because a payor's time with the children is sometimes tied to the amount of their child support obligation, the court often hears payors saying "the only reason you don't want the kids to spend so much time with

me is because you don't want me to pay less child support," or, on the other hand, recipients saying "the only reason you want the kids for so much time is because you want to pay less child support." It can be hard to keep discussions about parenting time and contact focused on the needs of the children and not on the impact of shared parenting time on child support.

You can get more information about shared parenting time in the Exceptions to the Child Support Guidelines section of the Child Support chapter.

Split parenting time

Split parenting time is a term used by the Child Support Guidelines to describe a kind of parenting situation in which one or more of the children live mostly with each parent.

This is a fairly unusual arrangement as it requires the separation of siblings for a lot of their time, and there's sometimes a risk that siblings will grow apart from each other as time passes. These sorts of orders are only made where there is clear evidence that it is in the best interests of all of the children to divide the family unit, such as when the children are constantly fighting or when one child has a particular attachment to a parent not wholly shared by the other children.

In cases like this, each parent pays the full amount of child support required by the Child Support Guidelines tables to the other parent, based on the number of children in that parent's care. Under section 8 of the Guidelines, the amount that changes hands is the difference between the higher amount of child support and the lower amount of support.

You can get more information about split parenting time in the Exceptions to the Child Support Guidelines section of the Child Support chapter.

Guardianship

Guardianship is a very old concept that goes back to the law of ancient Rome. Although guardianship can be hard to define, it's probably easiest to think of guardianship as the full bundle of rights and duties involved in caring for and raising a child. Historically, guardianship had two aspects: guardianship of the *person* of the individual, and guardianship of the *estate* of the individual. Under the *Family Law Act*, "guardianship" of a child is about being a guardian of the *person* of the child, which means being responsible for making parenting decisions that are in their best interests. Guardianship of the *estate* of the child is handled separately, under Part 8 of the act, which talks about children's property.

Most of the time a child's parents will be the child's guardians, but other people can be guardians too, including grandparents and stepparents as well as people who:

- have a court order appointing them as guardians,
- are appointed as the guardian of a child in a guardian's will, and
- are appointed as the standby guardian of a child by a guardian who is facing a terminal illness or a permanent mental incapacity.

It's important to know that a child can have one, two or more guardians, just the way that a child can have one, two or more parents.

Only the *Family Law Act* talks about guardianship, because making rules about guardianship is a responsibility of the provinces, not the federal government. The federal *Divorce Act* doesn't — and can't! — talk about guardianship. But the act uses concepts that are a lot like guardianship, when it talks about the rights and responsibilities involved in decision-making responsibility and parenting time.

This section talks about parents who are presumed to be the guardians of a child, how people can apply to be appointed as the guardian of a child, and how people can become a guardian upon the death of a guardian. It also talks about parental responsibilities and parenting time, which are the rights and obligations guardians hold.

Being a guardian

Section 39 of the *Family Law Act* sets out the basic rules about who is presumed to be the guardian of a child:

> (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
> ...
> (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
> (a) section 30 applies and the person is a parent under that section;
> (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
> (c) the parent regularly cares for the child.

Putting this another way, under section 39(1), parents who lived together for some time after their child was born, since birth is when you become a parent, are presumed to be the guardians of their child both during their relationship and after they separate. You don't need an agreement, an order or an award saying you're a guardian, you just *are* a guardian. It's automatic, as long as you meet the test in section 39(1) of the *Family Law Act.*

Parents who didn't live together, on the other hand, aren't guardians unless:

- they are parents because of an assisted reproduction agreement signed before the child was conceived (that's the bit about section 30 in section 39(3)(a)),
- the parent who the child doesn't usually live with and all of the child's guardians make an agreement that the parent is a guardian, or
- the parent who the child doesn't usually live with "regularly cares for the child."

It's easy to show that you're a guardian under section 39(3)(a) and (b) because you'll have a written agreement that says you're a guardian.

It's harder to show that you're a guardian under section 39(3)(c) because the *Family Law Act* doesn't say exactly what "regularly cares for the child" means. The dictionary definition of "regular" is something that occurs at recurring intervals... but surely "regular" intervals of two hours every three months or every three years isn't what the provincial government meant when it was writing section 39(3)(c). This is important for parents, generally fathers, who weren't living with the other parent, generally birth mothers, when the child was born and never lived with the other parent afterward. In cases like this, you may have to go to court to argue that your "regular care" for the child qualifies you as a guardian under section 39(3)(c). This is what the Court of Appeal said in the 2015 case of A.A.A.M. v. British Columbia (Director of Adoption) [1]:

> "I doubt that a visit once every calendar year could be intended to qualify as 'regular' for purposes of s. 39(3)(c), even though it could be said to have taken place at regular intervals. It seems to me that the intention of the Legislature was to refer to a parent who has demonstrated a continuing willingness to provide for the child's ongoing needs and a record of 'usually' or 'normally' doing so in fact. Certainly, it connotes something more than simply 'visiting' the child, even at regular intervals."

Now, all of this is really important because if you're a child's guardian, you:

- have parenting time with the child,
- are presumed to be able to exercise all parental responsibilities on behalf of the child,
- have day-to-day care and control of the child and day-to-date decision-making responsibility for the child when the child is with you,
- are entitled to get information about the child's health and education from people who have that information,
- are presumed to be entitled to manage property belonging to the child that's worth less than $10,000,
- have the right to object if another guardian wants to move away with the child, and

- you can appoint someone to be a guardian of your child in the event of your death through your will.

If you're *not* a guardian, you don't have any of these entitlements. You have contact with the child, if you spend time with the child, you don't have day-to-day care and control of the child or day-to-date decision-making responsibility for the child when the child is with you, you aren't entitled to get information about the child's health and education, and you can't object if a guardian wants to move.

Becoming a guardian

If you're not the guardian of a child and want to become one, your choices depend on your relationship to the child and the views of the child's other guardians. If you are one of the child's parents, you can:

- ask the court for a declaration that you are a guardian because you regularly care for the child under section 39(3)(c) of the *Family Law Act*,
- make an agreement with the child's guardians that you are a guardian under section 39(3)(b), or
- ask the court for an order appointing you as a guardian of the child, under section 51.

There's also the chance that a guardian might decide to:

- appoint you as a guardian in their will, under section 53 of the *Family Law Act*, so that you become a guardian of the child when the appointing guardian dies, or
- appoint you as a standby guardian of the child, under section 55, so that you become a guardian of the child when the appointing guardian is diagnosed with a terminal illness or a permanent mental incapacity.

If you are not one of the child's parents, your choices are more limited. You can ask the court for an order appointing you as a guardian of the child, under section 51 of the *Family Law Act*, or you can be appointed as a guardian in an appointing guardian's will or as a standby guardian.

Becoming a guardian by agreement

If you are a parent, you can become a guardian under section 39(3)(b) of the *Family Law Act* by making a written agreement with all of the child's other guardians. But if one of the child's guardians disagrees, you won't have any choice except to apply to court for an order appointing you as one of the child's guardians.

Guardians can't make an agreement appointing anyone other than a parent as a guardian.

Becoming a guardian by court order

Parents and anyone else can apply to be made a guardian of a child under section 51 of the *Family Law Act*. This section requires a person applying for guardianship, an *applicant*, to provide certain information about why the order would be in the best interests of the child.

In the Provincial Court, Rule 18.1 of the Provincial Court (Family) Rules [3] requires the applicant to provide a special affidavit in Form 34, signed no more than seven days before it is filed in court. The affidavit requires applicants to talk about:

- their relationship with the child,
- the child's current living arrangements,
- their plans for the parenting of the child,
- any incidents of family violence that might affect the child, and
- their involvement with other court proceedings involving children under the *Family Law Act*, the old *Family Relations Act*, the *Child, Family and Community Service Act* [2], and the *Divorce Act*.

The same rule also requires that applicants attach the following documents to their affidavit:

- a criminal records check,
- a British Columbia Ministry of Children and Family Development records check, and
- a Protection Order Registry records check.

The records checks need to be dated within 60 days of the filing of the affidavit in Provincial Court.

For the Supreme Court, Rule 15-2.1 of the Supreme Court Family Rules [3] says much the same thing, and also requires a special affidavit with the same three records checks added as exhibits. The special affidavit, Form F101, must be signed not more than 28 days before the hearing where people will present arguments, or not more than seven days before being filed in court if there will not be a hearing. The records checks must be dated no more than 60 days before the date of the hearing.

To get a criminal records check, go to your local police station. The forms required to get the Ministry of Children and Family Development records check and the Protection Order Registry records check can be found online from the Ministry of Justice [21]. The forms you'll need are:

1. **Consent for Child Protection Record Check**: This form must be signed in front of a commissioner for taking affidavits [3], such as a lawyer, a notary public or a registrar of the Supreme Court. Submit the completed form to the court registry where you're making your application.
2. **Request for Protection Order Registry Search**: This form must also be submitted to the court registry where the application is being made.

Becoming a guardian by will or a standby appointment

Parents and anyone else can be made a guardian if they have been appointed by a guardian as a "testamentary guardian" under section 53 of the *Family Law Act* or as a "standby guardian" under section 55. Guardians who are appointed in this way don't need to make an application under section 51 and don't need to worry about filing the special affidavit or getting records checks done.

Testamentary guardians can be appointed in the appointing guardian's will or if the guardian completes an Appointment of Standby or Testamentary Guardian in Form 2 of the Family Law Act Regulation [11]. Their appointment takes effect when the appointing guardian dies.

Standby guardians are appointed when the appointing guardian completes an Appointment of Standby or Testamentary Guardian, and their appointment takes effect when the conditions of the appointment are met, usually through a letter from a medical professional confirming that the appointing guardian has a terminal illness or a permanent mental incapacity.

Read more about this way of becoming a guardian in the discussion about the incapacity and death of guardians a bit later in this section.

Avoiding guardianship and terminating guardianship

It's important to know that someone doesn't become the guardian of a child just because of their relationship with someone who is a guardian of that child. Section 39 of the *Family Law Act* says that:

> (4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

Likewise, you won't become a guardian just by living with a guardian as a roommate or being a close fried of a guardian, no matter how much time you spend with the guardian or the child. If you're not a parent of the child, you can only become a guardian if the court makes an order appointing you as a guardian, if a guardian makes a will naming you as a guardian, or if a guardian makes you a standby guardian.

Sometimes, parents want to avoid being a guardian. Section 39 of the *Family Law Act* also says that

> (2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.

Sometimes, a guardian wants to remove another person as a guardian of a child. In cases like this, the guardian can ask the court for an order "terminating" a person's guardianship of a child under section 51 of the *Family Law Act*. This doesn't happen very often, even if the guardians are involved in high levels of conflict and can never agree on anything. Often, the court will take parenting time, parental responsibilities or both away from a guardian before removing them as a guardian.

Inability, incapacity or death of a guardian

When a guardian anticipates being unable to care for a child, either temporarily or permanently, they may appoint someone to act as guardian of the child in their place. No matter the age or health of a guardian, it's always a good idea to think about who might be able to look after the child in the event you die or become too ill to do so, and then record those arrangements in a will or in an Appointment of Standby or Testamentary Guardian form.

Temporary authorizations

Under section 43(2) of the *Family Law Act*, a guardian who is temporarily unable to exercise certain parental responsibilities may authorize someone to exercise those responsibilities on their behalf. Such authorizations must be made in writing, and should say exactly what it is that the authorized person can do.

The parental responsibilities that someone can exercise under a written authorization are:

- making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child,
- making decisions respecting with whom the child will live and associate,
- making decisions respecting the child's education and participation in extracurricular activities,
- giving, refusing, or withdrawing consent to medical, dental, and other health-related treatments for the child,
- applying for a passport, licence, permit, benefit, privilege or other thing for the child,
- giving, refusing, or withdrawing consent for the child, if consent is required,
- receiving and responding to any notice that a parent or guardian is entitled or required by law to receive,
- requesting and receiving from third-parties health, education, or other information about the child, and
- exercising any other responsibilities reasonably necessary to nurture the child's development.

Authorizations like these are mostly used when a child has to go somewhere else to attend school and the guardian needs to make sure the child is looked after, when the guardian is seriously ill but going to recover, or when the guardian is going to be out of commission for a while to recover from an illness, a surgery or some other kind of debilitating treatment.

Standby appointments

Under section 55 of the *Family Law Act*, when a guardian is facing a terminal illness or permanent loss of mental capacity, the guardian can appoint someone else to become a guardian of the child when they become incapable of continuing to act in that capacity.

Appointments are made by filling out an Appointment of Standby or Testamentary Guardian in Form 2 of the Family Law Act Regulation [11]. The appointing guardian must sign the form in the presence of two witnesses, neither of whom can be the guardian being appointed. The form must state the conditions that have to be met for the appointment to take effect, such as a doctor's certificate of incapacity. The appointing guardian cannot give a standby guardian any more parental responsibilities than those the appointing guardian had at the time of the appointment.

For the appointment to be effective, the person appointed as a standby guardian must accept the appointment.

A person who is appointed as a standby guardian does not have to apply for an appointment under section 51 of the *Family Law Act*, and will continue as the guardian of the child after the death of the appointing guardian.

Testamentary appointments

Under section 53 of the *Family Law Act*, a guardian can appoint someone to become the guardian of a child when they die.

Appointments are made either by filling out an Appointment of Standby or Testamentary Guardian form or in the guardian's will. For appointments made using an Appointment of Standby or Testamentary Guardian, the guardian must sign the form in the presence of two witnesses, neither of whom can be the guardian being appointed. The appointing guardian cannot give the testamentary guardian any more parental responsibilities than those the appointing guardian had at the time of the appointment.

For the appointment to be effective, the person appointed as a testamentary guardian must accept the appointment.

As with standby guardians, a person who is appointed as a testamentary guardian does not have to apply for an appointment under section 51 of the *Family Law Act*.

Parental responsibilities, decision-making responsibility and parenting time

Under the federal *Divorce Act*, someone who is a "spouse" may have *decision-making responsibility* and *parenting time* with a child. Under the provincial *Family Law Act*, someone who is a "guardian" may have *parental responsibilities* and *parenting time* with a child. The difference in language can be a bit confusing, but you can assume that "decision-making responsibility" under the *Divorce Act* means pretty much the same thing as "parental responsibilities" under the *Family Law Act*, and that "parenting time" means the same thing under both statutes.

Under the *Divorce Act*, the parts of an order that talk about decision-making responsibility and parenting time are called a "parenting order." A "parenting plan" is the part of a document, usually an agreement between spouses, that talks about decision-making responsibility and parenting time.

Under the *Family Law Act*, the parts of orders, agreements and awards that talk about parental responsibilities and parenting time are called "parenting arrangements."

It's important to remember that parenting orders under the *Divorce Act* are to be made taking into account only the best interests of the child, applying the factors listed in section 16 of the act. The same requirement appears in the *Family Law Act*, and the parties and the court must make decisions about parenting arrangements taking into account only the best interests of the child, applying the factors listed at sections 37 and 38 of that act.

Parental responsibilities and parenting time under the *Family Law Act*

Section 40 of the *Family Law Act* talks about who may have parental responsibilities and parenting time with respect to a child, and how they may be shared:

> (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.
>
> (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
>
> (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
>
> (a) one or more guardians only, or
>
> (b) each guardian acting separately or all guardians acting together.
>
> (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and

> without limiting that, the following must not be presumed:
>
> (a) that parental responsibilities should be allocated equally among guardians;
>
> (b) that parenting time should be shared equally among guardians;
>
> (c) that decisions among guardians should be made separately or together.

This section says a few important things. First, guardians are presumed to exercise all parental responsibilities until an order or agreement says otherwise, and guardians are required to consult with each other in the exercise of these responsibilities.

Second, if you do have an order or agreement, the order or agreement can require all of a child's guardians to share certain parental responsibilities or divide parental responsibilities so that a particular responsibility may only be exercised by one or more guardians acting on their own. For example, in one family, Guardian A and Guardian B might both have parental responsibility for making decisions about the child's schooling and health care, while Guardian A has sole responsibility for making decisions about the child's extracurricular activities and Guardian B has sole responsibility for making decisions about the child's language instruction.

Third, the court must not make any assumptions about how parental responsibilities and parenting time are to be shared, equally or otherwise.

The different decisions "parental responsibilities" includes are listed at section 41:

> (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
>
> (b) making decisions respecting where the child will reside;
>
> (c) making decisions respecting with whom the child will live and associate;
>
> (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
>
> (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
>
> (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
>
> (g) applying for a passport, license, 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.

It's important to know that, under section 43(1), guardians must always exercise parental responsibilities in the best interests of the child.

The parts of the *Family Law Act* that deal with parenting time are much less complicated. Section 42 says this:

> (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.
>
> (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

Remember, however, that section 40(4) says that "no particular arrangement is presumed to be in the best interests of the child," including, at section 40(4)(b), "that parenting time should be shared equally among guardians."

The duty to consult before making decisions

Section 40(2) of the *Family Law Act* requires a child's guardians to talk to each other before exercising a parental responsibility and making an important decision affecting the child, unless the right to exercise that parental responsibility has been assigned to just the guardian or guardians who are making the decision. This provision is really important. Here it is again:

> (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

In other words, unless you have the exclusive right to make decisions about the child's schooling, you can't just enrol your child at a school without first talking to the child's other guardians and trying to reach an agreement about where the child will go to school. The same thing applies to other, equally important, decisions about things like health care, choice of religious instruction and so on. Here's how the Provincial Court described the duty to consult in a 2021 case called *K.K. v D.H.* [4]:

> "The starting place, then, is that unless there is an agreement or court order to the contrary, guardians of a child share the responsibility of making decisions respecting where their child resides and, in arriving at that decision, they are expected to consult with one another and then come to a decision as to what is best for their child. ...
>
> “Another underlying principle or philosophy of the FLA is that generally, and but for exceptional circumstances, guardians must avoid, and be discouraged from, unilateral decision-making relating to matters affecting their children. The obvious concern is that making decisions that are ‘one-sided’, and therefore made without a fulsome consideration of the impact of a decision on a child, can result in an outcome that is highly disruptive for a child and ultimately found not to be in a child’s best interests.”

The Supreme Court said much the same thing in a 2021 case called *L.D.R. v J.C.L.* [5]:

> "The parties are both guardians of [the child], the parties share parental responsibilities, and pursuant to s. 40(2) of the FLA there is a duty to consult with each other. The claimant does not have a unilateral or final say."

If a guardian does make a decision about a shared parental responsibility on their own, a *unilateral* decision, another guardian who disagrees with that decision can apply to court for an order for the decision they think is right. The child's guardians will each be able to explain to the judge why the decision they think is right is the decision that is in the best interests of the child, but there is no guarantee that the judge will agree with the guardian who made the unilateral decision. In the Supreme Court, that guardian also needs to be worried that the court may make a costs order in favour of the guardian who made the application because of the time and expense involved in making that application.

Children and healthcare decisions

Section 41(f) of the *Family Law Act* is about making decisions about children's health, including medical care and medical procedures, drug prescriptions, dental and orthodontic work, and mental health care including counselling. It says this:

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

The reference to the provincial *Infants Act* [6] probably seems out of place in a statute that's all about families and family breakdown. It makes a lot more sense when you look at what section 17 actually says:

> (1) In this section:
>
> "health care" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care;
>
> "health care provider" includes a person licensed, certified or registered in British Columbia to provide health care.
>
> (2) Subject to subsection (3), an infant may consent to health care whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person, and if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian.
>
> (3) A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent to the health care for the purposes of subsection (2) unless the health care provider providing the health care
>
> (a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and
>
> (b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.

This section of the *Infants Act* allows "children" – persons under the age of 19 in British Columbia – to make their own decisions about their healthcare, with or without the consent of their guardians, as long as the healthcare provider has decided that:

- the care is in the best interests of the young person, and
- the young person understands the nature and consequences of the care, and its reasonably foreseeable benefits and risks.

This provision of the *Infants Act* seems to conflict with the parts of section 41 of the *Family Law Act* on guardians' responsibility to make healthcare decisions for a child. The Court of Appeal discussed how the *Infants Act* and the *Family Law Act* work together in a 2020 case called *A.B. v C.D.* [7]:

> "Under s. 41(f), parental responsibility for 'giving, refusing or withdrawing consent to medical, dental and other health related treatments for the child' is subject to s. 17 of the *Infants Act*. ... This reflects a carefully legislated balance between parental responsibilities, medical expertise, the protection of young people, and the right of a capable individual to medical self-determination.
>
> "Clearly 'subject to s. 17' means subject to a lawful exercise of the rights accorded to mature minors under s. 17. The lawful exercise of those rights requires a health care provider to assess whether the 'infant' understands the nature, consequences, benefits, and risks of the proposed treatment, and whether the treatment is in that individual's best interests.
>
> "The court's approach to that review must be deferential given the legislative intent behind s. 17 to recognize the autonomy of mature minors and the expertise and good faith of the health care providers."

In other words, children who are able to make their own decisions about their healthcare get to make those decisions, regardless of the views of one or more of their guardians.

Decision-making responsibilities and parenting time under the *Divorce Act*

Section 2(1) of the *Divorce Act* defines "decision-making responsibility" and "parenting time" relatively briefly:

> **decision-making responsibility** means the responsibility for making significant decisions about a child's well-being, including in respect of
>
> (a) health;
>
> (b) education;
>
> (c) culture, language, religion and spirituality; and
>
> (d) significant extra-curricular activities; ...
>
> **parenting time** means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

The word "including" at the beginning of the definition of decision-making responsibility means that the sort of "significant decisions" that fall under the heading of "decision-making responsibility" aren't limited to just the four decisions listed in the definition. The longer list of parental responsibilities provided in section 41 of the *Family Law Act* can all be addressed in orders about decision-making responsibility under the *Divorce Act*.

Section 16.1 talks about the kind of parenting orders the court may make:

> (4) The court may, in [a parenting order],
>
> (a) allocate parenting time in accordance with section 16.2;
>
> (b) allocate decision-making responsibility in accordance with section 16.3;
>
> (c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and
>
> (d) provide for any other matter that the court considers appropriate.

> (5) The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate. ...
>
> (8) The order may require that parenting time or the transfer of the child from one person to another be supervised.

Section 16.3 talks about decision-making responsibility:

> Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.

Finally, sections 16 and 16.2 talk about parenting time. Section 16.2 is about the orders the court can make:

> (1) Parenting time may be allocated by way of a schedule.
>
> (2) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.

Section 16(6) gives some additional guidance to the court when it makes orders about parenting time. It says 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.

Under the old *Divorce Act* [8], this was known as the "maximum contact" principle. The new *Divorce Act* drops this term to emphasize that under the new legislation, just like under the old legislation, decisions about children's time with each spouse are to be guided only by the child's best interests. This section does not create an automatic right to a shared parenting schedule.

Making parenting arrangements

You have a number choices when it becomes important to formalize the parenting arrangements for a child. You can come up with an agreement with the other parent, using negotiation, mediation, or a collaborative settlement process, or, if you can't agree, you can go to court or you can decide to use arbitration. Arbitration, like mediation, is a process that everyone involved needs to agree to use. However, unlike mediation, the arbitrator will make a final and binding decision if an agreement cannot be reached. You can get more information about negotiation, mediation, collaborative settlement processes and arbitration in the chapter Resolving Family Law Problems out of Court, and more information about litigation in the chapter Resolving Family Law Problems in Court.

It sometimes takes a while for parents to get to the point where they feel they must get something formal in place. Sometimes, people are just content with how things are working. In cases like this, where a stable parenting arrangement has managed to gel over time, section 48 of the *Family Law Act* says that a guardian shouldn't make unilateral changes to those arrangements without talking to the other guardians first:

> (1) If
>
> (a) no agreement or order respecting parenting arrangements applies in respect of a child, and
>
> (b) the child's guardians have had in place informal parenting arrangements for a period of time sufficient for those parenting arrangements to have been established as a normal part of that child's routine, a child's guardian must not change the informal parenting arrangements without consulting the other guardians who are

> parties to those arrangements, unless consultation would be unreasonable or inappropriate in the circumstances.
>
> (2) Nothing in subsection (1) prevents a child's guardian from seeking
>
> (a) an agreement respecting parenting arrangements, or
>
> (b) an order under section 45.

When formal arrangements are required, section 44 of the *Family Law Act* allows two or more of a child's guardians to make an agreement about the allocation of parental responsibilities and parenting time, as well as how disputes about those parenting arrangements will be resolved. (Agreements like these can't be made until the guardians have separated or are about to separate.) If agreement is impossible, a guardian can apply for a court order about parenting arrangements under section 45 of the *Family Law Act*, and married spouses can apply for a parenting order under section 16.1 of the *Divorce Act*.

When a child has more than one parent, the parents must work together and cooperate in raising the child. This can sometimes be difficult, particularly when there is a lot of conflict in the parents' relationship with each other. Before the *Family Law Act* came into effect, the rights and obligations involved in raising children were addressed through agreements and orders about custody, guardianship and access under the old *Family Relations Act* [9]. Similarly, before the new *Divorce Act* came into effect, these issues were addressed through orders about custody and access under the old *Divorce Act* [8]. Now, the *Family Law Act* talks about parental responsibilities and parenting time and the *Divorce Act*, using similar ideas and similar language, talks about decision-making responsibility and parenting time. The first section in this chapter, Children, talks about how to understand agreements and orders made under the old *Divorce Act* applying the language of the new *Divorce Act* in "Parenting after separation and the law."

Parental responsibilities and decision-making responsibility

Guardians can make agreements about how parental responsibilities for a child will be shared between them under section 44 of the *Family Law Act*. These agreements:

- should be written down whenever possible, and
- can only been made when the guardians have separated or are about to separate.

Written agreements can be filed in court under section 44(3) of the act and, once filed, can be enforced just like they are orders of the court.

When guardians can't agree on how parental responsibilities for a child will be shared, they can apply to court to get an order about how they'll be shared under section 45 of the *Family Law Act*. Parents who are married can also apply for an order about how decision-making responsibility will be shared under section 16.1 of the *Divorce Act*.

Orders about parental responsibilities and decision-making responsibility are either *interim* or *final*, and, like agreements, cannot be made until the parents have separated. An "interim order" is an order that has been made after a court proceeding has been started but before the court proceeding has wrapped up with a final order made after trial or by a final order that is made with the agreement of the parties. Interim orders can be changed by other interim orders. A "final order" is an order that is made by a judge either after a trial or by the agreement of the parties. Final orders can be changed too, providing there has been an important change in the circumstances of a party or a child, but are otherwise intended to be permanent.

It's important to know that interim orders are intended to be a sort of rough-and-ready solution to the legal issues parents have to address after separation, and are only meant to last until a final order is made. They are short-term solutions intended to deal with immediate problems about things like where a child will live and the role each parent will play in raising the child. While interim orders will be made based on the same considerations that apply to final orders, a lot of weight is usually given to the status quo — the parenting arrangements that are in place at the time the application for the interim order is made — in order to minimize the amount of disruption the child has to deal

with while the parents get on with their court proceeding.

Factors

There are two sets of factors that judges and arbitrators will consider in making orders about parental responsibilities and decision-making responsibility, the factors set out in the legislation and the additional factors that have developed through the courts. As far as the legislation is concerned, the most important factors are the children's best interests. Section 16 of the *Divorce Act* says that:

> (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (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. ...
>
> (5) In determining what is in the best interests of the child, the court shall not take into consideration the 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.

The list of *Divorce Act* best-interests factors is set out in section 16(3), and the list of additional factors to be considered when assessing the impact of family violence is set out in section 16(4).

Section 37 of the *Family Law Act* says this:

> (1) In 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. ...
>
> (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
>
> (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

The list of *Family Law Act* best-interests factors is set out in section 37(2), and the list of additional factors to be considered when assessing the impact of family violence is set out in a separate section, section 38.

The courts have expanded these factors into the following general principles when determining how parental responsibilities and decision-making responsibility will be allocated. The court may consider:

- each parent's ability and willingness to cooperate with the other parent when making decisions about the children, and the history of their cooperation and communication with each other,
- the extent to which the parents share a common approach to parenting and a common view of the children's needs and interests,
- each parent's understanding of the needs of the children and their ability to make appropriate decisions that address those needs,
- each parent's character, fitness, and overall parenting capacity, depending on the circumstances of the case and as long as issues like this are genuinely important and relevant,

- each parent's mental and physical capacity, again depending on the circumstances of the case and as long as issues like this are genuinely important and relevant, and
- the impact of any family violence, and the steps taken by the parent responsible for the family violence to prevent further family violence from occurring.

There is no guaranteed way to predict the outcome of a court proceeding about the allocation of parental responsibilities and decision-making responsibility. In most cases, it seems that parental responsibilities and decision-making responsibility wind up being shared. Conflict between parents, including basic disagreements about parenting philosophy, is often resolved by making one parent the decision-maker in the event parents cannot agree on a particular decision or by dividing parental responsibilities and decision-making responsibility about particular categories of decision. Either way, the critical factor in orders about parental responsibilities and decision-making responsibility is the best interests of the child.

Sharing all responsibilities

Most of the time, guardians wind up sharing all parental responsibilities with respect to a child and married spouses wind up sharing all decision-making responsibilities. This sort of arrangement can be agreed to or ordered regardless of how much time the children spend with each parent. However, this arrangement does require that parents work together and cooperate in raising the children.

Where parents work well together, and have similar approaches to parenting and similar hopes and expectations for their children, this arrangement can work quite well. However, when parents are likely to run into problems resolving disagreements on their own, it can sometimes help to have a "tie-breaker" clause added into the agreement or order. A common tie-breaker clause under the *Family Law Act* looks like this:

> The parties will share all parental responsibilities with respect to the child. Except in emergencies, the parties must consult each other before making a significant decision affecting the child. In the event that the parties, despite their best efforts, cannot agree on a significant decision affecting the child, Guardian A will make the decision and Guardian B may apply to court for directions or an order about the decision under section 49 of the *Family Law Act*.

(Section 49, if you're curious, says that "a child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate.")

Tie-breaker clauses like this are helpful because they ensure that important decisions do get made, even if a parent disagrees. The parent who disagrees has the right to go to court to challenge the decision, but also has to think about the time and money involved in making the application. Is the decision so important that the time and expense of going to court are justified?

Sharing some responsibilities

Where parents generally work well together, but have different parenting philosophies and different hopes and expectations for the children, it may be better that only one parent has responsibility for making decisions about certain subjects while both parents continue to share responsibility for other subjects. In general, the subjects that are assigned to one parent tend to be big, all-or-nothing subjects where compromise is difficult if not impossible, such as decisions about the child's:

- religious instruction, particularly when parents have very different religious beliefs,
- healthcare, particularly when parents have different views about the efficacy of traditional medicine or their views about medicine are influenced by religion, and
- education, particularly where parents have different views about the efficacy of the public school system or concerns about the curriculum.

During COVID-19, for example, the courts were very busy dealing with applications about whether children should or should not be vaccinated and must or must not wear masks. Where parents disagree about issues like these, it's often the case that no dispute resolution process will help them see eye to eye.

A common set of clauses sharing some but not all parental responsibilities under the *Family Law Act* might look like this:

> The parties will share all parental responsibilities with respect to the child, except for decisions concerning the education of the child and the child's participation in extracurricular activities. Except in emergencies, the parties must consult each other before making significant shared decisions affecting the child.
>
> Guardian A will be solely responsible for making decisions concerning the education of the child. In the event that Guardian B disagrees with a decision made by Guardian A, Guardian B may apply to court for directions or an order about the decision under section 49 of the *Family Law Act*.
>
> Guardian B will be solely responsible for making decisions concerning the child's participation in extracurricular activities. In the event that Guardian A disagrees with a decision made by Guardian B, Guardian A may apply to court for directions or an order about the decision under section 49 of the *Family Law Act*.

This example is just an example. There is no requirement that if one parent gets sole responsibility for one kind of decision that the other parent automatically gets sole responsibility for another kind of decision. Depending on the issues and the circumstances, it could certainly be the case that just one parent winds up with sole responsibility for all hotly-contested decisions.

Sharing no responsibilities

When the conflict between parents is extreme or a parent has rarely or never been involved in the child's day-to-day life, it may be more appropriate that the parent who has primarily cared for the child in the past, and usually been responsible for making decisions about the child, continue in that role and be the only parent with parental responsibilities or decision-making responsibilities. A clause with this sort of arrangement under the *Family Law Act* might look like this:

> Guardian A will have all parental responsibilities with respect to the child and is not required to consult with Guardian B before making a significant decision affecting the child.

Parallel parenting

"Parallel parenting" is another way of dealing with parental responsibilities or decision-making responsibilities when the level of conflict between parents is extreme and they rarely agree on any decisions that have to be made about their children. The idea with parallel parenting is that each parent has complete and sole responsibility for making decisions about their children when the children are in their care, so that no discussions, consultations or negotiations between the parents are ever necessary. As you can imagine, there are lots of challenges involved in this model of managing decisions.

First, this approach can make it very difficult to schedule things during the other parent's parenting time. The timing of medical and dental appointments is usually based on the availability of the medical professional rather than the parents' schedule of parenting time. Common activities, like sports, music lessons and art lessons, tend to be scheduled every week and it can be challenging to find activities that match the parents' parenting time. And

parent-teacher meetings happen when the school calendar says they happen.

Second, a lot of really important decisions aren't limited to a particular schedule of parenting time. Decisions about children's education, healthcare, diet and religious instruction affect the children no matter whose home they're living at. Handling these decisions requires either that one parent have sole responsibility for the decision, that the parents must consult each other about the decision, or that the decision is given to a judge or an arbitrator to resolve.

A helpful 2004 decision of the Provincial Court, J.R. v S.H.C. [10], talks about parallel parenting at length. In this arrangement, the court said that:

- one parent assumes complete responsibility for the children when they are with them,
- each parent has no say over the actions and decisions of the other parent when the children are in that parent's care,
- there are no expectations of flexibility between the parents,
- neither parent can plan activities for the children when they are with the other parent,
- communication between the parents is minimized and children are not asked to pass messages to the other parent, and
- when the parents must communicate, they do so by writing in a book that the children take with them from one home to the other.

An example of parallel parenting being ordered can be found in Sodhi v Sodhi [11], a 2014 decision of the Supreme Court.

Parallel parenting is not a term you will find in either the *Family Law Act* or the *Divorce Act*.

Parenting time

Guardians can make agreements about how the child's parenting time will be shared between them under section 44 of the *Family Law Act*. These agreements:

- should be written down whenever possible, and
- can only been made when the guardians have separated or are about to separate.

Written agreements can be filed in court under section 44(3) of the act and, once filed, can be enforced just like they are orders of the court.

When guardians can't agree on how parental responsibilities for a child will be shared, they can apply to court to get an order about how they'll be shared under section 45 of the *Family Law Act*. Parents who are married can also apply for an order about how a child's parenting time will be shared under section 16.1 of the *Divorce Act*.

Orders about parenting time are either *interim* or *final*, and, like agreements, cannot be made until the parents have separated. An "interim order" is an order that has been made after a court proceeding has been started but before the court proceeding has wrapped up with a final order made after trial or by a final order that is made with the agreement of the parties. Interim orders can be changed by other interim orders. A "final order" is an order that is made by a judge either after a trial or by the agreement of the parties. Final orders can be changed too, providing there has been an important change in the circumstances of a party or a child, but are otherwise intended to be permanent.

It's important to know that interim orders are intended to be a sort of rough-and-ready solution to the legal issues parents have to address after separation, and are only meant to last until a final order is made. They are short-term solutions intended to deal with immediate problems about things like where a child will live and the role each parent will play in raising the child. While interim orders will be made based on the same considerations that apply to final orders, a lot of weight is usually given to the status quo — the parenting arrangements that are in place at the time the application for the interim order is made — in order to minimize the amount of disruption the child has to deal with while the parents get on with their court proceeding.

However, the wrongful conduct of a parent will not establish a status quo that the court is likely to respect. If a parent is seeing a child too little or if the other parent is withholding parenting time, the court will act on an interim basis to expand the time the parent has with the child; if a parent has just picked up and moved away with a child, without an order or the agreement of the other parent to do so, the court may order the child to be returned.

It can otherwise be difficult to change a child's parenting time once a stable arrangement has been established, and both parents should be careful and consider their options if things come to the point where one parent has to move out of the family home. Interim orders can, however, be changed. Generally, a parent will apply to vary an interim order where there has been a change in circumstances that has affected the best interests of the child. Where there has not been such a change in circumstances, the interim order will usually stay as it was.

Factors

There are two sets of factors that judges and arbitrators will consider in making orders about how children's parenting time will be allocated between their parents, the factors set out in the legislation and the additional factors that have developed through the courts. As far as the legislation is concerned, the most important factors are the children's best interests. Section 16 of the *Divorce Act* says that:

> (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (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. ...
>
> (5) In determining what is in the best interests of the child, the court shall not take into consideration the 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.
>
> (6) 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 list of *Divorce Act* best-interests factors is set out in section 16(3), and the list of additional factors to be considered when assessing the impact of family violence is set out in section 16(4).

Section 37 of the *Family Law Act* says this:

> (1) In 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. ...
>
> (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
>
> (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

The list of *Family Law Act* best-interests factors is set out in section 37(2), and the list of additional factors to be considered when assessing the impact of family violence is set out in a separate section, section 38.

The courts have expanded these factors into the following general principles when determining how the children's parenting time will be allocated. The court may consider:

- the age, maturity and independence of the children,
- which parent was the children's primary caregiver during the relationship,
- the distance and travel time between the parents' homes,
- the parents' work schedules and the children's school schedule and schedule of extracurricular activities,
- each parent's flexibility and willingness to cooperate with the other parent about parenting time and accommodate unexpected changes,
- whether siblings should be kept together, which is usually the case although siblings can be separated if it is in their best interests to do so,
- whether the children are in a stable and satisfactory setting, and if so, whether the children's long-term interests justify upsetting a stable arrangement,
- each parent's character, fitness, and overall parenting capacity, depending on the circumstances of the case and as long as issues like this are genuinely important and relevant,
- each parent's mental and physical capacity, again depending on the circumstances of the case and as long as issues like this are genuinely important and relevant,
- the impact of any family violence, and the steps taken by the parent responsible for the family violence to prevent further family violence from occurring, and
- the wishes of the children, particularly those of children who are 10 or 11 years old or older, although the court isn't required to make the order the children would prefer.

There really is no standard pattern of parenting time, although a trend toward shared parenting time has developed in case law over the past several years. All of these factors, including the best-interests factors, usually get taken into account when a parenting time schedule is designed, and, in general, a parenting time schedule can be as creative as the flexibility of the parents and common sense allow. This chapter has a chart of different parenting schedules that accommodate some of these concerns in the section Parenting after Separation.

Shared parenting time

Shared parenting time is a term used by the federal Child Support Guidelines to describe a kind of parenting arrangement in which the children spend an equal or almost equal amount of time with each parent. Where parents have shared parenting time, the children will usually spend a certain amount of time with one parent at that home and a similar amount of time with the other parent at their home. Shared parenting time arrangements can require that the children switch homes every three or four days, every other week, every two weeks, or every month; the amount of time the children spend with each parent will depend on the circumstances of each case, the age and maturity of the children, the parents' work schedules, and the schedules of the children's activities.

In many ways, this is an ideal way to share the children's parenting time as the children wind up spending an equal amount of time with each parent, have an equal opportunity to bond with each parent, and have an equal opportunity to be parented by each parent. Shared parenting time usually requires that:

- the parents have good communication skills, usually resolve problems easily, and share information about the children and their wellbeing,
- the parents have a track record of being able to put the children's needs ahead of their own,
- the children are old enough to be able to tolerate the disruption of living in two different homes, and
- the arrangement is in the best interests of the children.

Of course, there are downsides to this sort of arrangement. The strain of maintaining good communication with the other parent can be challenging, and it can be expensive to maintain a full set of clothing, shoes, toiletries, and supplies at each house, never mind a similar variety of entertainment and sports equipment.

Split parenting time

Split parenting time is a term used by the federal Child Support Guidelines to describe a kind of parenting arrangement in which one or more of the children live mostly with each parent.

This is a fairly unusual arrangement as it requires siblings to be separated for large amounts of time and there is a risk that the children may grow apart from each other as time passes. These sorts of orders are only made where there is clear evidence that it is in the best interests of all of the children to fracture the family unit, such as when siblings are constantly fighting or are otherwise at each other's throats, or when one child has a particular attachment to a parent that isn't wholly shared by the other children. In such cases, a parenting assessment, prepared under section 211 of the *Family Law Act*, confirming that the children should be split apart may be essential.

Specified and unspecified parenting time

Most agreements and orders about parenting time will say that the children will have a specific schedule of time with one parent, or a specific schedule of time with both parents. Some provide a set schedule, and allow for additional parenting time as the parents may agree, usually by saying that a particular parent will have "such further and other time with the children as the parties may agree." Still others are much more ambiguous, sometimes to the point that the agreement or order doesn't really set out a parenting time schedule at all. Agreements and orders like this may say something like this:

> `Parent A will have parenting time with the children as Parent A and Parent B may agree.`
>
> `Parent A will have liberal and generous parenting time with the children.`
>
> `Parent A will have parenting time with the children as the children may agree.`

This sort of unspecified parenting time is appropriate where parents communicate with each other reasonably well and each is prepared to accommodate the other. Where there is any tension between the spouses relating to the children, an agreement or order like this may not be appropriate, particularly if there is a chance that one parent will withhold the child from the other when parenting time is requested. In fact, agreements and orders like this may be a recipe for disaster.

Specified parenting time is, without a doubt, the more common parenting arrangement. Agreements and orders for specified parenting time will state at what times and dates the children will be with one or both parents, usually with enough detail that the children's parenting schedule can be mapped out in a calendar for years. Agreements and orders like these can be quite complex, dividing holidays, birthdays, Mothers' Day and Fathers' Day, special school days, and so on. Agreements and orders for specified parenting time can be extraordinarily detailed and address pretty much every kind of issue and event that you can think of, or be shorter and more general. In general, the more difficult the parents' relationship is after separation, the more likely it is that their agreement or order will specify the parenting schedule in more detailed terms. Some people just need a set of rules to live by.

A chart showing a number of different parenting schedules is available in the section Parenting after Separation.

Birdnesting

"Birdnesting" refers to a parenting schedule where the children live full-time in the family home and it's their parents who move in and out when it's the children's time with them. This type of arrangement is more common when parents are in the early stages of their separation and don't have their own homes, and when both parents believe that the children's need for stability requires them to stay permanently in the former family home.

The theory underlying this concept is that it is disruptive for children to switch homes every week and that it can be costly to make sure there's a full set of clothing, toys, books, and whatnot in both houses. Birdnesting lets the kids stay in a single home, usually the family home that they've grown up in and are familiar with. Of course, the cost saved by avoiding duplication of the children's clothes and books is offset by the need to maintain two or possibly three homes: the family home, and a home for each of the parents.

Birdnesting is a term that has been created by lawyers and judges, like the terms "primary residence" and "parallel parenting." Birdnesting is not a term you will find in the *Family Law Act* or the *Divorce Act*.

Conditional parenting time

A parent's parenting time can be made *conditional* upon the parent doing or not doing something. If a parent fails to meet any of the conditions of their parenting time with the child, the parent's parenting time may reasonably be denied.

In general, the court must have some fairly serious concerns about a parent's lifestyle or behaviour before an order for parenting time will be conditional. Conditional parenting time orders have been made in cases where a parent:

- was a heavy smoker, the condition being to not expose the child to second-hand smoke,
- used illicit drugs or alcohol, the condition being to not consume drugs or alcohol while with the child and for a certain number of hours or days before seeing the child, and
- was a dangerous driver, the condition being to not drive with the child in the car.

In theory, parenting time can be made conditional for pretty much any kind of bad behaviour on the part of a parent that poses an actual risk to the child.

It is up to the parent saying that the other parent's parenting time should be conditional to prove why it should be conditional and that the condition they seek to impose is in the best interests of the child.

Supervised parenting time

Parenting time may be restricted where there is a concern that the child may be harmed by spending time with a parent. In extreme cases, the court may require that a parent's parenting time be *supervised* by a third party. A supervisor may be the other parent, a grandparent, another relative, a person who specializes in supervising parenting time, or someone else altogether. There are even companies that provide supervised parenting time services, although these companies charge for their service and are generally only found in larger urban centres.

The courts are generally reluctant to require supervision as a condition of a parent seeing a child, but will do so if:

- there has been a history of child abduction or attempts to abduct the child,
- there is a history of family violence against the child or the other parent,
- the parent has attempted to damage the child's relationship with the other parent, or otherwise interfere with the child's relationship with that parent, or
- there are serious concerns about the parent's ability to properly care for the child, including the parent having a mental or physical illness.

In general, supervised access is intended to be a short-term solution to a problem, rather than a permanent condition of a parent's parenting time with a child. It is up to the parent saying that the other parent's parenting time must be supervised to prove why it should be supervised and that supervision is in the best interests of the child.

Contact

Under the provincial *Family Law Act*, the time people who are not guardians have with a child, including parents who are not guardians, is called "contact." The language is the same under the federal *Divorce Act*, except that "contact" refers to the time people who are not married spouses have with a child.

Contact under the *Family Law Act*

The *Family Law Act* doesn't say much about contact compared to what it has to say about parental responsibilities and parenting time, except to say that anyone can apply for contact, including parents who are not guardians, grandparents, other family members, and anyone else really. This is the definition of contact from section 1 of the act:

> **contact with a child** or **contact with the child** means contact between a child and a person, other than the child's guardian, the terms of which are set out in an agreement or order;

It's important to know that someone who has contact with a child has none of the responsibilities and entitlements that a guardian does. Among other things, they do not have:

- responsibility for making day-to-day decisions affecting the child when the child is with them,
- day-to-day care, control and supervision of the child when the child is with them, or
- the right to get health, education and other information about the child from other people.

Contact under the *Divorce Act*

The *Divorce Act* has just as much to say about contact as the *Family Law Act*. The definition of "contact" in section 2(1) isn't very helpful, and just says this:

> **contact order** means an order made under subsection 16.5(1);

Section 16.5(1) says that:

> A court of competent jurisdiction may, on application by a person other than a spouse, make an order providing for contact between that person and a child of the marriage.

Just like the *Family Law Act*, someone who has contact under a *Divorce Act* order does not have:

- the authority to make day-to-day decisions affecting the child when the child is with them, or
- the right to get information about the child's wellbeing from other people, including information about the child's health and education and other information.

Making arrangements for contact

People can make arrangements that someone have contact with a child in a number of ways. They can make an agreement with the child's parents, using negotiation, mediation, or a collaborative settlement process, or, if they can't agree, the person seeking contact can go to court or the person and the child's parents can decide to use arbitration. Arbitration, like mediation, is a process that everyone involved needs to agree to use. However, unlike mediation, the arbitrator will make a final and binding decision if an agreement cannot be reached. You can get more information about negotiation, mediation, collaborative settlement processes and arbitration in the chapter Resolving Family Law Problems out of Court, and more information about litigation in the chapter Resolving Family Law Problems in Court.

Under section 58(1) of the *Family Law Act*, the guardian of a child can make a written agreement with someone who is not a guardian that they have contact with a child. (Under section 58(2), agreements like these are only good if they are made with all of the child's guardians who have parental responsibility for making decisions about the

people with whom the child may associate.) Written agreements can be filed in court under section 58(3) of the act and, once filed, can be enforced just like they are orders of the court.

If agreement isn't possible, the person asking for contact can apply for a contact order under section 59 of the *Family Law Act* or under section 16.5 of the *Divorce Act*. It's important to remember that people who are asking for contact orders under the *Divorce Act* can only ask for those orders if:

- there is an existing court proceeding between married spouses under the *Divorce Act*, and
- the court first gives them permission to apply for contact under section 16.5(3) of the *Divorce Act*.

There are no similar restrictions on people who are asking for contact orders under the *Family Law Act*.

Factors

There are two sets of factors that judges and arbitrators will consider in making orders about contact with children, the factors set out in the legislation and the additional factors that have developed through the courts. As far as the legislation is concerned, the most important factors are the children's best interests. Section 16 of the *Divorce Act* says that:

> (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
>
> (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. ...
>
> (5) In determining what is in the best interests of the child, the court shall not take into consideration the 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.

The list of *Divorce Act* best-interests factors is set out in section 16(3), and the list of additional factors to be considered when assessing the impact of family violence is set out in section 16(4).

Section 37 of the *Family Law Act* says this:

> (1) In 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. ...
>
> (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
>
> (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

The list of *Family Law Act* best-interests factors is set out in section 37(2), and the list of additional factors to be considered when assessing the impact of family violence is set out in a separate section, section 38.

The courts have expanded these factors into the following general principles when determining if someone should have contact with a child and, if so, the extent of their contact with the child. The court may consider:

- the age, maturity and independence of the children,

- the child's history of spending time with the person seeking contact,
- the nature and strength of any connection between the child and the person seeking contact,
- any benefits the person seeking contact offers to the child's cultural, linguistic and spiritual upbringing and heritage,
- the nature of the relationship between the person seeking contact and the child's parents, including the presence of any conflict,
- how the contact can be accommodated into any parenting time schedule that may exist, including whether it is appropriate to set the person's contact with the child during a particular parent's parenting time,
- the mental and physical capacity of the person seeking contact, depending on the circumstances of the case and as long as issues like this are genuinely important and relevant,
- the impact of any family violence, and the steps taken by the person seeking contact to prevent further family violence from occurring, and
- the wishes of the children, particularly those of children who are 10 or 11 years old or older, although the court isn't required to make the order the children would prefer.

There really is no standard pattern of contact, although contact is usually shorter in duration and less frequent than the parenting time parents have, and when the person seeking contact is a relative of the child's parent, their contact will usually come out of that parent's parenting time. All of these factors, including the best-interests factors, will be taken into account when contact is allowed and a schedule of contact is designed. In general, a schedule of contact can be as creative as the circumstances and common sense allow.

Conditional contact

A person's contact with a child can be made *conditional* upon the person doing or not doing something. If the person fails to meet any of the conditions of their contact with the child, their contact may reasonably be denied.

In general, the court must have some reasonable concerns about a person's lifestyle or behaviour before an order for contact will be conditional. In fact, where such concerns exist, the person is more likely to be denied contact with the child altogether than to get contact on conditions. Common conditions include limits on:

- the sort of activities the person can attend, access or undertake with the child,
- the sort of food and drink the person can provide to the child,
- the places where the contact must, or must not, occur,
- the person's ability to drive with the child in the car, and
- the person's use of illicit drugs or alcohol.

It is up to the parent saying that the person's contact should be conditional to prove why it should be conditional and that the conditions they seek to impose are in the best interests of the child.

Supervised contact

A person's contact with a child can be allowed with the requirement that it be *supervised* where there is a concern that the child may be harmed by spending time with the person. A supervisor may be a parent, a grandparent, another relative, a person who specializes in supervising parenting time, or someone else altogether. There are even companies that provide supervised contact services, although these companies charge for their service and are generally only found in larger urban centres.

In general, the court must have some reasonable concerns about the threat a person poses to the wellbeing of the child before an order for contact will be made on the condition that the contact is supervised. In fact, where such concerns exist, the person is more likely to be denied contact with the child altogether than to get contact on the condition that it is supervised.

It is up to the parent saying that the person's contact should be supervised to prove why it should be supervised and that the supervision of the person's contact is in the best interests of the child.

Assessments and reports about children and parenting after separation

Making decisions about parenting after separation can be difficult, especially when parents are in high levels of conflict with each other, when their children are very young, when one or more of their children have special needs, and when one or both parents struggle with family violence, the use of alcohol or illicit drugs, and personality and other mental health disorders. It's hard for parents and it's hard for judges and arbitrators.

While both the *Divorce Act* and the *Family Law Act* say that the only consideration when making arrangements about decision-making, parenting time and contact is the best interests of the child, and provide lists of helpful factors that go into deciding the arrangements for parenting and contact that are in the child's best interests, sometimes what's needed is the input of a neutral professional, usually a mental health professional like a psychologist, a clinical counsellor or a social worker. This input is usually provided through the different kinds of assessments and reports, like parenting assessments and views of the child reports, that are available under the *Family Law Act*. Other helpful reports can include psychological-educational reports about children's learning needs, reports from counsellors working with a parent or a child, medical assessments, and reports from physiotherapists and occupational therapists.

Parenting assessments

Parenting assessments, which are sometimes called "section 211 reports" and used to be known as "custody and access reports," are prepared by mental health professionals. They are available when parents agree that an assessment should be prepared, or when a judge or arbitrator orders that an assessment should be prepared under section 211(1) of the *Family Law Act*. Section 211 says this:

> (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:
>
> (a) the needs of a child in relation to a family law dispute;
>
> (b) the views of a child in relation to a family law dispute;
>
> (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
>
> (2) A person appointed under subsection (1)
>
> (a) must be a family justice counsellor, a social worker or another person approved by the court, and
>
> (b) unless each party consents, must not have had any previous connection with the parties.
>
> (3) An application under this section may be made without notice to any other person.
>
> (4) A person who carries out an assessment under this section must
>
> (a) prepare a report respecting the results of the assessment,
>
> (b) unless the court orders otherwise, give a copy of the report to each party, and
>
> (c) give a copy of the report to the court.
>
> (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

A "full" parenting assessment consists of the mental health professional's report on all of the things listed in section 211(1): the needs of a child; the views of a child; and, the ability and willingness of a party to satisfy the child's needs. However, parents can agree, and judges and arbitrators may order, that the parenting assessment just report on

one or two of these subjects. In most cases, the professional will:

- speak to each of the parents, often more than once,
- speak to one or more other people who know the family or the children, like teachers, family members, social workers and therapists,
- speak to the children, depending on the children's age and maturity,
- observe each of the parents interacting with the children, and
- review reports and other documents about the parents, the family or the children, like psychological-educational reports, medical reports, and materials that have been filed in court.

(Psychologists will also usually ask the parents to complete one or more tests that are designed to provide information about the parents' personalities and parenting styles, and see whether family violence is present.)

A full parenting assessment will make recommendations about the arrangements for parenting and contact that the professional believes to be in the bests interests of the children. They can also be asked to look at, and make recommendations about, specific issues such as a parent's mental health, a parent's capacity to care for the children or the impact of family violence.

Parenting assessments can help parents who are trying to resolve issues about parenting after separation out of court, through negotiation, collaborative settlement processes, and mediation; in fact, parenting assessments often provide the input parents need to reach a settlement. They're also useful when parents are dealing with disagreements about parenting through litigation and arbitration. It's important to know, however, that while judges and arbitrators almost always appreciate the opinion of the professional who prepared the assessment, they're not required to accept the professional's recommendations.

Parenting assessments are available from Family Justice Counsellors, government employees attached to the Provincial Court, for free. Because these assessments are free, there's a huge demand for them and you can expect to have to wait months for the assessment process to begin and months for the process to complete.

Parenting assessments are also available privately, from psychologists, clinical counsellors and social workers. These reports are usually completed faster than the reports of Family Justice Counsellors, but the cost can range from $6,000 to $24,000, depending on the circumstances and complexity of the case, the number of children, and whether the assessor must travel to meet the family.

Evaluative views of the child reports

Evaluative views of the child reports, which are sometimes called "hear the child reports" and "voice of the child reports," are prepared by mental health professionals under section 211(1)(b) of the *Family Law Act*. They are available when parents agree that a report should be prepared, or when a judge or arbitrator orders that a report should be prepared. In most cases, the professional will:

- speak to each of the children, sometimes more than once, and
- review reports and other documents about the parents, the family or the children.

These reports are important because both the *Divorce Act* and the *Family Law Act* include children's views and preferences among the factors that must be taken into account when deciding the arrangements for parenting and contact that are in the best interests of the children. (You can find this factor at section 16(3)(e) of the *Divorce Act* and at section 37(2)(b) of the *Family Law Act*.) They will describe the children's views, preferences and wishes and provide the mental health professional's opinion of the children's views, preferences and wishes. The professional might provide an assessment, for example, about the strength and consistency of the children's views, the extent to which the children's preferences are in their best interests, and the extent to which what the children have said reflects what the children actually think.

Parents, judges and arbitrators often find it helpful to hear what the children have to say about things from a neutral professional. Like parenting assessments, these reports can provide the missing piece of the puzzle that helps parents

finally agree on parenting schedules and decisions about issues like where the children go to school, which extracurricular activities they participate in, where they live, and how much time they spend with relatives.

Evaluative views of the child reports are available from Family Justice Counsellors for free. However, there's a huge demand for these reports, just like there is for parenting assessments, and you can expect to have to wait months for the report to be available.

Evaluative views of the child reports are also available privately, from psychologists, clinical counsellors and social workers. These reports are usually completed faster than the reports of Family Justice Counsellors, but the cost can range from $2,000 to $6,000, depending on the circumstances and complexity of the case, the number of children, and whether the assessor must travel to meet the children.

Non-evaluative views of the child reports

Non-evaluative views of the child reports, which are also sometimes called "hear the child reports" and "voice of the child reports," are prepared by mental health professionals, by lawyers, and by anyone else who's been trained to speak with children and report on their views. People who aren't mental health professionals may not be able to provide a report about the views of children younger than five or six, depending on the child's maturity and verbal skills.

These reports are different from evaluative views of the child reports because the person who speaks to the children isn't being asked to provide an opinion or an assessment of what the children have said, they're just being asked to describe what the children have told them. The person who speaks to the children will usually ask the children questions about life before their parents separated, what their parents' separation was like, life after separation, and what they would like for the future. The person who speaks to the children can also be asked to focus on specific issues, like the children's experience of the conflict between their parents, the children's preferred parenting schedule, or how much time the children would like to spend with family members.

Non-evaluative views of the child reports are available under sections 37(2)(b) and 202 of the *Family Law Act*. They are available when parents agree that a report should be prepared, or when a judge or arbitrator orders that a report should be prepared. In most cases, the person preparing the report will speak to each of the children once, or twice at most. Because the person preparing the report isn't providing an opinion, they won't be interested in reading reports about the children, reviewing materials filed in court, speaking to the parents, or speaking to people who know the family and the children. *All they're doing is describing what the children have told them.*

These reports can be used when parents are trying to resolve parenting issues out of court and when they're dealing with those issues in court. Like parenting assessments and evaluative views of the child reports, these reports can provide the missing piece of the puzzle that helps parents finally reach an agreement or tip the balance for the judge or arbitrator who's being asked to decide which arrangements for parenting and contact are best for the children.

Non-evaluative views of the child reports are available privately, from psychologists, clinical counsellors, social workers and lawyers. These can be completed very quickly, sometimes on the same day that they're requested, and generally cost about $1,000 to $1,500 per child, depending on how much the child has had to say to the person who speaks with them. The BC Hear the Child Society [12] has a roster of professionals who are trained to prepare non-evaluative views of the child reports, however not every professional who prepares these reports is a member of the society and therefore included in their roster.

Resources and links

Legislation

- *Divorce Act*
- *Family Law Act*
- Family Law Act Regulation [12]
- Provincial Court Family Rules [2]
- Supreme Court Family Rules [9]

Links

- Ministry of Attorney General's website "Parenting After Separation (PAS) Program" [5]
- Justice Education Society's workshop Parenting After Separation [13] (online and in-person options)
- Dial-A-Law Script "Guardianship, Parenting Arrangements, and Contact" [14]
- Legal Aid BC's fact sheet "How to Become A Child's Guardian" [15]
- Legal Aid BC's Family Law website's information page on "Parenting & guardianship" [26]
- Clicklaw Common Question "We can't agree about who the children should live with" [16]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 23 August 2022.

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[16] https://clicklaw.bc.ca/question/commonquestion/1007

Moving Away after Separation

Change, and how adapt to change, are facts of life in the twenty-first century. Some changes are small, like getting a new haircut or buying a new phone; others, like changing jobs or starting a new relationship, are much more significant. One of the ways family law has changed, particularly over the last twenty years or so, has been the number of cases about parents who want to move, with or without the children, after their relationship with the other parent has ended. Cases involving parents who want to move were once relatively rare; now, it seems that every other case involves an issue about moving.

Moves are necessary, of course, when the family home sells and one or both parents have to find new places to live. Other moves are prompted by the benefits to the children of going to a new school in a new town, a parent's wish to pursue a new relationship or a new career opportunity, or a parent's need to get help caring for the kids from friends and family who live somewhere else. Like other life changes, moves can be minor and relatively unimportant, like moving to a different neighbourhood in the same city. They can also be enormously consequential, like moving to a new city, a new province or a new country.

It's easy to understand why parents rarely agree when one of them wants to move. Even a small move can upset an established pattern of parenting time and require the children to change schools and extracurricular activities. Larger moves will certainly upset whatever arrangements are in place for parenting time and, where the children's time with a parent is cut back as a result, can have a profound impact on the quality of the relationship between the children and the parent who didn't move.

This section talks about small moves and large moves after separation, and the rules about moving in the *Divorce Act* and the *Family Law Act*. Because moves can be so important — including when they're not permitted, just as much as when they are! — if you or another parent are thinking about moving away, you really should speak to a family law lawyer and get advice about how the law applies to you in your specific circumstances.

Introduction

A parent who wants to move away from the other parent after separation must have the other parent's permission to move or a court order allowing the move. Common reasons for moving include:

- the parent has a new employment opportunity elsewhere,
- the parent is in a new relationship with someone from out of town and wants to live with them or closer to them,
- the parent wants to be closer to a support network of family and friends who live elsewhere,
- there is a unique educational opportunity elsewhere, for either the parent or the children, or
- there is an important medical or therapeutic opportunity elsewhere, for either the parent or the children.

Normally, the other parent doesn't want the children to move since the move could impact their ability to see the children as frequently as they do, and could harm the children's relationship with them as a result. This is especially true when a parent wants to move to another province or another country. Even within British Columbia, a relatively short move from Richmond to Chilliwack, for example, can make it impossible to continue the parenting time schedule that was in place before the move. Moves can also impact the children's relationships with other people, including their relationships with family members, friends, schoolmates and people who have contact with them.

Moving away without the other parent's permission, or a court order allowing the move, is another problem altogether. Depending on the circumstances, moving away without permission or a court order could qualify as child abduction, a serious criminal offence under sections 281, 282 and 283 of the federal *Criminal Code* [11]. It might also result in the court making an order requiring the children to be returned to the other parent right away.

The federal *Divorce Act* and the provincial *Family Law Act* both talk about moving after separation in terms of moves that fit within their definitions of "relocation" and moves that do not, and are instead "changes in the place of residence" of a child. (Lawyers also refer to claims about moving as "mobility cases," but in this section, we'll stick

with the language used in the legislation.) The rules about relocation apply when a parent wants to move *with* the children as well as when a parent wants to move *without* the children.

The *Family Law Act* has talked about moving after separation since the act came into effect in 2013. The *Divorce Act* has only talked about moving since it was overhauled in 2021. Unfortunately, while both statutes use some of the same terminology and some of the same tests, they're different enough that you can't assume the rules in one statute are similar to the rules in the other. As a result, in this section we'll talk about the rules in the *Divorce Act* first and then move on to the rules in the *Family Law Act*.

It's important to know that the *Divorce Act* only applies to people who are or were married to each other. The *Family Law Act*, on the other hand, applies to everyone, including married spouses. While married spouses sometimes have a choice about whether they want the *Divorce Act* or the *Family Law Act* to apply to their legal problems, they'll be stuck with the *Divorce Act* if:

- a court proceeding asking for parenting orders under the *Divorce Act* is already underway, or
- parenting orders under the *Divorce Act* have already been made.

If you're not married to the other parent, then it's the rules under the *Family Law Act* that apply.

Moves under the *Divorce Act*

Section 2(1) of the federal *Divorce Act* defines "relocation" in terms of the impact that a move may have on the children's relationships with other people:

> **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;

(A "child of the marriage" is a person under the age of majority, age 19 in British Columbia, who is the child of one or both spouses.)

This definition covers moves by people who have *an order* under the *Divorce Act* giving them decision-making responsibility or parenting time with a child, whether they want to take the children with them or not. It also covers moves by people who are making *an application for an order* about decision-making responsibility or parenting time under the *Divorce Act*. It doesn't cover people who have *an agreement* giving them decision-making responsibility or parenting time. Moves by people who have an agreement about decision-making responsibility or parenting time are dealt with under the provincial *Family Law Act*.

As you can probably guess, the key part of this definition is whether a proposed move is "likely to have a significant impact on the child's relationship" with the specific people it identifies; not just anyone, but only people with parenting time, people with decision-making responsibility, people who have filed an application for parenting time or decision-making responsibility, and people with contact. If a move is going to have a "significant impact" on the child's relationship with these people, then the move qualifies as a "relocation," and there are different rules about moves that are relocations and moves that are not relocations. So, how do you know whether the impact caused by a move is likely to be "significant" or not?

Unfortunately, there are only a handful of cases that deal with relocation under the updated *Divorce Act* and the meaning of "significant impact." The good news is that the definition of "relocation" under the *Family Law Act* also uses the term "significant impact," and the cases that talk about "significant impact" under the *Family Law Act* can

be used to understand "significant impact" under the *Divorce Act*. Here, for example, is what the court had to say about "significant impact" in a 2022 case from the Saskatchewan Court of Appeal, D.T.D. v T.A.J. [1]:

> [46] ... As the courts in British Columbia have held, a child's best interests are part and parcel of the more fundamental question of whether the proposed move is a relocation. As the Court said in *Berry*, the relocation analysis examines whether the effect of the move will have a significant impact on the child's relationship with the other parent: "The use of the qualification 'significant', acknowledges that there will be some impact from a move but limits the courts involvement to those moves which will have a significant impact on relationships. The focus is on the best interests of the children."
>
> [47] What this means is that, in assessing the root question of whether the proposed move will have a significant impact on the child's relationship with the non-moving parent, a court must take into account more than just the commuting distance between residences. A contextual analysis is called for that would include considerations such as the following:
>
> (a) whether and how the move would change the amount and frequency of parenting time for the non-moving parent;
>
> (b) whether and how the move would affect the degree of involvement of the non-moving parent in the child's activities, schooling and so forth;
>
> (c) whether the moving parent is willing to bear the burden of any increase in the commuting time;
>
> (d) how the distance or commuting time between the two residences would affect the quality of the child's relationship with the non-moving parent; and
>
> (e) whether the non-moving parent has the ability – financial or otherwise – to commute to and from the child's proposed new place of residence or an intermediate location.
>
> [48] Of course, the above is not an exhaustive list, and the factors are not prioritized in any way. The facts of each case will vary. Much will depend on the parenting order in place, the age of the children, the scope of parental involvement (e.g., shared parenting), etc.

(The "Berry" case referred to by the Saskatchewan court is a 2013 case from our Supreme Court, Berry v Berry [2], involving a move from Surrey to North Vancouver.)

Moves that are not relocations

Section 16.8 of the *Divorce Act* deals with changes in the residence of a person with decision-making responsibility or parenting time — whether they plan on taking the children with them or not — that do not qualify as "relocations" under the definition in section 2(1). In other words, it deals with moves that *are not* likely to have a "significant impact" on the children's relationships with:

- the person who wants to move,
- another person who has decision-making responsibility or parenting time, or
- a person who has contact with the child.

Under section 16.8(1), a person who plans to make a move like this must give notice about their plans to anyone else who has decision-making responsibility, parenting time or contact with the children. Under section 16.8(2), the notice must state:

- the date of the proposed move, and
- the address of their new home, their new contact information, and any new contact information for the children.

If the person who plans to move doesn't want to give notice, perhaps because of concerns about things like family violence, they can apply to court for an exemption under section 16.8(3), and they don't have to notify anyone else of their application for the exemption the way the Rules of Court normally require.

Moves that are relocations

Sections 16.9 to 16.96 of the *Divorce Act* deal with moves that do qualify as "relocations" under the definition in section 2(1). In other words, they deal with moves that *are* likely to have a "significant impact" on the children's relationships with:

- the person who wants to move,
- another person who has decision-making responsibility or parenting time, or
- a person who has contact with the child.

(Don't worry, there aren't really 87 sections about relocation in the new *Divorce Act*. When a statute is changed to add a new section in the middle of the statute instead of at the end, rather than renumbering everything the new section is numbered with a decimal point. The old *Divorce Act* was numbered sequentially, with section 17 following section 16, section 16 following section 15, and so on. When the new sections were added between sections 16 and 17 of the old act, they were numbered 16.1, 16.2, all the way through to 16.9. And when more sections needed to be added after section 16.9, they were numbered 16.91, 16.92 and so on. As a result, there's just seven sections that deal with relocation.)

Notice of a proposed move

If a person with parenting time or decision-making responsibility wants to relocate, section 16.9(1) of the *Divorce Act* says that they must notify anyone else who has decision-making responsibility, parenting time, or contact with the child about their plans. The notice must be:

- prepared using Form 1 of the Notice of Relocation Regulations [3], and
- provided to everyone entitled to notice within at least 60 days of the proposed move date.

Under section 16.9(2) of the *Divorce Act* and section 2 of the Notice of Relocation Regulations, the notice must state:

- the name of the person proposing to move, and the names of any children who will also be moving,
- the names of any children who won't be moving,
- the date of the proposed move,
- the address of the person's current home and their current contact information,
- the address of the person's new home, their new contact information, and the new contact information for any children who will also be moving, and
- the names of anyone else who has decision-making responsibility, parenting time, or contact with any of the children.

The notice must also provide a proposal about how decision-making responsibility, parenting time, or contact could be handled if the move goes ahead.

Form 1 can be found on the website of the federal Department of Justice [4] as a PDF file that you can download, or as a form you can complete and print directly from the webpage. The same website also has a helpful Fact Sheet [5] about moving after separation.

If the person who plans to relocate doesn't want to give notice, perhaps because of concerns about things like family violence, they can apply to court for an exemption under section 16.9(3), and they don't have to notify anyone else of their application for the exemption as the Rules of Court normally require. The same exemption is available for moves that don't qualify as "relocations."

Objecting to a proposed move

Under section 16.91(1) of the *Divorce Act*, people who have decision-making responsibility or parenting time have 30 days to object to a proposed move if the person proposing to move is proposing to move with one or more of the children, and the 30 days begin the day after they receive notice of the proposed move. If the person proposing to move is *not* planning on moving with a child, you *do not* have the right to object to the move. Similarly, people who have contact with a child *do not* have the right to object to a move; they're entitled to notice about a proposed move, but they can't do anything to stop it.

A person with decision-making responsibility or parenting time can object to the move by either:

- making an application to court, either for a new order for decision-making responsibility or parenting time or for an order changing an existing order for decision-making responsibility or parenting time, or
- giving the person proposing to move an objection using Form 2 of the Notice of Relocation Regulations [3].

Someone who decides to go to court rather than sending a Form 2 objection would usually be asking the court for orders that will stop the children from being moved away, such as an order that the child live in a particular town or city, an order that they have the children's primary home, or an order that the children not be moved from a particular town or city.

Under section 16.91(2) of the *Divorce Act* and section 4 of the Notice of Relocation Regulations, the objection must state:

- the name of the person who received notice of the other person's intention to move,
- the address of the person's current home and their current contact information, and
- the person's objection to the proposed move, and the reasons for their objection.

The objection must also state the person's views about the proposal, given in the notice, about how decision-making responsibility, parenting time, or contact could be managed if the move goes ahead.

Form 2 can be found on the website of the federal Department of Justice [6] as a PDF file that you can download, or as a form you can complete and print directly from the webpage. The same website also has a helpful Fact Sheet [5] about moving after separation.

It's important to know that the person who wants to move can go ahead and move if there is no existing order preventing the move or if you don't object to the proposed move, either by applying to court or by providing an objection in Form 2. Don't ignore a notice of a proposed move!

Making decisions about a proposed move

If someone with decision-making responsibility or parenting time objects to a proposed move, section 7.3 of the *Divorce Act* says that the parties must first try to resolve the disagreement out of court, using dispute resolution processes such as negotiation, mediation, collaborative settlement processes or arbitration:

> To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

If these sorts of out-of-court processes don't resolve the disagreement, then the parties will have to go to court and ask a judge to make a decision about the proposed move. If the person objecting to the move has filed an application to prevent the move, it'll be their application which goes to court. If the person objecting to the move has provided a Form 2 objection, it'll usually be the person who wants to move who will make an application for permission to move.

Factors

When the court has to decide whether to allow or prohibit a move, it will first of all think about the best-interests factors in section 16(3) of the *Divorce Act*, and the additional factors in section 16(4) about the impact of family violence. These are the section 16(3) factors::

> (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.

Under section 16.92, the court must consider these additional factors when someone wants to move:

> (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,
>
> (a) the reasons for the relocation;
>
> (b) the impact of the relocation on the child;
>
> (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the

> level of involvement in the child's life of each of those persons;
>
> (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
>
> (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
>
> (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
>
> (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

There are a few things that the court must not consider. Firstly, under section 16(5), the court cannot take into account the behaviour of either party, unless the behaviour is relevant to how the party has exercised orders about parenting time or decision-making responsibility. Secondly, under section 16.93(2), the court cannot take into account whether a person who proposes to move with a child would still move if the child couldn't come with them:

> (2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

The burden of proof

The "burden of proof" is how lawyers and judges describe the obligation to convince the court that it should make a particular order. Sometimes both of the people involved in an application have the burden of proof. Sometimes it's just one of the people involved in an application who has the burden of proof. For example, to change a parenting order, the person who wants to change the order is required to show that there has been a "material change in circumstances" before the court will even consider their application to change the order. The person who wants to change the order has the "burden of proof" to show that there has been a change in circumstances, and if they can't convince the court that there has been a change in circumstances, their application is over.

Section 16.93 of the *Divorce Act* says who has the burden of proof when the parties can't agree about a proposed move, and the burden shifts depending on the children's schedule of parenting time:

> (1) 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, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
>
> (2) 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, the party opposing the relocation has the burden of proving that the relocation would not be

> in the best interests of the child.
>
> (3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

All of that boils down to this:

> **If the parties share the children's time more or less equally, it's the person who wants to move who has to prove that the move should be allowed.**
>
> **If the children are almost always in the care of the person who wants to move, it's the person who objects to the move who has to prove that the move should not be allowed.**

In middle-ground cases, however, where you can't say that the children's time is equally or almost equally split between the parties or that the children spend almost all of the time with just one party, then the person who wants to move has to show why the move should be allowed and the person who objects to the move has to show why the move should not be allowed. In these cases, both parties have the burden of proof.

Practically speaking, section 16.93 creates a couple of presumptions. If the person who wants to move has almost all of the children's time, then that person should be allowed to move. (That's why it's up to the other person, who has the children for just a small amount of their time, to show that the move *is not* in the children's best interests.) If the person who wants to move shares the children's time with the other person more or less equally, then the move should be prohibited. (And that's why it's up to the person who shares the children's time with the other person to show that the move *is* in the children's best interests.) On the other hand, in those middle-ground cases, there are no presumptions about whether moving or not moving is best for the children.

After decisions about a proposed move are made

If the court *does not* allow a proposed move, that should be the end of things. Section 17 of the *Divorce Act*, which is about changing orders including parenting orders and contact orders, says that:

> (5.3) A relocation of a child that has been prohibited by a court under paragraph (1)(b) or section 16.1 does not, in itself, constitute a change in the circumstances of the child for the purposes of subsection (5).

(Section 17(5) of the *Divorce Act* says that before the court can change an existing order for parenting time, decision-making responsibility or contact, the court must be satisfied that there has been a "change in the circumstances of the child" before it can even consider an application to change the existing order.)

In other words, if the court has refused to make an order allowing a proposed move, the refusal itself is not a reason to change an existing order for parenting time or decision-making responsibility.

If the court *does* allow a proposed move, things are a bit different.

First, the fact that the move has been allowed is a reason to change an existing order for parenting time or decision-making responsibility. Section 17 says that:

> (5.2) The relocation of a child is deemed to constitute a change in the circumstances of the child for the purposes of subsection (5).

This is important, of course, because moves that are likely to significantly impact the child's relationship with someone who has parenting time are also likely to disrupt that person's ability to spend time with the children the way they used to. Whatever the schedule of parenting time used to be, if the child is moved further away than a 30- or 60-minute drive, it may be impossible to continue the usual schedule and the schedule will need to be updated.

Second, under section 16.95, the court can also make orders about sharing the expenses the parent who isn't moving will have to pay in order to exercise parenting time:

> If a court authorizes the relocation of a child of the marriage, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.

This too is important, because the cost of travelling to see the children is likely to be much higher after a move than it was before the move. These expenses may include the cost of gasoline and meals for a person who is driving to see the children, the cost of airline tickets for the person or the children, and the cost of hotels when the person travels to see the children. Under section 16.95, the court can order that the person who moved must pay a share of these expenses.

Moves under the *Family Law Act*

The provincial *Family Law Act* talks about moves in two circumstances: changes in the location of a child's home when there is no agreement or order about parental responsibilities and parenting time, under section 46 of the act; and, changes in the location of a child's home when there is an agreement or order about parental responsibilities, parenting time or contact, under sections 65 to 71 of the act.

The portions of the *Family Law Act* that talk about moving only apply if a proposed move is likely to have a "significant impact" on the child's relationship with certain other people, including other guardians, just like section 2(1) of the federal *Divorce Act*. The portion that talks about moves when there is no agreement or order, section 46, only applies if:

> ... the child's guardian plans to change the location of that child's residence and the change can reasonably be expected to have a significant impact on that child's relationship with another guardian.

The portion that talks about moves when there is an agreement or order, sections 65 to 71, only applies if the move qualifies as a "relocation," and whether a move qualifies as a relocation depends on whether the move is likely to have a "significant impact" on the child's relationship with certain other people. Here's the definition of relocation in section 65:

> (1) In this Division, "relocation" means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with
>
> (a) a guardian, or
>
> (b) one or more other persons having a significant role in the child's life.
>
> (2) This Division applies if
>
> (a) a child's guardian plans to relocate himself or herself or the child, or both, and
>
> (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.

(The phrase "this Division" refers to the portion of the *Family Law Act* that deals with relocation, Division 6 of Part 4 of the act, "Care of and Time with Children.")

Neither the *Family Law Act* nor the *Divorce Act* say exactly what "significant impact" means. Government could have decided, for example, to say that moves beyond a certain distance or moves that require travelling longer than a certain amount of minutes are moves that will cause a significant impact on children's relationships with other

people, but it didn't. As a result, it's been up to the court to decide which moves are likely to have a "significant impact" and which aren't. Because individual cases are heard by individual judges, the cases that talk about "significant impact" talk about what is and isn't a "significant impact" in the specific circumstances of the family in each case. Here's what the judge said in C.E.N. v B.K.N [7], a 2021 decision of the Supreme Court, when using *Family Law Act* cases to decide a relocation case under the *Divorce Act*:

> [66] ... Relocation, as defined in the [*Divorce Act*], states that a relocation is a move that is likely to have a "significant impact" on the child's relationship with a parent.
>
> [67] In Wong v Rooney, 2016 BCSC 1166 and [T.T. v S.Z.T., 2020 BCSC 1628], a proposed relocation to a new city that was over two hours away was determined to be a relocation, as the courts determined that the move would significantly affect the children's relationship with others. In D.L.R.A. v S.K.C., 2018 BCSC 1472, a relocation of one hour and 45 minutes was determined not to be a relocation because the Court found that the move would not impact the child's relationship with the non-relocating parent.
>
> [68] In the case at bar, the move from the Lower Fraser Valley to Kelowna is approximately 322 kilometers, which takes 3.5 hours to travel by car. I find this a significant distance that would significantly affect the children's relationship with the respondent. ...

Ultimately, whether a particular move is likely to have a "significant impact" on the child's relationship with another guardian or another important person in their life will be decided based on the particular circumstances of the particular family and the potential impact of the move on the particular child. This is what the judge said in Berry v Berry [2], a 2013 case from the Supreme Court:

> [32] The test in ss. 46 and 65 the FLA is child-centred. It focuses on children's relationships and the impact of a change in residence on those relationships. To qualify as a relocation, the impact must be significant. The use of the qualification "significant," acknowledges that there will be some impact from a move but limits the court's involvement to those moves which will have a significant impact on relationships. The focus is on the best interests of the children.

(We'll talk about section 46 in a moment.)

Moves when there is no agreement or order

Section 46 of the *Family Law Act* talks about moves when there is no agreement or order. Under section 46(1), the section only applies if:

- there is no written agreement or order about parental responsibilities and parenting time, including an interim order,
- a guardian is asking for an order about parental responsibilities and parenting time, including an interim order, and
- a guardian plans to change where a child lives, and the change is likely to have a significant impact on the child's relationship with another guardian.

This section doesn't talk about agreements and orders about contact, and it doesn't talk about the impact of a move on the child's relationship with someone with contact. It's all about guardians, and the impact of a proposed move on the child.

If a move is proposed and all of the conditions described in section 46(1) are met, section 46(2) describes what the court can and can't think about in deciding whether to allow or prohibit the move:

> (2) To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court

> (a) must consider, in addition to the factors set out in section 37(2), the reasons for the change in the location of the child's residence, and
>
> (b) must not consider whether the guardian who is planning to move would do so without the child.

The "factors set out in section 37(2)" are the factors the court is required to consider when making decisions about the best interests of children. In addition to considering the reasons for the move, the court must consider the best-interests factors in section 37(2) and the additional factors in section 38 that apply when family violence is an issue. Here are the best-interests factors in section 37:

> (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (a) the child's health and emotional well-being;
>
> (b) the child's views, unless it would be inappropriate to consider them;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
>
> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
>
> (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

Section 46 is very short and provides relatively brief guidance to guardians and courts, compared to the portions of the *Family Law Act* about moves when there is an agreement or order. This is probably because the absence of an agreement or order about parental responsibilities and parenting time suggests that the children's guardians have separated recently and haven't made any formal arrangements about parenting their children. However they're managing the children's care and time, these arrangements probably haven't been in place for a very long time and changes to those arrangements are likely.

The most important case so far on moves when there is no agreement or order is a 2019 decision from the Court of Appeal, Duggan v White [8], which involved a proposed move from the interior to the lower mainland.

Moves when there is an agreement or order

Sections 65 to 71 of the *Family Law Act* talk about moves when there is an agreement or order. They apply when:

- a guardian is planning a move, with or without a child,
- the move will likely have a significant impact on the child's relationships with a guardian or another person who has "a significant role in the child's life," and
- there is a written agreement or an order about parental responsibilities, parenting time or contact.

People who aren't guardians and might have a significant role in a child's life include parents who aren't guardians, grandparents and other family members, other adults with important roles as caregivers for the child, and people who have an agreement or an order for contact with the child.

Notice of a proposed move

If a guardian wants to relocate, with or without a child, section 66 of the *Family Law Act* requires them to give 60 days' written notice of the proposed move to:

- all other guardians, and
- people who have contact with the child.

Other people who have significant roles in the child's life aren't entitled to notice.

There is no prescribed form of notice, the way there is under the *Divorce Act*. Any kind of written notice will do, including notice given by email. The notice must state:

- the date of the proposed move, and
- the place to which the guardian proposes to move.

Under section 66(2), the moving guardian can apply to court for an exemption from the notice requirement if there are concerns about family violence or they can prove that the child has no ongoing relationship with a guardian or a person with contact. These applications can be made without the moving guardian notifying anyone else of their application, as the Rules of Court normally require.

Objecting to a proposed move

Under section 68, a guardian who receives notice of another guardian's plan to relocate with a child has 30 days from the date they received the notice to file an application in court for an order preventing the proposed move. There is no prescribed form of objection, the way there is under the *Divorce Act*.

People with contact who are notified about a guardian's plan to move aren't entitled to object. Guardian's aren't entitled to object either, if the guardian planning to move isn't planning on moving with a child.

Making decisions about a proposed move

If someone with decision-making responsibility or parenting time objects to a proposed move, section 67 of the *Family Law Act* says that the child's guardians and persons with contact must make their best efforts to work with each other to resolve any issues relating to the proposed move. The act doesn't say how these efforts are to be made, but the usual out-of-court dispute resolution processes are negotiation, mediation, collaborative settlement processes and arbitration.

If these sorts of out-of-court processes don't resolve the disagreement, then the guardians will have to go to court and ask a judge to make a decision on the application about the proposed move. These applications are governed by section 69, which allows guardians to ask the court for orders allowing or prohibiting the relocation of a child.

Factors

When the court has to decide whether to allow or prohibit a move, it will first of all think about the best-interests factors in section 37(2) of the *Family Law Act*, and the additional factors in section 38 about the impact of family violence. These are the section 37(2) factors:

> (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (a) the child's health and emotional well-being;
>
> (b) the child's views, unless it would be inappropriate to consider them;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
>
> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
>
> (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

Under sections 69(4) and 69(5), the court must consider these additional factors, from section 69(4)(a), when someone wants to move:

- whether the guardian who plans to move is proposing to move in good faith, and
- whether the guardian who plans to move has proposed "reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life."

"Good faith" is addressed in section 69(6):

> (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
>
> (a) the reasons for the proposed relocation;
>
> (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
>
> (c) whether notice was given under section 66;
>
> (d) any restrictions on relocation contained in a written agreement or an order.

There are a few things that the court must not consider. Firstly, under section 37(4), the court cannot take into account the behaviour of a guardian, unless the behaviour is relevant to one or more of the best-interest factors listed in section 37(2). Secondly, under section 69(7), the court cannot take into account whether a guardian who proposes to move with a child would still move if the child couldn't come with them:

> (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.

The burden of proof

Section 69 of the *Family Law Act* says who has the burden of proof when guardians can't agree about a proposed move, and, like the *Divorce Act*, the burden shifts depending on the children's schedule of parenting time. If the guardians *do not* have "substantially equal parenting time" with the child, under section 69(4)(a), the guardian who wants to move must show that:

- they are proposing to move in good faith, and
- they have proposed "reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life."

If the guardian who wants to move can prove these two points, then, under section 69(4)(b), the proposed move is presumed to be in the best interests of the child unless another guardian can prove otherwise.

If the guardians *do* have "substantially equal parenting time" with the child, under section 69(5), the guardian who wants to move must show that:

- they are proposing to move in good faith,
- they have proposed "reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life," and
- the move is in the best interests of the child.

In other words, if the guardian who wants to move has the child for most of the time, the guardian must only show that they are proposing to move in good faith – using the factors in section 69(6) – and that they've proposed reasonable arrangements for how parenting could work after the move, and the move will be presumed to be in the

best interests of the child. The burden then lies on the other guardian to show that the move *is not* in the best interests of the child.

If the guardians share the child's time, then the guardian who wants to move must not only show that they are proposing to move in good faith and that they've proposed reasonable arrangements for how parenting could work, they also have the burden of proving that the proposed move *is* in the best interests of the child.

After decisions about a proposed move are made

If the court *does not* allow a proposed move, that should be end of things. Section 71 of the *Family Law Act* says that:

> The fact that an order is made that prohibits a child's relocation is not, in itself, a change in the child's circumstances for the purposes of section 47.

Section 47 of the *Family Law Act* is about changing orders about parental responsibilities and parenting time, and says that before the court can change an existing order about parenting arrangements, the court must be satisfied that there has been a "change in the circumstances of the child" before it can even consider an application to change the existing order. In other words, if the court has refused to allow a proposed move, the refusal itself is not a reason to change an existing order about parental responsibilities and parenting time.

If the court *does* allow a proposed move, things are a bit different. Section 70 of the act says that if the court allows a move, the court can also:

- make or change an order about parental responsibilities and parenting time, with the goal of trying to preserve the parenting arrangements in place before the move as much as possible, and
- make an order to ensure that the moving guardian complies with any terms of the order allowing the move.

The part of section 70 about changing orders about parenting arrangements is important, because moves that are likely to significantly impact the child's relationships with a guardian or another person who has a significant role in the child's life are also likely to disrupt that guardian's ability to spend time with the children and participate in making decisions about the children the way they used to. Whatever the schedule of parenting time used to be, if the child is moved further away than a 30- or 60-minute drive, it may be impossible to continue the usual schedule and the schedule will need to be updated.

Preventing moves

For many parents, the prospect of the other parent moving away with the children after separation is a bit of a nightmare. Most moves, especially moves that result in a significant reduction of the parent's time with the children, will impact the quality of the relationship between the children and the parent who is left behind. On top of that, it can be really hard to predict whether a proposed move will be allowed or not, and the time, effort and cost of dealing with an application to relocate can be significant.

If there's any possibility that a parent may want to move away with the children after separation, terms can be included in separation agreements, arbitrator's awards and court orders about the children's parenting arrangements to discourage the likelihood of moves in the future.

Agreements

People who are making a separation agreement can include terms about pretty much anything in their agreement. (There are a few exceptions to this general rule. Agreements that say that no child support will be paid or that a person may not remarry, for example, will not be upheld by the court.) An agreement that deals with children's parenting arrangements could include terms saying that the parents will not:

- move further than a certain number of kilometres away from each other, or away from a central point, like the children's school,
- move outside of a particular neighbourhood, town, city or district,
- move outside British Columbia, or
- move without giving a certain number of months' notice to the other parent.

It can be particularly important to include terms about moving in agreements because of the "good faith" test in sections 69(4) and 69(5) of the *Family Law Act*. Under those sections, a guardian who wants to move away must prove that they are proposing to move in good faith, among other things, and the factors the court must consider in deciding whether the guardian is acting in good faith include, under section 69(6):

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

Orders

If people are dealing with issues about parental responsibilities, parenting time or contact in court, it's possible to ask the court to include terms about moving in its order. The court, as a part of its general authority to include terms and conditions in orders about parenting under section 218 of the *Family Law Act*, can make orders saying that the parents will not:

- move further than a certain number of kilometres away from each other, or away from a central point, like the children's school,
- move outside of a particular neighbourhood, town, city or district, or
- move outside British Columbia.

Again, it can be important to include terms about moving in orders because of the "good faith" test in sections 69(4) and 69(5) of the *Family Law Act*. Under those sections, a guardian who wants to move away must prove that they are proposing to move in good faith, among other things, and the factors the court must consider in deciding whether the guardian is acting in good faith include, under section 69(6):

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

Section 64(1) of the *Family Law Act* also allows the court to "make an order that a person not remove a child from a specified geographical area," called "non-removal orders." In the case of K.K. v D.H. [4], a 2021 decision of the Provincial Court, the judge made an order under section 64 *after* a guardian had moved with the child from Nanaimo to Victoria, with the result that the child was returned to Nanaimo.

Section 64(2) also allows the court to make other orders to ensure that people comply with a non-removal order made under section 64(1), but only if it is satisfied that a person is planning to move a child out of the province and is unlikely to return with the child:

> (2) On application, if satisfied that a person proposes to remove a child from, and is unlikely to return the child to, British Columbia, the court may order the person who proposes to remove the child to do one or more of the following:
>
> (a) give security in any form the court directs;

> (b) surrender, to a person named by the court, passports and other travel records of the person who proposes to remove the child or of the child, or of both;
>
> (c) transfer specific property to a trustee named by the court;
>
> (d) if there is an agreement or order respecting child support, pay the child support to a trustee named by the court.

Orders under section 64 won't stop someone from applying to move with a child under section 69, but they will help to stop someone from moving without getting permission from the court first.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Criminal Code of Canada* [9], sections 281-283
- Notice of Relocation Regulations [10]

Links

- Legal Aid BC's Family Law website's information page on "Moving and travelling with your children" [11]
- Federal Department of Justice's Fact Sheet on "Moving after separation or divorce? [5]"
- Notice of Relocation Form [4] from Federal Department of Justice's website
- Objection to Relocation Form [6] from Federal Department of Justice's website

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd 5 August 2022.

References

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[11] https://family.legalaid.bc.ca/children/parenting-guardianship/moving-and-travelling-your-children

Children Who Resist Seeing a Parent

Children may resist seeing a parent after separation for many reasons. Whatever those reasons may be, it's always hard to be the parent a child doesn't want to spend time with. Because children's resistance to seeing a parent usually doesn't become obvious until the relationship between the parents has ended, it's easy to see how a child's preferences could be interpreted as something new that's been caused by the other parent's malicious behaviour. However, it's important to know that the reasons a child may not want to spend time with a parent range from innocent reasons related to the child's age, gender identity and stage of development, to understandable but more difficult reasons related to parenting styles, parental conflict and family violence, to truly blameworthy reasons stemming from a parent's intentional interference with the relationship between the child and the other parent.

This section provides an introduction to the problem of children who resist seeing a parent after separation and talks about possible solutions to the problem. It also discusses alienated and estranged children, as well as what the experts have to say about a largely discredited theory called Parental Alienation Syndrome. It also looks at the options available for dealing with children who resist seeing a parent after separation, and provides a selection of helpful online and printed resources.

Introduction

While parents are together, they usually sort out childrearing and childcare issues together. Sometimes they talk and negotiate how these things will work; for other parents, issues about the kids just seem to sort themselves out. However these issues are resolved, each parent's strengths, skills and interests usually work to offset the other parent's weaknesses. One parent might be better at homework, and take on the lion's share of helping the kids with school. Another parent might be more detail-oriented, and take care of booking parent-teacher conferences and appointments with medical and dental professionals. One parent might enjoy cooking more than the other, and wind up doing most of the meal planning and meal preparation as a result.

After separation, each parent's strengths and weaknesses are no longer buffered by the strengths and weaknesses of the other parent, putting their parenting styles into sharp contrast. A parent who never cooked needs to either master Skip the Dishes or figure out how the kitchen works in short order; a parent who wasn't responsible for discipline and making sure the kids are up on time and go to bed at a reasonable hour, now has to manage these tasks as well. This understandably creates anxiety for the parents — "She never cooked, how are the kids going to stay healthy living on pizza and hotdogs at her place?" — as well as confusion for the children. One parent might make a cozy, warm and welcoming home after separation, while the other might leave the walls blank and take a minimalist approach to furniture and other creature comforts. One parent might be a more rigid disciplinarian and insist that homework gets done right after dinner and impose strict rules about screen time, while the other might take a more relaxed approach to the children and let them free-range. One parent might be interested in the children's social lives, friend groups and conflict with bullies at school, the other parent might not be interested in these things and not talk to the children about them as a result.

It's rare for parents to be so well-matched that the homes they make, the lives they build, and the parenting expectations they set after separation are more or less the same.

These differences, coupled with the fact of separation, often give children choices and perspectives that they never had while their parents were together. There are a few reasons for this. First, while their parents were together, they had no choice about dealing with a parent they liked less than another parent, putting up with a punishment they thought was unfair, or dealing with household routines, like getting ready for school or getting ready for bed, that they didn't like. Second, while their parents were together, they had the benefit of the support both parents provided as well as the different parenting skills and approaches each parent offered, as well as the buffering effect that offsets each parent's weaknesses. After separation, when parents each make a new home for themselves, all of this changes.

Like it or not, it's easy for kids to form preferences for one parent over the other, and for one parent's home over the other. Sometimes this is a response to different approaches to parenting. Sometimes it results from different parenting skills, particularly when a parent is inflexible or intolerant, takes a harsh and erratic approach to discipline, or has problems with drug or alcohol use. Sometimes it's about the home environment, and which parent's home has bicycles, skateboards and scooters, which parent's home has the XBox or PlayStation console, which parent's home has more toys and stuffies, or which parent's home has a better selection of clothes and shoes and a more comfortable bed. It's also about the children, because as children age it's developmentally normal to have a preference for one parent over the other that changes back and forth as they get older and mature and their needs evolve.

This is normal; it happens all the time. It can become problematic when a child's preference for a parent or a parent's home — or, to put it the other way, a child's dislike of a parent or a parent's home — results in the child not wanting to spend time with a parent. Left unchecked, a child's dislike of a parent can grow into a complete, sometimes long-lasting, breakdown in their relationship with that parent.

In this section, we'll talk about the parent a child prefers to spend time with as the *favoured parent*, as the *preferred parent*, as the *alienating parent*, depending on the context, or just as the *parent the child prefers to spend time with*. We'll talk about the other parent as the *rejected parent*, or as the *parent the child resists seeing* and similar terms.

When children resist spending time with a parent

When a child begins to form a preference for one parent over the other, the first sign that this might become a problem often occurs when the child begins to express a reluctance to spend time with the other parent. It's important to distinguish a simple reluctance, that might be appropriate for the child's age and stage of development or result from age-appropriate separation anxiety, from a more serious problem like estrangement or alienation. It's also important to distinguish between a reluctance that stems from the child's own feelings toward a parent and a reluctance that a parent encourages.

Normal reasons why a child might resist parenting time or contact with a parent include:

- a developmentally-appropriate preference for a parent,
- age-appropriate separation anxieties that make it difficult to leave a parent,
- challenges coping with the transition between homes, especially when there is a lot of conflict between the parents and when the two homes are very different in terms of environment, expectations and rules,
- not liking a parent's new partner,
- not wanting to leave an upset, emotionally-vulnerable parent at home alone,
- a dislike of a parent's parenting style,
- seeing or suffering family violence,
- a parent having issues with substance use and abuse, and
- parents who are in high levels of conflict with each other after separation.

Of course, any resistance to seeing one parent is, or at least should be, difficult for both parents. For the parent sending the child to the other parent, it can be heart-wrenching to force the child out the door and into the car against their complaints. For the parent receiving the child, it can be devastating to hear — from the other parent or the child — that the parenting time or contact is unwelcome and unwanted, and experience the profound sense of rejection, grief and loss that results.

It's important to know that each parent has a duty to nurture and encourage the children's relationships with the other parent. In the context of parenting after separation, this means helping the child look forward to seeing the other parent. In a more general context, this means actively fostering the child's relationship with the other parent and refraining from making negative remarks about the other parent.

In high-conflict situations, even parents who understand this basic duty can unconsciously telegraph their feelings about the other parent to the child. Children aren't stupid; they know that something's not right and they'll be painfully aware of the feelings each parent has toward the other. Even young children will pick up on non-verbal

clues to a parent's feelings. This sort of unintentional communication includes:

- making faces, grimacing, groaning, cringing or shuddering when the other parent is mentioned,
- arguing with the other parent when the children can see or hear the dispute,
- making negative comments about the other parent when the children are within earshot,
- using an emotionless or negative tone of voice when speaking to the children about the other parent, and
- reacting in a flat or negative manner when the children talk about the other parent or their activities with that parent.

It's far worse when a parent *intentionally* expresses their negative feelings about the other parent to the child.

When a child begins to express a reluctance to visit the other parent, both parents must take action to stop the problem from getting worse. For the parent preferred by the children, this means that you must:

- work harder at encouraging the children to look forward to their time with the other parent,
- make sure that you are not a part of the problem by unconsciously broadcasting your feelings about the other parent,
- make a consistent effort to remind the children about the other parent's positive qualities and the fun they have with that parent,
- consider getting the children in to see a counsellor about the separation and their relationship with the other parent, and
- seriously consider taking a parenting after separation course.

For the parent whom the children are resisting seeing, this means that you must:

- work harder at making the children feel welcomed and listened to in your home,
- re-examine your approach to parenting issues, particularly if you were the disciplinarian during your relationship with the other parent,
- make sure that you are not insulting, mocking or belittling the other parent when the children are within earshot,
- consider getting the children in to see a counsellor about the separation and their relationship with you,
- consider seeing a counsellor yourself about your approach to parenting and your relationship with the children, and
- seriously consider taking a parenting after separation course.

None of these solutions may be effective if a child's opinion and emotions are too entrenched, if the parents are simply too angry with one another to cooperate effectively, or if one of the parents is actively working to undermine the child's relationship with the other parent. When things go too far, or when an emerging problem is left unchecked, a child's simple preference for one parent can develop to the point where the child is estranged or alienated from the other parent. We'll talk more about this later.

Knowing when there's a problem

An otherwise normal resistance to parenting time or contact can cross the line when the child's opinion of the parent, and their emotional attachment to that parent, begins to change. Temper tantrums about a visit and expressions of rage and hate should send a loud and clear signal that both parents have to work a lot harder to help the child through their experience of the separation. Mild expressions of a change in the child's attachment to a parent include:

- expressing ambivalence about visiting the parent, in other words, not caring one way or the other about seeing the parent,
- grumbling about having to go to see the other parent, and
- stating a preference for particular activities, like playing a game or seeing friends, over seeing the other parent.

More serious expressions of a change in the child's attachment to a parent include the child:

- expressing a preference for one parent over the other, and a general ambivalence about the other parent,
- expressing a stong preference for one home over the other,

- expressing concern about missing the parent the child is leaving,
- being upset that an activity, like playing a game, going on an outing or seeing friends, will be interrupted by their time with the other parent,
- saying that their time with the other parent is boring, and
- being reluctant to speak to the other parent on the telephone.

Much more serious expressions of a change include the child:

- saying that they don't like the other parent,
- occasionally putting the other parent down,
- expressing concern for the well-being of the parent the child is leaving, in the case of older children,
- crying before the visit, in the case of younger children,
- complaining that it's not fair to have to visit, in the case of older children,
- offering promises, like studying harder or doing more chores, in exchange for not having to spend time with the other parent,
- claiming that the other parent doesn't parent properly and does things like providing bad food, imposing unfair discipline and making them do things they don't want to do, and
- refusing to talk to the other parent when they telephone.

The most serious expressions of a change in the child's attachment to a parent include the child:

- throwing temper tantrums before leaving to spend time with the other parent, in the case of younger children,
- becoming enraged about being forced to go to the other parent, in the case of older children,
- saying that they hate the other parent,
- making threats about running away or involving the police, in the case of older children,
- pleading to do anything except go on the visit,
- making bizarre and unlikely claims about the other parent's behaviour, like making claims about abuse, neglect and so forth, and
- constantly making insulting comments about the other parent or putting the other parent down.

Even mild indications that a child is growing emotionally distant from a parent are disturbing and deserve attention by both parents. When a child is clearly heading from feeling ambivalent about a parent to feeling hatred towards that parent, parents should seriously consider getting the child and themselves in to see a mental health professional who specializes in helping children cope with and adjust to the separation of their parents. It's often helpful for parents themselves to find some counselling of their own as well, and get input on how to approach parenting time and contact issues with the child.

A few notes from John-Paul Boyd

I am not a psychologist, a psychiatrist, or a counsellor. As a result this section should be read with a grain of salt, as it's based on my observations of my clients' experiences, a bit of research, and some common sense. For the same reason, be cautioned that this section should not be used as an authority for the propositions it sets out.

I also wish to acknowledge that much of this section was drawn from two sources in particular: Dr. Deirdre Rand's 1997 article, "The Spectrum of Parental Alienation Syndrome (Part II) [1]" in the American Journal of Forensic Psychology; and, a 2001 article by Drs. Joan Kelly and Janet Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome, [2]" published in *Family Court Review*. Both articles are excellent and should be read if you believe that estrangement or alienation is an issue in your family.

Parental alienation

The alienation of children from parents in the course of high-conflict family law litigation was first noted by the mental health community in 1976. In 1987, Dr. Richard Gardner gave this problem the label "Parental Alienation Syndrome," which he used to describe a disorder in children that he said occurs in the course of disputes between separated parents about their children's parenting arrangements.

Gardner's take on this problem was not without controversy and the problem and Gardner's theory has continued to be studied, critiqued, and updated by the mental health community. In fact, I think it's fair to say that Parental Alienation Syndrome, as Gardner originally framed it, has largely been discredited. No one doubts that alienation can occur when parents separate; the questions raised by mental health and other professionals largely concern whether Parental Alienation Syndrome is a diagnosable "syndrome" at all, and the fact that more current research shows that there are many reasons why a child can come to resist seeing a parent other than alienation. The current thinking on alienation, and a related problem called estrangement, has become quite nuanced. The most recent significant work on parental alienation comes from Drs. Joan Kelly and Janet Johnston, but since Gardner came up with his formulation of Parental Alienation Syndrome first, that's where we'll start.

Gardner's Parental Alienation Syndrome

In 1997, Dr. Deirdre Rand published an article called "The Spectrum of Parental Alienation Syndrome (Part II) [1]," in the *American Journal of Forensic Psychology*, summarizing and updating Gardner's theory. In that article, Rand describes Parental Alienation Syndrome as the child's formation of an "alignment" with one parent against the other. Think of *alignment* as meaning an alliance, or a sense of allegiance, in which a child comes to share the views and emotions of one parent over those of the other parent.

A study by Johnston and Dr. Linda Campbell in 1988 found a measurable degree of alignment between children and one parent in 35 to 40 percent of the high-conflict cases they studied. In a 1993 article entitled "Children of Divorce who Refuse Visitation," Johnston reported finding strong alignments in 28 to 43 percent of 9- to 12-year-olds in high-conflict cases, with another 29 percent showing symptoms of a mild alignment.

According to Rand, children align differently depending on their ages:

- **2- to 3-year-olds:** Mostly show age-appropriate separation anxiety from their primary parent. This anxiety worsens when the primary parent is emotionally disturbed.
- **3- to 6-year-olds:** Alignments shift depending on which parent the children are with. Children in this age range have not yet learned to understand two different points of view, and cannot understand why one parent says one thing and the other parent says another.
- **6- to 7-year-olds:** Children in this age range are sensitive to hurting their parents, and often have conflicting loyalties between one parent and the other.
- **7- to 9-year-olds:** Children this old are able to understand each parent's point of view and understand how one perspective can conflict with another.
- **9- to 12-year-olds:** Children in this age range are the most vulnerable to Parental Alienation Syndrome, as they are old enough to establish a strong alignment with one parent, and are old enough to try resolving conflicts of loyalty by "picking" one parent over the other.
- **Teenagers:** Children's alignments often continue into their mid-teens. Many teens are able to take a more mature and independent, and sometimes critical, view of their parents' fight, but a significant number of teens maintain their alignment and continue to reject one parent in favour of the other.

According to Rand and Gardner, children are about twice as likely to form alignments with their mothers than they are with their fathers, meaning that mothers are twice as likely to engage in alienating behaviour. (In fact, in his original writing about Parental Alienation Syndrome, Gardner claimed to see evidence of alienation in 90 percent of the children he saw in his clinical practice, and that, for these children, their mothers were the alienating parent 90 percent of the time!)

Rand says that Parental Alienation Syndrome is a risk whenever parents must litigate a parenting dispute. This risk increases when one or both parents make claims that attack the integrity, moral fitness, or character of the other parent. (Claims like these are typically hard to defend, and put one parent on the defensive while giving the other parent an often unwarranted sense of moral superiority.) She notes that the statistical risk of Parental Alienation Syndrome increases when: the parent perceived to be responsible for the breakdown of the relationship becomes involved in a new relationship shortly afterwards; or, a parent leaves the relationship suddenly. In my view, a third risk factor occurs when a parent's immediate family members vigorously support the parent's cause and encourage the parent's negative feelings about the other parent.

Rand and Gardner identify five types of behaviour that they say are characteristic of Parental Alienation Syndrome:

- **Rejecting:** The parent rejects the child's need for a relationship with both parents. The child fears abandonment and rejection by the alienating parent if positive feelings are expressed about the other parent.
- **Terrorizing:** The alienating parent bullies the child into being terrified of the other parent, and punishes the child if the child expresses positive feelings about the other parent.
- **Ignoring:** The alienating parent withholds love and attention from the child if the child expresses positive feelings about the other parent.
- **Isolating:** The alienating parent prevents the child from participating in normal social activities with the other parent and that parent's friends and family.
- **Corrupting:** The alienating parent encourages the child to lie about and be aggressive toward the other parent. In very serious cases, the alienating parent will recruit the child to assist in deceits and manipulative behaviour intended to harm the other parent.

To this list, I would add two more categories:

- **Distracting:** The alienating parent sets up oppositional activities, goals, or interests that are highly valued by the child but conflict with the other parent's time with the child.
- **Resigning:** The alienating parent ceases to accept responsibility for the child's time with the other parent, and seems to leave it up to the child to decide whether to go or not go. This forces the child to make the choice to see the other parent, knowing that the alienating parent doesn't want the child to go at all, putting the child in a loyalty conflict.

Gardner suggested that, when the courts find that a child is suffering from Parental Alienation Syndrome, the best and maybe only solution is for the court to order that the child be placed into the full-time care of the parent the child rejects, in order to insulate the child from the ongoing malignant influence of the alienating parent.

Reaction to Gardner's Parental Alienation Syndrome

As you can imagine, lawyers loved the idea of Parental Alienation Syndrome when Gardner first wrote about it, especially in the United States where it became a rather trendy strategy in high-conflict parenting cases.

While lawyers might have loved the theory, it did raise lots of other problems. Men's rights groups liked it because the majority of parents perpetrating Parental Alienation Syndrome were said to be women, because Gardner's work seemed to give them the credible scientific backing that would turn the tide in courts they perceived to be biased in favour of women, and because Gardner's recommended response to Parental Alienation Syndrome would have the children removed from the other parent and placed in their primary care. Women's groups hated it as a sexist and unscientific piece of claptrap that was often used to sidestep and trivialize serious concerns about family violence and poor parenting skills.

The courts didn't like it because implementing Gardner's recommendations would require them to place the child in the home of the "hated" parent, which was plainly the last thing the alienated child wanted. Here, for example, is what the judge said in A.A. v S.N.A. [3], a 2007 decision of the Supreme Court:

> [77] If custody is transferred to [the father], the immediate effect of that change will be extremely traumatic to [the child]. She may or may not adjust in a reasonable length of time. She will have to be forcibly removed from the custody of her mother, either by the authorities arriving at her school and physically apprehending her or by forcibly apprehending her from her mother. Her mother will not cooperate. In my view, [the child] will, with much justification, conclude that she is being forcibly dealt with in a manner that completely ignores her integrity and her wishes. ...

The mental health community has been split on Parental Alienation Syndrome for a number of reasons, including that:

- there is no scientific support to give Parental Alienation Syndrome status as a diagnosable syndrome, and Parental Alienation Syndrome is still not recognized as a "syndrome,"
- the theory focuses almost exclusively on the alienating parent as the cause of the child's rejection, glossing over other important contributing factors, and
- Parental Alienation Syndrome is overly simplistic and frequently misapplied.

Rethinking Parental Alienation Syndrome

In their 2001 article "The Alienated Child [2]", published in *Family Court Review*, Kelly and Johnston propose a reformulation of Gardner's theory that focuses primarily on the child rather than on the alienating parent, on the principle that there are many different factors that can cause a child's relationship with a parent to break down other than the actions of a malicious parent who intends to undermine the child's relationship with the other parent. Kelly and Johnston made the important observation that children's relationships with their parents fall on a spectrum that runs from the child wanting a positive relationship with both parents to the child being pathologically detached from one parent:

POSITIVE RELATIONSHIP with both parents	Child prefers to have time with both parents
AFFINITY with one parent	Child prefers to have time with both parents
ALLIANCE with one parent	Child prefers one parent, and expresses ambivalent feelings about the other
ESTRANGED from one parent	Child rejects one parent and may either be ambivalent about that parent or express a strong dislike for that parent
ALIENATED from one parent	Child rejects one parent and expresses a strong dislike for that parent

Central to this reformulation of Gardner's theory are these important ideas:

- children should be the primary focus of any investigation into the breakdown of their relationship with a parent, not just the behaviour of one of their parents,
- children can grow apart from a parent for objectively good and justifiable reasons, which the authors call *estrangement*, and
- there are many more potential factors that might cause a child's relationship with a parent to break down, including developmentally-normal factors, than just the actions of a parent who is actively trying to harm the child's relationship with the other parent.

Kelly and Johnston do not reject Gardner's suggestion that malicious, alienating parents exist, but they do broaden the scope of things that should be considered when looking into the breakdown of a child's relationship with a parent. Most importantly, they point out that there are many reasons why a child might resist seeing a parent, and that the reasons why a child might resist seeing a parent are complex and nuanced. Part of the key to understanding the

important points Kelly and Johnston make is the difference they draw between *estranged children* and *alienated children*.

Estranged children

The difference between an estranged child and an alienated child is that an estranged child has grown apart from a parent for reasons that are, to be blunt, reasonable and understandable from the child's perspective. An alienated child, however, is the victim of one parent's efforts to destroy the child's relationship with the other parent.

An estranged child is either absolutely ambivalent about a parent or enraged by that parent, and doesn't want to spend time with them. These feelings are, most importantly, justified by the child's experience of the separation or by the child's experience of that parent. (In fact, some researchers use the term "justified rejection" when talking about estrangement.) These children have usually become estranged from a parent for reasons that a stranger would understand and sympathize with, such as:

- witnessing family violence committed by that parent against the other parent,
- being the victim of family violence at the hands of that parent,
- the parent's persistently immature and self-centered behaviour,
- the parent's unduly rigid and restrictive parenting style, and
- the parent's own psychological or psychiatric issues.

The point here is that the feelings of estranged children have grown from the child's actual, lived experience. In cases of estrangement, the child's rejection of a parent is *reasonable*, and is an adaptive and self-protecting response to the rejected parent's behaviour and their interactions with the rejected parent. The feelings of alienated children, however, are neither reasonable nor primarily the result of the rejected parent's conduct.

Alienated children

Alienated children usually reject a parent without guilt or sadness, and do so without an objectively reasonable cause that stems from the rejected parent's behaviour or the child's interactions with the rejected parent. The children's views of the rejected parent are usually distorted and exaggerated.

Alienation is most easily defined as the breakdown of a child's relationship with a parent as a result of the other parent's efforts to turn the child against the rejected parent. Typically, alienation only becomes a problem when the parents are involved in extremely bitter and heated litigation about the children's parenting arrangements. Not every case of high conflict litigation involves alienation, of course, but alienation can and does happen.

The intentional alienation of a child from a parent is absolutely wrong and strikes me as virtually inexcusable and unforgivable. Some writers even say that alienation amounts to child abuse, a position I tend to agree with. As Dr. Michael Bone and Michael Walsh put it in their article "Parental Alienation Syndrome: How to detect it and what to do about it," published in 1999 in the *Florida Bar Journal*, 73(3): 44–48:

> "Any attempt at alienating the children from the other parent should be seen as a direct and willful violation of one of the prime duties of parenthood."

While the parent most likely to attempt to alienate a child from the other parent is the parent who has most of the child's time, usually because of an interim order or some other sort of temporary arrangement, there are a small number of cases in which the parent with the least of the child's time has attempted to alienate the child from the parent with most of the child's time.

The sorts of behaviours that suggest an intention to alienate a child from the other parent include, among other things:

- persistently making negative comments about the other parent to the child,
- stating or implying that the child is in danger when with the other parent,
- grilling the child about their activities, meals and living conditions when with the other parent,

- stating or implying that the activities, meals and living conditions offered by the other parent are deficient or problematic,
- setting up activities that the child will enjoy during times when the child is with the other parent but cannot do with the other parent,
- telling the child that it's up to them to decide whether to visit the other parent, and
- stating or implying that the child is being abused or maltreated by the other parent.

The consequences of alienation or attempted alienation can be quite profound. Alienation at its best is a form of psychological programming; at worst, it's brainwashing. Alienation may result in the permanent destruction of a child's relationship with the rejected parent and in long-lasting psychological problems for the alienated child. In Dr. Glenn Cartwright's article "Expanding the Parameters of Parental Alienation Syndrome [4]," published in the *American Journal of Family Therapy* in 1993, a number of long-term psychological problems were found in children who had been the victims of alienation, including:

- depression, anxiety and stress,
- delayed emotional maturity,
- psychosomatic illnesses, and
- long-term feelings of guilt and loss.

In Dr. Anita Lampel's article "Children's Alignment with Parents in Highly Conflicted Custody Cases [5]," published in the *Family and Conciliation Courts Review* in 1996, these psychological problems were found to include:

- being angrier than children who had not been alienated from a parent,
- being less well-adjusted, and
- being less able to conceptualize complex situations.

Other researchers describe other potential impacts of alienation, including higher rates of substance use and abuse as adults, higher rates of separation and divorce as adults, and higher rates of suicide and other self-harming behaviours.

Contemporary perspectives on alienation and estrangement

Gardner's Parental Alienation Syndrome continues to live on in popular culture, especially among men's rights groups, often without the dose of tempering wisdom offered by more recent research such as the work of Kelly and Johnston. Claims that a child doesn't want to see a parent because of alienation are commonplace in Canada's courts, but rarely proven. Some lawyers even think that the rate of cases involving alienation claims is on the rise.

Part of the problem understanding children who resist seeing a parent after separation is that it's hard for the rejected parent to engage in a sometimes painful reflection on their past history as a parent. It's difficult to ask whether *you* might be the reason why your child doesn't want to see you. On the other hand, what's really easy — and emotionally gratifying as well! — is to avoid that awkward introspection and point the finger at the other parent and claim alienation.

On the other hand, these claims put the parent accused of alienation in a difficult spot too. They can't say that they're even a tiny, little bit responsible for how the child feels about the other parent, for fear of damaging their legal position in the eyes of the judge. Instead, all these parents can reasonably say is that they had nothing at all to do with the child's feelings, and that the problem lies entirely in the poor parenting provided by the rejected parent.

And for their part, judges and lawyers are not mental health professionals. Law school doesn't teach *anything* about psychology, family breakdown and children's responses to the separation of their parents. Not a thing! We are *not* experts in psychology, let alone in complex issues about estranged children and alienating parents. So, where does the expertise we need come from? Often the only way to get objective information about a claim of alienation comes from a parenting assessment conducted by a psychologist, clinical counsellor or social worker, and these reports can be really, really expensive and take a lot of time to complete. As a result, when alienation claims come to court, quite

a few of those claims are presented without the input of an expert, and you can imagine how challenging cases involving a child's resistance to seeing a parent might be.

Attachment disruption

One way to crack the problem is to focus on the basic problem — a child's reluctance to spend time with a parent — rather than on concepts like alienation and digging into whose behaviour is responsible for what. One way of looking at the problem of children who resist seeing a parent after separation is from the perspective of *attachment theory*. Attachment theory was first proposed by Dr. John Bowlby, a psychiatrist, in 1988, drawing on earlier research conducted by Dr. Mary Ainsworth in the 1960s and 1970s. It describes how children bond with their parents, and how the quality of this bond can have life-long implications for the wellbeing of children and wind up impacting their relationships with parents, friends and future partners down the road. Attachment theory has been widely researched and remains a cornerstone of how mental health professionals think about families and family relationships.

Looking at a child's reluctance to see a parent from an attachment point of view, the one thing that claims of estrangement and alienation have in common is the obvious breakdown in the attachment between the child and the rejected parent. The idea that there has been a disruption in the child's attachment to that parent is something that both the favoured parent and the rejected parent can agree on... perhaps the only thing they can agree on. If we get rid of labels like "alienation" and "Parental Alienation Syndrome," neither of which tend to be well understood by lawyers or by litigating parents anyway, and focus on the problem of attachment disruption, we can start looking at the problem without having to worry about which parent did what and we can do that without the usual finger-pointing, rancour, blaming and anger that accompany claims about alienation.

Although the cause of the problem is still important, parents, lawyers and judges still have the same set of tools to deal with a child's resistance to seeing a parent as they do when the child's resistance is said to be caused by the malicious actions of the favoured parent or the incompetent parenting of the rejected parent. Plus, in my experience, I have never had a case of attachment disruption that resulted wholly from "alienation" or from "estrangement." In the cases I've dealt with, a child's reluctance to see a parent usually results from a combination of factors that suggest alienation and factors that suggest estrangement; these cases are rarely one or the other.

Resist-refuse dynamics

"Resist-refuse dynamics" is a term that has begun to gain a lot of traction within the legal and mental health communities. It's another way of trying to focus on the basic problem without using the labels of "alienation" and "estrangement," and all the baggage and misunderstandings that come with those terms. Like attachment disruption, this term suggests a child-centred examination into why the child is reluctant to spend time with a parent and proposes that there are many more potential factors at play than just the malicious actions of one parent or the poor parenting of the other.

The research on alienation and estrangement today

There's good news and bad news here. The bad news is that we continue to lack long-term, large-population, high-quality research about children who resist contact with a parent after separation. The research currently available uses only small numbers of people, and is often confined to the people that psychologists see in their normal, day-to-day practices. We still don't have a definition of "alienation" that is widely accepted, although to my mind the way that Kelly and Johnston talk about alienation and estrangement seems closest to the mark. We also don't have a lot of good research about the legal and therapeutic responses to children who resist seeing a parent that could tell us which responses work best. While most writers on the subject suggest that courts should assign judges to these cases early on, judges who continue to be involved in these cases as case managers, most courts don't have enough judges or enough court time to make case management a practical solution.

The good news is that there has been lots of research on different aspects of alienation and the problem of children who resist seeing a parent, although this research tends to rely on small numbers of people and tends not to be conducted over the lengthy periods of time necessary to really understand the impact on children and their wellbeing. There are also a lot of very good books, articles and essays about children who resist seeing a parent, some of which are listed below, and there are an increasing number of mental health professionals who have made working with families and children who resist contact their priority and are developing specialized programs to address the issue. We also have some good, creative ideas about the kinds of legal and therapeutic responses that do help, and those that might help, although we don't know nearly enough about how effective these responses are, especially over the long term.

The other bit of good news is that more and more judges and lawyers are familiar with the alienation and the problem of children who resist spending time with a parent, although many of these legal professionals don't have a deep understanding of the issues and may not know much more about them than the basics of what Gardner had to say about his Parental Alienation Syndrome.

Responding to children who resist spending time with a parent

It's usually important to take action when a child begins to resist spending time with a parent after separation, and many parents will want to start trying to find out what's going on for the child as soon as possible, perhaps when the child begins to demonstrate some of the more serious behaviours identified above, in the "Knowing when there's a problem" part of this section.

Hopefully, both parents will see the deterioration in the child's relationship with a parent as a problem. If that's the case, then their first steps should probably be to get help from a mental health professional with expertise in working with families and family breakdown. Because the problem isn't just the child's problem, it isn't just the child who will need to see the psychologist or counsellor. The favoured parent might need help supporting the child's relationship with the rejected parent and responding to the child's negative remarks about that parent. The parent the child doesn't want to see might need help coping with the rejection they may feel, rebuilding their relationship with the child and changing their approach to parenting.

If both parents don't see this as a problem, which is most likely to occur when the parents are in court arguing about the children's parenting arrangements, the parent the child doesn't want to see may have to ask for orders to address the problem. It's important to understand, however, that judges don't have a magic wand they can wave and heal the relationship between a child and their parent. Judges simply don't have that power. While there are orders the court can make that can help children overcome a reluctance to see a parent, if a solution to that problem exists anywhere, it lies in the counselling and therapeutic services provided by mental health professionals. You're not going to find a cure in court.

Legal and therapeutic responses

There are a number of orders the court can make to deal with the problem of a child's reluctance to see a parent. These are the *legal responses* available when a child resists seeing a parent. The *therapeutic responses* consist of the different kinds of help available from mental health professionals.

It may be necessary to ask the court for orders when one or both parents won't agree to take steps to support and foster the child's relationship with the rejected parent. These orders might include adjusting the children's parenting plan, limiting how and when the parents interact with each other, and enforcing orders and agreements that say when a child will see their parents. Other orders can require children and parents to participate in one or more of the available therapeutic responses. The kind of orders that are most likely to help will change depending on the circumstances, the age and maturity of the child, and the extent of the breakdown in the child's relationship with the rejected parent.

Intevene early

It can be important to get professional help to figure out what's going on as soon as a child begins to demonstrate a continuing reluctance to see a parent or any other sign that problems are developing, or already exist, in the child's relationship with a parent. Involving mental health professionals right off the bat can help stop the problem from getting worse and maybe even suggest ways of fixing the problem. The potential roles mental health professionals can play at this early stage are about diagnosis, figuring out what the problem is, and providing ongoing therapeutic help.

If you need help getting you, the other parent or your child in to see a counsellor or psychologist, section 224(1)(b) of the *Family Law Act* allows the court to make orders that:

> require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.

This sort of early intervention is especially important if the child's time with the rejected parent is already limited. Don't wait, do it now. Find out what's going on.

Set a schedule of parenting time

Another good early step is to apply for an order for parenting time, under section 45 of the *Family Law Act* or section 16.1 of the *Divorce Act*, that provides a specific schedule for the child's time with each parent. These orders can give the rejected parent specific, set periods of time with the child, on a schedule neither parent can control, and ensure that the child continues to see the parent despite their resistance.

Orders about parenting time are relatively easy to enforce, and a failure to follow orders always makes a parent look bad in court. See the section "Enforcing Orders, Awards and Agreements" for more information.

Address problems with a parent's behaviour

When the behaviour of the favoured parent is or might be part of the problem, another step is to ask the court to include in the order terms about parenting time that are aimed at managing bad behaviour. Section 218 of the *Family Law Act* and section 16.1(5) of the *Divorce Act* allow the court to include any terms and conditions it thinks appropriate in parenting orders. Helpful terms might include requirements that a parent:

- not speak badly of the other parent to the children or within the children's hearing,
- not allow others to speak badly of the other parent in front of the children, and
- support and encourage the children's relationship with the other parent.

When the conflict between the parents is contributing to the problem, other terms might talk about the parents' behaviour when the children are being exchanged from one parent to the other, for example by limiting face-to-face contact between the parents at exchanges, or managing how the children are exchanged, such as requiring them to be dropped off and picked up through school.

Get a parenting assessment

Section 211 of the *Family Law Act* allows the court to order that a mental health professional, including psychologists, clinical counsellors, social workers and Family Justice Counsellors, conduct an assessment of the needs of a child, the views of a child, and the ability and willingness of the parties to meet the child's needs. To prepare these reports, assessors will usually speak to both parents, interview the children, if the children are old enough, watch each parent engage and interact with the children, and interview other people with knowledge of the family, including friends and family members. They will also read any reports about the children that may be available, including medical and psychiatric reports, psych-ed assessments and so on. Assessors who are psychologists will also usually ask the parents to complete psychological tests like the Minnesota Multiphasic Personality Inventory.

When a child is resisting spending time with a parent, a parenting assessment can provide parents and the court with valuable information about the relationships between parents, between siblings, and between the parents and their children. Usually, these reports are sought to get recommendations and information about the parenting arrangements that are likely to be in the best interests of the children. However, they can also be used to look into specific issues, like the reasons why a child is resisting seeing a parent, and get recommendations about the things that can be done to restore the relationship between the child and the rejected parent.

While these reports are often invaluable, and can help parents settle their legal disputes, they're also often very expensive. Family Justice Counsellors are government employees, usually social workers, attached to the Provincial Court who will prepare parenting assessments for free. The demand for their services is huge, as you'd probably expect, and their reports can take many months to start and finish as a result. Reports prepared by other mental health professionals cost money and will be paid for by the parents. While these reports will be available much sooner than the reports of Family Justice Counsellors, the cost can range from $6,000 to $24,000, depending on the circumstances and complexity of the case, the number of children, and whether the assessor must travel to meet the family.

Ask for case management

A lot of people, including Kelly and Dr. Matthew Sullivan, strongly recommend that family law cases involving claims of alienation be managed by a single judge, so that all court appearances leading to the trial are dealt with by the same person. The idea behind this sort of case management is that the judge learns about the family, gains an understanding of the family's needs and dynamics, makes sure that the case stays on track, and makes sure that orders are both followed and adapted as needed to better suit the family's changing circumstances.

I think the idea of case management is a great idea for all families who are in court and engaged in higher levels of conflict. However, the courts of British Columbia just don't have the resources to take this kind of an approach as a general rule. Sometimes, a judge may agree or volunteer to "seize" themself of a case, which means that the judge will deal with all of the family's court appearances except for the trial, until the judge "unseizes" themself of the case. Seizing themselves of a case can be very challenging for judges, never mind court administrators, as it adds to the judge's workload and creates huge scheduling problems, usually with the result that appearances are handled before the start of the usual court day or after the end of the court day.

Look for specialized interventions

Section 224(1)(b) of the *Family Law Act* can also be used to get orders that parents and children get special kinds of counselling specifically to address the problem in the relationship between a child and the parent they don't want to spend time with. This sort of counselling is provided by mental health professionals, usually psychologists and clinical counsellors, who specialize in family breakdown, family relationships and attachment disruptions. In fact, a number of mental health professionals in the province have created programs aimed at helping children restore their relationships with parents they resist spending time with.

The available therapeutic interventions include:

- **Regular counselling**, the kind of basic, affordable counselling most people are familiar with. This is an easily-accessible option, but it's helpful to make sure that the therapist has experience dealing with attachment issues and family breakdown.
- **Coordinated counselling**, involving several different therapists working with different family members, all under the management of a team leader. This will be more expensive because of the number of people involved, but it offers a good opportunity for the therapists to coordinate their work. It can also be hard to find therapists who are willing to work together.
- **Non-residential treatment programs** specifically aimed at separated families dealing with a child's reluctance to see a parent. These programs usually involve a team approach under the guidance of a team leader and a treatment

agreement that outlines how the therapists will talk to each other about the family and coordinate their responses. There are lots of benefits to this kind of program, especially when the therapists involved are specialists in the area of attachment and attachment breakdown, but these programs can be hard to find and cost a lot of money.

- **Residential treatment programs** that are also specifically aimed at separated families dealing with a child's reluctance to see a parent but are shorter, far more intense and require the children and one or both parents to live in a camp-style setting. These programs are available primarily in the United States.

What's really important to understand about these interventions is that they're not geared toward helping a parent "prove" alienation; they're about helping the child have a normal relationship with the parent they have rejected. They're not about who's right and who's wrong, they're about trying to restore the child's relationship with the parent they don't want to spend time with, rebuild a healthy attachment between the child and that parent, and support the child's best interests, growth and wellbeing.

Adjust the children's parenting arrangements

There are a number of ways that schedules of parenting time may need to be adjusted when a child resists seeing a parent.

Most commonly, parenting arrangements are changed to clarify and reduce ambiguity in parenting schedules, particularly in high-conflict cases. The purposes of changes like this are to eliminate either parent's discretion to avoid complying with the children's parenting arrangements and make sure that the child's time with each parent happens as it is planned to happen.

Sometimes parenting arrangements are changed to reduce a parent's time with the children, particularly when it is suspected that the parent is undermining the child's relationship with the other parent. When the problem is particularly difficult, parenting arrangements may be changed to require that the favoured parent's time with the children be supervised. This will usually only be appropriate as an extreme measure when the parent simply cannot be trusted to refrain from trash-talking the rejected parent to the children and sabotaging the children's relationship with that parent, or just refuses to stop engaging in these behaviours.

In extreme cases, parenting arrangements may be changed to suspend or terminate the favoured parent's time and communication with the children, usually with the result that the children have their primary home with the rejected parent. This is a drastic remedy as it puts the children in the home of the parent they don't want to spend time with, and can be fairly traumatic as a result. Orders like these require the court to be convinced that the long-term benefit to the children outweighs the discomfort they'll feel in the short-term, and are usually only made where the court believes that the favoured parent is trying to alienate the children from the other parent. These orders are rare, but they do get made from time to time.

Risky responses

By "risky responses," I mean legal responses to children's resistance to seeing a parent that have a chance of backfiring, and making the situation worse rather than better. These include getting views of the child reports and asking for orders that a parent be found in contempt of court, asking for orders for court costs from the favoured parent, and enforcing orders about parenting time using the peace officer enforcement provisions of the *Family Law Act*.

Views of the child reports

There are two kinds of reports that are limited to describing the children's views, *evaluative* views of the child reports, prepared under section 211(1)(b) of the *Family Law Act*, and *non-evaluative* views of the child reports, prepared under sections 37(2)(b) and 202 of the act. These reports are sometimes also called "hear the child" reports and "voice of the child" reports, but they're both focused on speaking to a child and describing what the child has said. ("Evaluative" reports are prepared only by mental health professionals and include the author's opinion of the

child's views, while "non-evaluative" reports can be prepared by anyone with the right training and experience, and contain only a factual statement of what the child has told the author.)

These reports are often used to get a statement of the child's views for the purposes of the best-interests tests in sections 37 and 38 of the *Family Law Act* and section 16 of the *Divorce Act*. While they're normally very helpful, in cases where a child is estranged or alienated from a parent, they're helpfulness is limited. Reports in circumstances like these may only deepen the disruption in the child's attachment to the rejected parent as they give the child the chance to confirm their negative views about that parent, and put those views on the record. In cases like this, views of the child reports may only serve to tell everyone what they already know, and making a permanent record of the child's views may make it impossible for the child's relationship with the rejected parent to ever heal.

Contempt applications and cost awards

When someone fails to follow a court order, they are said to have "breached" the order, and breaching an order is called *contempt of court*. One way of enforcing a court order is to make an application to court asking for an order that the other person be found "in contempt" for breaching a particular term of a particular order in a particular way. When contempt is proven, the court may make orders intended to punish the person who breached the order by issuing fines, sending them to jail, or requiring them to perform community service of some nature. (The court has lots of other choices as well.) Contempt applications are serious business.

Sometimes a contempt application, or the threat of a contempt application, is what's necessary to force someone to comply with a court order. However, where a child is estranged or alienated from a parent, a contempt application could inadvertently wind up reinforcing the child's negative views of the rejected parent by making the favoured parent look like a victim. In cases of alienation in particular, a contempt application may just feed into the idea that the rejected parent is being unfair, mean or nasty to the favoured parent.

"Costs awards" are orders that one party be paid their *costs* of an application or a court proceeding by another party to that application or proceeding. "Costs" doesn't mean that one party has to pay the full bill of the other party's lawyer, but they will have to pay for the lawyer's out-of-pocket expenses for things like filing fees and photocopying, plus an additional amount that usually works out to maybe 35 to 40 percent of the lawyer's bill. ("Special costs" require a much larger payment, and "solicitor-client" or "lawyer-client" costs require the payment of an amount equal to the lawyer's bill.) Costs awards aren't often made in family law cases because of their financial impact on the party who has to pay them.

Like contempt orders, an award of costs, special costs or lawyer-client costs may also wind up reinforcing the child's negative views of the rejected parent by making the favoured parent look like a victim. It can be tempting to ask for costs awards when the behaviour of a parent is particularly bad, but be careful about how the award might ultimately undermine the rejected parent's chances of rebuilding a relationship with their child.

Peace officer enforcement

Section 231 of the *Family Law Act* allows the court to make an order requiring a peace officer, including a police officer, to take a child and deliver the child to a parent if the court believes that parent has been "wrongfully denied" parenting time by the other parent. The court may order that the officer enter any place where the child is being kept, seize the child, and take the child to the other parent.

As you can imagine, this is a pretty serious order. Peace officer enforcement orders are only made in extreme circumstances, when the court is satisfied that nothing else will get a parent to follow an order. Some parents may feel that this is the only way they can get a parent to follow an order for parenting time, and sometimes that's true. In cases where a child is estranged or alienated from a parent, however, the effect of the police showing up at the door to forcibly remove the child from the favoured parent can be devastating. It's easy to see how this sort of thing would feed into the story the favoured parent tells about the rejected parent, and make the rejected parent look like a bully. Be careful of asking for these orders in cases of estrangement and alienation.

When responses fail

Sometimes, there's nothing that can done to restore the relationship between an estranged or alienated child and the rejected parent. Counselling and other interventions may not have succeeded; a child's negative views of a parent may have been allowed to sit for so long that they are deeply entrenched and can't be changed; or, steps to enforce a parenting schedule may have failed in the face of a child's threats to run away or hurt themselves if they're made to see a parent. At other times, a parent may have run out of money and not be able to continue fighting for the actions that might revive the child's relationship with them. The emotional toll of the fighting in court may be too much; or, all of the battles in court may be causing more harm to the child than the benefit of restoring the child's relationship with a parent.

In circumstances like these, a rejected parent may decide to give up the fight, or a judge may decide that nothing is ever going to change the child's views about the parent. While these outcomes are tragic and profoundly upsetting, sometimes it's best, and even necessary, to just stop.

It's important to know, however, that reconciliation between the child and the parent can still occur, although this may not happen until later in the child's life, when the child is older and more mature. This sort of "spontaneous reconciliation," as the research calls it, can and does occur. Although no one can count on this sort of thing happening, there are a few steps the rejected parent can take to encourage the chances of reconciliation down the road:

- **Stay in touch:** Make a point of sending the child greeting cards for important events such as birthdays and important public holidays, always with a return address on the envelope and providing current contact information. It's important to include personal messages, keeping those messages relatively light and supportive in tone and avoiding intense expressions of emotion that might discourage the child from wanting to read the card.
- **Create a private social media group:** Create a private group on social media platforms like Facebook to post personal news and updates in a way that is accessible to the child and lets them keep up to date on life events without having to directly communicate with you if they'd rather not.
- **Keep your contact information current:** Sometimes all that can be done is to wait until the child is old enough that they begin to look back on their own childhood with more objectivity, perhaps in their late teens or in their 20s, reexamine their experiences and relationships, and reach out on their own. However, it's important to make sure that the child can contact you, by email or telephone, or can find you on social media.

The common theme among these suggestions is about the importance of finding ways to keep the door open for the possibility of contact by the child in the future. It's usually important to take a consciously passive and restrained approach that doesn't expose the child to the parent's feelings of grief and loss, and makes it as easy as possible for the child to reach out.

Resources on children who resist spending time with a parent

The following lists of resources are not, of course, encyclopedic. There are doubtless many valuable studies, articles, and websites that I have overlooked; it's always a good idea to do your own research and consult with a legal or mental health professional whenever possible.

Academic materials

The January 2010 [6] and April 2020 [7] editions of *Family Court Review*, published by the Association of Family and Conciliation Courts, are entirely devoted to the issue of alienated and estranged children and other contact problems after separation. If you can get your hands on a copy of these editions, you should. (Courthouse Libraries BC [34] can help you with this.) They offer a fairly up-to-date look at current court practices and the latest literature on the subject, and were edited by two prominent Canadian professionals, Professor Nicholas Bala, a law professor at Queen's University, and Dr. Barbara Jo Fidler, a psychologist and mediator based in Toronto.

Bala, Fidler and Professor Michael Saini, a member of the University of Toronto's Faculty of Social Work, are also the authors of *Children Who Resist Postseparation Parental Contact* [8], a 2013 book published by Oxford University Press that provides a really good overview of more recent research and therapeutic and legal responses to children who resist contact after separation. Courthouse Libraries BC can probably help you find this book as well.

The Association of Family and Conciliation Courts has also recently published a joint statement [9] on parent-child contact problems with the National Council of Juvenile and Family Court Judges, an American organization. The statement is worth reading for the suggestions it directs toward lawyers, judges and mental health professionals dealing with children who resist seeing a parent after separation. Another excellent resource in the "what can we do about this problem" vein is *Overcoming Parent-child Contact Problems* [10], published by Oxford University Press in 2017, which includes chapters by prominent mental health professionals, researchers and academics including Bala, Fidler, Sullivan, Johnston and Saini, as well as Drs. Robin Deutsch, Abigail Judge and Peggie Ward.

The following articles were among the readings on child alienation and estrangement recommended by Kelly at a seminar in Vancouver and may be helpful, even though they're all more than a few years old.

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Online information

The web is full of resources about alienation, estrangement and children who resist seeing a parent after separation. Much of the information available online is, however, of limited usefulness. Look about the internet and educate yourself about children who are reluctant to spend time with a parent, but be cautious about the sources of what you're reading. Stick to information published by academics, lawyers, psychiatrists, psychologists, clinical counsellors and researchers, and avoid anonymous websites, websites sponsored by special interest groups that are likely to be biased, sensationalist websites, and websites that don't give a source for their data or their conclusions. The most reliable sort of online information is that which is published in a professional journal, as journal articles are usually peer-reviewed and normally of a very high quality.

A good starting point for online research is the website of the Shared Parenting Information Group [11], a UK organization, which has a good discussion of the subject and plenty of useful links.

A final note of caution. Many of the groups you'll find online that offer information on Parental Alienation Syndrome, such as Fathers Are Capable Too, seem to regard the problem of children who resist seeing a parent after separation as a men's rights or fathers' rights issue. However, some of these sites go too far and identify feminism and mothers, or rather their prejudice against feminism and mothers, with the small number of women who engage in alienating behaviours. Fathers also engage in alienating behaviour. Take care in choosing your sources of information and make sure you're reading between the lines.

Resources and links

Legislation

- *Divorce Act*
- *Family Law Act*

Links

- "The Alienated Child: A Reformulation of Parental Alienation Syndrome [2]"
- "Children's Alignment with Parents in Highly Conflicted Custody Cases [5]"
- Family Court Review [12]
- Shared Parenting Information Group [11] (UK)

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 28 September 2022.

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[2] http://jkseminars.com/pdf/AlienatedChildArt.pdf
[3] https://canlii.ca/t/1r9wc
[4] http://www.fact.on.ca/Info/pas/cartwr93.htm
[5] http://www.canadiancrc.com/Parental_Alienation_Syndrome_Canada/lampel96.pdf
[6] https://onlinelibrary.wiley.com/toc/17441617/2010/48/1
[7] https://onlinelibrary.wiley.com/toc/17441617/2020/58/2
[8] https://www.amazon.com/Children-Resist-Postseparation-Parental-Contact/dp/019989549X
[9] https://files.constantcontact.com/6beb60a3701/43f71ab1-a85f-44e8-9b18-449927fafa35.pdf
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Changing Family Law Orders, Awards and Agreements Involving Children

There really is no such thing as an absolutely final order, award or agreement involving children. All orders, awards and agreements involving children may be changed, but, in general, something new and important must have happened since the original order or agreement was made that affects the best interests of the children, including a change in the capacity of an adult to care for them, before the order, award or agreement is changed. In family law, "material change in circumstances" is the term used to describe when something new has happened that may justify a change to an order, award or agreement.

This section talks about changing orders, awards and agreements about the arrangements for children's parenting and contact under the *Divorce Act* and the *Family Law Act*.

Introduction

Changing a court order is called *varying* an order. An order can only be varied by a new order, usually by the same court that made the original order.

Changing an agreement is called *amending* an agreement. An agreement can be amended by making a new agreement, usually called an *addendum agreement* or something to the same effect. An agreement can also be changed by the court setting all or part of the agreement aside and making an order in its place.

Arbitrator's awards may be varied by an arbitrator if the arbitration agreement or the arbitration award says that the arbitrator will hear applications to vary the award. If the arbitration agreement or the arbitration award doesn't talk about changing awards, the court can make an order changing an arbitration award in the same way that it can make an order changing a court order.

Parents usually want to vary an order, award or agreement because something new and important has happened that affects the best interests of the children. The court will not vary an order, award or agreement lightly. The person who wants to change an order, award or agreement must usually establish that there has been a *material change in circumstances* since the order, award or agreement was made before the court will even consider making an order that is different from the original order, award or agreement.

The process for applying to vary a court order will depend on whether the original order was made under the federal *Divorce Act* or the provincial *Family Law Act*. If the order was made under the *Family Law Act*, the process will also depend on whether the order was made by the Supreme Court or the Provincial Court. Applications to change arbitration awards and agreements are made under the *Family Law Act*, and the court will apply almost the same general considerations it applies varying orders to varying arbitration awards and setting aside agreements.

Changing orders under the *Divorce Act*

Under section 5 of the *Divorce Act*, the Supreme Court has the jurisdiction to vary a *Divorce Act* parenting order or contact order made anywhere in Canada, as long as the person making the application, the *applicant*, ordinarily lives in British Columbia when the application is made or if both spouses agree to have the application heard in British Columbia. However, if the child has deeper roots and greater social ties in the other province or territory, the court may decide to transfer the application to be heard in that other province or territory under section 6(2) of the act.

A "parenting order" is an order about how decision-making responsibilities and parenting time are shared between married spouses. A "contact order" is an order giving a right to spend time with a child to someone who is not a married spouse. Decision-making responsibilities, parenting time and contact are discussed in the first section of this chapter, Children and Parenting after Separation.

Section 17 of the *Divorce Act* gives the court the authority to hear and decide applications to vary orders for parenting arrangements or contact. Under this section, the court may vary, cancel, or suspend orders dealing with parenting arrangements or contact. Section 17 also sets out the test for the variation of custody and access orders, and the principle that it is in a child's best interests to have maximum contact with each parent. Section 17 says this:

> (2.1) If the court makes a variation order in respect of a contact order, it may make an order varying the parenting order to take into account that variation order ...
>
> (2.2) If the court makes a variation order in respect of a parenting order, it may make an order varying any contact order to take into account that variation order ...
>
> (5) Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order ...
>
> (5.1) For the purposes of subsection (5), a former spouse's terminal illness or critical condition shall be considered a change in the circumstances of the child, and the court shall make a variation order in respect of a parenting order with regard to the allocation of parenting time. ...
>
> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

It is up to the applicant to first show that there has been a change in the "condition, means, needs or other circumstances of the child" under section 17(5) since the last order was made or the court won't change the original order. In the 1996 case of Gordon v Goertz [22], the Supreme Court of Canada summarized the test to vary orders for custody under the old *Divorce Act*:

> [10] Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther.
>
> [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued.
>
> [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J.G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

> [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

The same approach applies to applications to change parenting orders and contact orders under the new *Divorce Act*.

When that preliminary test is met, the court will think about the parenting order or contact order that is in the best interests of the child as if the parenting order or contact order is being made for the first time. In Gordon v Goertz, the court also said that when:

> [17] The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances to decide what custody arrangement now accords with the best interests of the child. The threshold of material change met, it is an error for the judge on a variation application simply to defer to the views of the judge who made the earlier order. The judge on the variation application must consider the matter anew, in the circumstances that presently exist.

(Under the old *Divorce Act*, the law that was in place before the changes to the *Divorce Act* took effect on 1 March 2021, "decision-making responsibility" was known as *custody* and "parenting time" and "contact" were known as *access*. Older orders that use the terms "custody" and "access" are still good and don't need to be updated to the new language. If you have an older order that says you have custody, you now have decision-making responsibility for your children. If you are or were married to your ex and have an order that says you have access, you now have parenting time.)

Whenever the court is asked to make an order about parenting and contact, section 16(1) of the act requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at sections 16(3) and 16(4).

Changing orders, awards and agreements under the *Family Law Act*

The *Family Law Act* has different rules about varying orders, awards and agreements. The rules also change depending on the subject of the part of the order, award or agreement that needs to be varied.

Changing orders

Both the Supreme Court and the Provincial Court have the power to make and change orders about guardianship, parenting arrangements, and contact. As a general rule, applications to vary orders can only be brought to the court that made the original order; an order of the Supreme Court can only be varied by the Supreme Court and an order of the Provincial Court can generally only be varied by the Provincial Court.

"Parenting arrangements" refers to the parts of an order, award or agreement that talk about how parental responsibilities and parenting time are shared between guardians. A "contact order" is an order giving a right to spend time with a child to someone who is not guardian. Guardianship, parental responsibilities, parenting time and contact are discussed in the first section of this chapter, Children and Parenting after Separation.

Section 47 of the *Family Law Act* gives the court the power to vary orders about parenting arrangements:

> On application, 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 because of a change in the circumstances of another person.

The test to vary orders about contact is at section 60, and says exactly the same thing, just with the word "contact" in place of the phrase "parenting arrangements":

> On application, a court may change, suspend or terminate an order respecting contact with a child if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

The general test to vary orders is found at section 215(1) of the *Family Law Act*. It applies when there isn't a specific test required to vary an order about a specific subject, the way sections 47 and 60 talk about the test to vary orders for parenting arrangements and contact. Since there's no specific test to vary orders for guardianship, the general test set will apply:

> Subject to this Act, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

In a 2016 case from the Court of Appeal, Williamson v Williamson [1], the court confirmed that the "change in circumstances" test that must be met under the *Family Law Act* before an application to vary parenting arrangements can be considered is the same test that applies to the variation of parenting orders under the *Divorce Act,* described in the case of Gordon v Goertz discussed above. Under this test, a *material change in circumstances* is:

- a change in the condition, means, needs, or circumstances of the child or in the ability of the parents to meet the needs of the child,
- which affects the child in an important way, and
- which was either not foreseen or could not have been reasonably contemplated by the judge who made the original order.

When this preliminary test is met, the court will think about the orders that are in the best interests of the child as if the orders were being made for the first time. Whenever the court is asked to make an order about guardianship, parenting arrangements, and contact, section 37(1) of the act requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at sections 37 and 38.

Changing awards

Only the Supreme Court has the power to change awards about guardianship, parenting arrangements, and contact. Section 19.18 of the *Family Law Act* says that:

> (3) On application by a party, the Supreme Court may change, suspend or terminate all or part of an arbitration award for any reason for which an order in relation to the same matter could be changed, suspended or terminated under this Act.

In other words, to change an award about parenting arrangements, the test in section 47 of the *Family Law Act* will apply, and to change an award about contact, the test in section 60 of the *Family Law Act* will apply.

If the court decides there has been a change in circumstances, it will make an order about guardianship, parenting arrangements, or contact. Whenever the court is asked to make an order about guardianship, parenting arrangements, and contact, section 37(1) of the act requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at sections 37 and 38 of the *Family Law*

Act.

Setting aside agreements

The court cannot *vary* or *amend* agreements under the *Family Law Act*. However, when the court is convinced that parts of an agreement are no longer in the best interests of the children, the court will *set aside* the parts of the agreement that are causing the problem and make an order in place of the parts of the agreement that were set aside. The act has different tests that must be met to set aside parts of an agreement depending on the subject of the parts someone wants to set aside; there are tests about agreements dealing with the division of property, the payment of child support and spousal support, and parenting after separation. Section 44 says this about agreements concerning parental responsibilities and parenting time:

> (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

Section 58 says almost the same thing about agreements concerning contact:

> (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting contact with a child if satisfied that the agreement is not in the best interests of the child.

Rather than having to prove that there has been a "material change in circumstances," someone who wants to change an agreement about parental responsibilities, parenting time or contact must first show that the agreement is not in the best interests of the child. If the court agrees, section 214 of the *Family Law Act* says what happens to agreements when part of an agreement is set aside:

> (1) If an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement.
>
> (2) A court may incorporate into an order all or part of a written agreement respecting a family law dispute made by the parties to the proceeding and, unless the court orders otherwise,
>
> (a) the order replaces that part of the agreement that is incorporated, and
>
> (b) the remainder of the agreement remains effective.
>
> (3) Unless the court orders otherwise, if an agreement and an order made after the agreement provide differently for the same subject matter,
>
> (a) the order replaces the part of the agreement that provides differently for the same subject matter, and
>
> (b) the remainder of the agreement remains effective.

If the court decides that the agreement is not in the best interests of the child, it will cancel the parts of the agreement about parenting arrangements or contact and make an order about parenting arrangements or contact, while leaving the rest of the agreement alone and intact. Whenever the court is asked to make an order about parenting arrangements and contact, section 37(1) of the *Family Law Act* requires the court to consider only the best interests of the child. The factors to be taken into account in considering the best interests of the child are set out at sections 37 and 38 of the act.

Changing guardianship

Section 39 of the *Family Law Act* has rules about who is presumed to be a guardian. When someone is *presumed* to be a guardian, that person *is* a guardian, without the need for an order. The only people who must have an order making them a guardian are the people who don't fit into those presumptions, including parents, relatives, and other people who have established a caring relationship with a child. Under section 51(1)(a) of the act, the court may make an order *appointing* someone as a guardian of a child who isn't presumed to be a guardian.

Section 51(1)(b) of the *Family Law Act* also allows the court to make an order *terminating* someone's guardianship of a child. This section doesn't say what the court should consider when deciding whether to terminate someone's standing as a guardian of a child. However, section 37(1) says that whenever the court makes orders about guardianship, it must consider only the best interests of the child:

> (1) In 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.

For people who are presumed to be guardians, this is the only guidance the *Family Law Act* provides. For people who were appointed as guardians by court order, section 215 provides the general test to change orders under the act:

> (1) ... a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

In other words, to vary an order appointing a person as guardian, the applicant will have to show that there has been a change in circumstances and explain why it is in the best interests of the child that the person be removed as guardian.

Applications to terminate a person's guardianship of a child are generally only made when:

- a guardian has ceased to be involved with caring for the child, or perhaps has never been involved in the child's care,
- the guardians simply cannot agree about important parenting decisions that need to be made for the child, for example about the child's healthcare, vaccination status, or schooling, or
- the guardians are in very high levels of conflict and rarely agree on any decisions affecting the child.

However, the court will usually be reluctant to remove someone's standing as a child's guardian. Remember that, as we discussed in the Basic Principles section in this chapter, people who are guardians:

- have parenting time with the child,
- are presumed to be able to exercise all parental responsibilities on behalf of the child,
- have day-to-day care and control of the child and day-to-date decision-making responsibility for the child when the child is with them,
- are entitled to get information about the child's health and education from people who have that information,
- are presumed to be entitled to manage property belonging to the child that's worth less than $10,000,
- have the right to object if another guardian wants to move away with the child, and
- can appoint another person to be a guardian of the child in the event of their death.

On the other hand, people who aren't guardians, including parents who aren't guardians, don't have *any* of these entitlements. They best they can hope to have is contact with the child, but they won't have day-to-day care and control of the child or day-to-day decision-making responsibility for the child when the child is with them, they're not entitled to get information about the child's health and education, and they can't object if a guardian wants to move with the child. As a result, the court will usually look at the conflict between the guardians to see whether any other options will solve the problem before taking the drastic step of removing someone's standing as a guardian. In D. v D. [2], a 2013 Provincial Court decision, the court described such orders as “extreme” and to be granted only in

"rare" cases:

> [24] When considering an application to terminate a parent's guardianship, I am of the view that considering the factors enumerated in s. 37(2) of the *Family Law Act*, termination can only occur in the most extreme situations. The approach to be taken is, first, to ask whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian. If it is, guardianship should not be terminated. It must be remembered that once a parent is no longer a guardian, that parent loses all parenting responsibilities and rights and is simply an adult who may have contact with the children.

In the 2019 decision of Lessard v Mahoney [3], the Supreme Court considered the cases to date about terminating someone's standing as a guardian, and said that:

> [148] Accordingly, I accept that an application to remove a parent, presumptively a guardian, under s. 51(1)(b) will be granted only in extreme or rare circumstances and provided that it is in the best interests of the child. In that regard, as an alternative, the court should consider whether it is in the child's best interest to maintain the relationship to a lesser degree by still allowing that parent's involvement in a more limited fashion by the re-allocation of parental responsibilities as set out in ss. 40 and 41 of the FLA.
>
> [149] The onus is on [the guardian seeking to terminate a person's standing as a guardian] to establish that there have been material changes in the child's circumstances to justify [the guardian's] removal as guardian and that such removal is in the child's best interests.

Changing decision-making responsibilities and parental responsibilities

Decision-making responsibilities under the *Divorce Act* and parental responsibilities under the *Family Law Act* mean almost the same thing. As discussed in the Basic Principles section in this chapter, decision-making responsibilities and parental responsibilities are about making decisions affecting a child, from the choice of where a child goes to school to the choice of health care when the child is sick. Many, if not most, parents will share decision-making responsibilities and parental responsibilities for their children after separation, meaning that they must consult with each other before making important decisions. However, parents can agree, and judges and arbitrators may order, that:

- one parent will be solely responsible for some kinds of decisions, and both parents will be responsible for all other decisions,
- each parent will be solely responsible for certain kinds of decisions, and both parents will be responsible for all other decisions,
- both parents will be responsible for all decisions, but one of them will have the final say about decisions if the parents can't agree on the decisions, or
- one parent will be solely responsible for all decisions.

The decisions that are included in *decision-making responsibilities* under the *Divorce Act* are listed in section 2(1) of the act, in the definition of "decision-making responsibilities." The list is short, compared to the decisions that are included in *parental responsibilities* under the *Family Law Act*, however, the list isn't exhaustive and other kinds of decisions, like those listed in the *Family Law Act*, can be included as decision-making responsibilities under the *Divorce Act*. The decisions that are included in *parental responsibilities* under the *Family Law Act* are listed in section 41 of the act.

Changes may need to be made to orders, awards or agreements about decision-making responsibilities and parental responsibilities if those arrangements are no longer working as well as they should. This might happen because:

- parents have fundamentally different ideas about important issues, like healthcare and schooling, and are not going to be able to agree on the decisions that are in the best interests of their children,

- parents cannot stop arguing about decisions affecting their children, so that decisions are made late or never made at all,
- parents are constantly going to mediation, arbitration or court to resolve disagreements about decisions affecting their children,
- ongoing conflict between the parents about making decisions is affecting the wellbeing of their children, or
- there is a personal protection order in place that prevents parents from discussing decisions affecting their children.

In circumstances like these, the changes people usually look for are intended to stop parents from arguing about one or more kinds of decision, and usually people wind up asking for orders that they have sole responsibility for making those decisions. While this may be a practical solution to a difficult problem, it's often a difficult pill to swallow for the parent losing the right to have influence over decisions affecting their children, especially when the approach they would take to making decisions is guided by personal principles, beliefs and convictions. Think, for example, about deciding whether to have a child vaccinated against COVID-19, deciding on home-schooling versus public- or private-schooling, deciding on homeopathic treatments versus traditional medical care, or deciding on the religion in which the child will be instructed.

Applications to change orders about decision-making responsibilities under the *Divorce Act* are made under section 17 of the act.

Applications to change orders about parental responsibilities under the *Family Law Act* are made under section 47 of the act, while applications to change awards about parental responsibilities are made under section 19.18(3), and applications to set aside agreements about parental responsibilities are made under section 44(4).

Before going this route, it's important to know that section 49 of the *Family Law Act* lets parents go to court to get "directions" — an order — about decisions affecting a child, and it might be easier to do this than take a particular parental responsibility away from a guardian. Section 49 says this:

> A child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate.

It's also important to know, however, that the Court of Appeal, in a 2017 case called N.R.G. v G.R.G. [4], said that the primary responsibility for making decisions affecting children belongs to the children's guardians and that it will not always be appropriate for the court to assume this responsibility:

> [40] On our reading of s. 41, decisions about activities, phone calls, electronic communications, attendance at school events, and other such daily aspects of children's lives are within the meaning of "parental responsibilities". The scheme thus envisages that only guardians may make such decisions (s. 40), although the court may order the allocation of those responsibilities to, and determine the means for resolving disputes between, the guardians as it deems appropriate (s. 45). One means for resolving disputes may be, for example, an order for a parenting coordinator (who is limited in the role he or she may play by ss. 17 and 18). Another means is an application by either guardian under s. 49 for directions. No doubt there will be occasions in which the court is called on to resolve a dispute about a particular matter, and can do so under ss. 45 and 49, or can manage certain matters through tools in the Child Support Guidelines such as s. 7. In the end, however, we consider that the Act expects parental responsibilities to be assigned to a guardian or guardians, or be guided by a parenting coordinator, rather than having the judge make the specific decisions at first instance. In other words, the Act does not contemplate that the details of parenting will be directed by the court; the legislation does not provide for the court to step into a guardian's role.

Other cases that have taken the same approach include M.B.D.C. v Y.G.D.C [5], a 2021 decision of the Supreme Court, and Dunn v Dunn [6], a 2018 decision of the Supreme Court.

Changing parenting time and contact

People usually want to change orders, awards and agreements about parenting time and contact because:

- a child has grown older and more independent, and the existing schedule no longer meets the child's needs,
- one of the parties has been frustrating the schedule, especially a schedule that is vague and gives one or more of the parties the opportunity to interfere with another party's time with the children,
- a party is constantly late or frequently cancels scheduled time with the children,
- a party has moved and the existing schedule no longer works for the parties or the children, or
- a child, particularly an older child, has expressed a wish to spend less or more time with a parent.

Applications to change orders about parenting time and contact under the *Divorce Act* are made under section 17 of the act.

Applications to change orders about parenting time under the *Family Law Act* are made under section 47 of the act, and applications to change orders about contact are made under section 60. Applications to change awards about parenting time and contact are made under section 19.18(3). Applications to change agreements about parenting time are made under section 44(4) of the act, and applications to change agreements about contact are made under section 58(4).

Clarifying vague schedules

Problems often crop up when an order, award or agreement says only that a party will have "liberal and generous time" with a child, or sets a schedule that is too vague, like a schedule that says the children will be with a party "every other weekend." In situations like this, it's too easy for a schedule not to work. What is "liberal and generous time" anyway? And who decides what is "liberal" and what is "generous?" When does the "weekend" start, Friday after school or after work, or on Saturday like the calendar says? What happens if there's a holiday Friday or Monday attached to the weekend, does the "weekend" include the holiday as well?

While arrangements like these can work wonderfully well when the adults involved all get along well, have a good, positive attitude toward each other, and are prepared to nurture the children's relationships with each other, they tend to fall off the rails when disagreements come up or the relationship between the adults get difficult. What's often needed then is to change the order, award or agreement to make the schedule more specific and less ambiguous. For example, instead of an agreement that says:

> "Morgan will have parenting time from Friday to Sunday."

You might try something like this:

> "Morgan will have parenting time from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. Morgan will be responsible for picking the child up on Fridays and Pat will be responsible for picking the child up on Sundays."

At least this nails down when the person's parenting time begins and ends, and who is responsible for doing the pick-ups. Even better would be an agreement that says:

> "Morgan will have the child from Friday at 4:00pm or the end of the school day, whichever is earlier, to the following Sunday at 6:00pm, every other week. If the Friday is a statutory holiday or a non-instructional school day, Morgan will have the child from Thursday at 4:00pm or the end of the school day, whichever is earlier. If the Monday following the Sunday is a statutory holiday or a non-instructional school day, Morgan will have the child until Monday at 6:00pm.
>
> "Morgan will be responsible for picking the child up at the beginning of her parenting time with the child and Pat will be responsible for picking the child up at the conclusion of Morgan's parenting time with the child.

> "In the event that Morgan is unable to care for the child during their parenting time, Morgan will give at least two days' notice to Pat.
>
> "On Fathers' Day, Morgan's parenting time with the child will be suspended from 10:00am to 2:00pm, during which time Pat will have the child.
>
> "Morgan's parenting time with the child will be suspended during the summer, winter, and spring school holidays, during which periods the following special holiday parenting schedule will prevail ..."

In general, the degree of specificity in a schedule for parenting time or contact is directly proportionate to the level of conflict between the parties. I have seen parents in extraordinarily high levels of conflict work out parenting schedules that go on for ten single-spaced pages in mind-numbing detail, and parents in very low levels of conflict who can effectively manage a parenting schedule contained in a single sentence:

> "The parties will share the child's time on an alternating weekly basis."

It's important to know that while a high degree of specificity might solve some problems, it can create others. The purpose of very detailed orders, awards or agreements is to take away flexibility and discretion so that everyone can count on the schedule unfolding as intended. However, there are times when something unexpected comes up, like the death of a close relative or the opportunity to go on a spur-of-the-moment holiday, that requires the flexibility detailed schedules take away, and people with detailed schedules cannot depend on the other adults involved being willing to accommodate a temporary change, no matter how important the reasons for the change might be.

Reducing time with a child

Cases in which orders, awards and agreements about parenting time and contact have been varied to reduce someone's parenting time or contact have included circumstances such as when:

- a party has moved far enough away so that the original schedule has become impossible to comply with,
- an older child has expressed a wish not to see a party, or a wish to see them less often,
- a party has developed a mental or physical illness such that the children's health and welfare are at risk in their care,
- the relationship between the adults has worsened to the point that they can no longer cooperate with each other,
- a party has attempted to interfere with a child's relationship with another party, or
- spending time with a party is proving harmful to the children's mental or physical health and welfare.

Where there are allegations involving mental health issues, substance abuse, parenting capacity, or the children's wishes, it is often essential to have a psychologist, psychiatrist, clinical counsellor or social worker provide an assessment of the needs of the child, the views of the child, or the ability of each of the child's caregivers to meet the child's needs. These assessments are available under section 211 of the *Family Law Act* and can give the court the critical information it needs about the best interests of the child before it changes an order, award or agreement about parenting time or contact.

Increasing time with a child

Of course, orders, awards and agreements about parenting time and contact can also be changed to increase the amount of time a person has with a child. Cases in which this has happened have included circumstances such as when:

- a child has grown older and more mature, better able to handle longer amounts of time with one or more parties,
- a party has interfered with a child's relationship with another party, so that more time was required to restore the relationship,
- a party was interfering with and unreasonably limiting the time provided to the other person in an order or agreement,

- a problem that had been limiting the time the child could spend with a party, such as long work hours, ill-health or a problem with substance abuse, has resolved, or
- an older child has expressed a wish to see a party more often.

These are just a few of the circumstances in which a person's time with a child can be increased from the amount provided in an order, award or agreement. As long as there has been a change in circumstances since the order, award or agreement about parenting time or contact was made and the increased time is in the children's best interests, schedules can be adjusted.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Aid BC's Family Law website's information page "Court orders" [7]
  - See "Change an order or set aside an agreement made in BC" and "When can you change a final order?"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 22 August 2022.

References

[1] http://canlii.ca/t/gnftl
[2] https://canlii.ca/t/fz3fl
[3] https://canlii.ca/t/hzqpb
[4] https://canlii.ca/t/hnw49
[5] https://canlii.ca/t/jhbvk
[6] https://canlii.ca/t/j0l6d
[7] https://clicklaw.bc.ca/resource/4645

Enforcing Orders, Awards and Agreements Involving Children

Final orders, awards and agreements about arrangements for parenting and contact after separation are meant to give parents and other adults involved in children's lives a set of rules that describe how decisions affecting children are to be made, how much time each of the adults will have with the children, and when each adult's time with the children begins and ends. The purposes of rules about these things include: creating certainty about where the kids will be and when they'll be there; allowing parents to make plans for holidays, trips and special occasions well in advance; and, most importantly, reducing conflict between the adults involved in the children's lives. When one or more of the parties to an order, an award or an agreement doesn't follow those rules, these benefits are lost and it may be necessary to take steps to enforce the order, award or agreement so that everyone does the things the rules require them to do.

The process for enforcing orders generally is discussed in the Resolving Problems in Court chapter, especially within the online chapter sections which are updated frequently. The process for enforcing agreements generally is discussed in the section Enforcing Agreements in the Family Law Agreements chapter. Under section 19.20 of the *Family Law Act*, arbitrator's awards are enforced as if they are court orders.

This section talks about the special processes and remedies available for enforcing orders, awards and agreements about arrangements for parenting and contact under the *Family Law Act*, as well as the enforcement of orders under the *Divorce Act*.

Introduction

The Canadian justice system is based on the idea that people will follow court orders and arbitration awards, and the agreements they have made, because they know it's the right thing to do. When people don't live up to their obligations, steps must sometimes be taken to make them do what an order, award or agreement requires. It's important to know, however, that neither judges nor arbitrators police their own orders and awards, to make sure everyone is doing what they're supposed to do, and that no one is keeping an eye on whether someone is living up to their obligations under agreements they've signed. When there's a problem, it's up to the parties to the order, award or agreement to do something about it.

Problems with the terms of an order, award or agreement about parental responsibilities or decision-making responsibilities might arise when a party to the order, award or agreement:

- takes steps or makes decisions affecting the children without first consulting the other party, when the parties share parental responsibilities or decision-making responsibilities,
- refuses to meaningfully consult with the other party about steps that must be taken or decisions that must be made, when the parties share parental responsibilities or decision-making responsibilities, or
- takes steps or makes decisions about parental responsibilities or decision-making responsibilities that are allocated to another party.

Problems with the terms of an order, award or agreement about parenting time or contact might arise when a party:

- fails to exercise the parenting time or contact to which they are entitled,
- is constantly law picking up the children to exercise the parenting time or contact to which they are entitled,
- refuses to give the children to a party entitled to parenting time or contact without a good reason for doing so,
- is constantly late transferring the children to a party entitled to parenting time or contact,
- arranges for the children to be unavailable for the parenting time or contact another party is entitled to have with them, or
- abuses any discretion they might have to withhold the children from a party entitled to parenting time or contact.

Both the Supreme Court and the Provincial Court have the ability to enforce orders made under the *Divorce Act* and the *Family Law Act*, using laws like the *Court Order Enforcement Act* [27] and certain parts of the *Family Law Act* that talk about enforcement. The Supreme Court can also enforce orders under the Supreme Court Family Rules [1] and the common-law rules about contempt of court. Enforcement under these laws requires making an application to court, and it's up to you to make the application.

The Supreme Court has the ability to enforce arbitration awards the way it enforces court orders, under section 19.20(1) of the *Family Law Act*. This also requires making an application to court, and it's your responsibility to make this application as well.

Both the Supreme Court and the Provincial Court have the ability to enforce agreements under the *Family Law Act*. It won't be a surprise to learn that enforcing agreements requires making an application to court, and that it's up to you to make the application.

It's important to know that the *Criminal Code* [11] lists a number of criminal offences connected with orders about parenting time and contact, although I wouldn't describe these offences as options for enforcement as they require the involvement of police and "crown counsel," lawyers who work for the government and prosecute criminal offences, and aren't steps that a party to an order can take on their own. First of all, section 127 of the *Criminal Code* makes it an offence to fail to obey a court order other than an order for the payment of money. However, other sections of the *Code* describe other offences more specifically related to parenting time and contact:

- section 279: it is an offence to kidnap a person, including a child, with the intention of keeping the person against their will (kidnapping)
- section 280: it is an offence to take a child under age sixteen out of the possession and against the will of the child's guardian or parent (abduction of a person under sixteen)
- section 281: it is an offence for someone who is not a guardian or parent to take or entice away a child under age fourteen with the intention of depriving a guardian or parent of the child (abduction of a person under fourteen)
- section 282: it is an offence for a guardian or parent to take or entice away a child under age fourteen contrary to the terms of a parenting order with the intention of depriving a guardian or parent of the child (abduction in contravention of custody or parenting order)
- section 283: it is an offence for a guardian or parent to take or entice away a child under age fourteen, whether there is a parenting order in place or not, with the intention of depriving a guardian or parent of the child (abduction)

It's important to read these sections of the *Criminal Code*, as well as the defences available under sections 284 and 285, to really understand how these offences work and the circumstances in which criminal charges require the approval of the Attorney General.

Enforcement under the *Divorce Act*

The *Divorce Act* doesn't talk much about enforcing orders other than orders about child support and spousal support. All the act has to say about enforcing orders about decision-making responsibilities, parenting time and contact appears in section 20, which says this:

> (2) An order made under this Act in respect of support, parenting time, decision-making responsibility or contact and a provincial child support service decision ... have legal effect throughout Canada.
>
> (3) An order or decision that has legal effect throughout Canada under subsection (2) may be
>
> (a) registered in any court in a province and enforced in like manner as an order of that court; or

> (b) enforced in a province in any other manner provided for by the laws of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

In other words, a *Divorce Act* order about parenting arrangements and contact that's made in Nova Scotia can be registered in British Columbia and be enforced by the courts of British Columbia, and vice versa. (The *Family Law Act* takes the same approach to the registration and enforcement of orders made outside the province at section 75 of the act.)

In British Columbia, *Divorce Act* orders are enforced by the Supreme Court under the Supreme Court Family Rules [9], the common-law rules about contempt of court, and the special rules that apply to contempt applications. A "contempt application" is an application for an order that someone be found "in contempt of court" because they have intentionally breached a court order, either by not doing something that the order requires them to do or by doing something that the order says they must not do. If the court decides that someone is in contempt of court, it can also decide to punish that person by, for example, ordering that they pay a fine or spend time in jail. See the discussion about contempt applications in the Enforcing Orders section of the chapter Resolving Problems in Court.

The court's primary goal in deciding if and how to punish someone who has breached an order is to get them to comply with the order. Most of the time, the court will give someone the opportunity to "cure" their contempt by complying with the order before punishing them, or instead give them a warning that future breaches of the order will be dealt with more severely.

The court may be more open to dealing with breaches of orders about decision-making responsibilities, parenting time and contact by changing the order instead. A schedule of parenting time or contact that is vague may be changed, or "varied," to be more specific and give all of the parties less discretion to decide how and when parenting time or contact will happen. An order about decision-making responsibilities might be changed to give a party the final say about particular decisions when the parties don't agree, or to remove a party's right to contribute to particular decisions.

Enforcement under the *Family Law Act*

The Supreme Court can enforce *Family Law Act* orders under the Supreme Court Family Rules [9], the common-law rules about contempt of court, and the special rules that apply to contempt applications in the same way that it can enforce *Divorce Act* orders. (The Provincial Court generally cannot punish people for contempt.)

However, the *Family Law Act* has rules about enforcing orders, awards and agreements that the court will usually turn to first, before deciding to deal with a problem through its contempt powers. These rules are available in the Provincial Court as well as the Supreme Court.

Parental responsibilities

There are no special rules for enforcing orders, awards and agreements about parental responsibilities under the *Family Law Act* other than the general rules about enforcing orders, awards and agreements. Orders, awards and agreements about parental responsibilities are enforced like any other order, award or agreement.

Section 230(2) of the *Family Law Act* describes the court's general enforcement powers and says this:

> (2) For the purposes of enforcing an order made under this Act, the court on application by a party 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.

(Remember that, under section 19.20(1) of the *Family Law Act*, an arbitration award can be filed in court and then be enforced as if the award was a court order. Section 44(3) says the same thing about agreements about parental responsibilities.)

In A.J.F. v N.L.S. [2], a 2020 decision of the Supreme Court, the court talked about section 230, and section 228 about the enforcement of conduct orders, and summarized the case law to date:

> [85] The measures set out in ss. 228 and 230 should be resorted to when, and only to the extent, necessary and appropriate to enforce and secure compliance with orders made under the FLA. Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders.
>
> [86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: s. 199(1). The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court.

If none of the remedies under section 230 are effective in getting a person to comply with an order, award or agreement about parental responsibilities, section 231 of the *Family Law Act* gives the court the power to put someone in jail for up to 30 days:

> (1) This section applies if
>
> (a) a person fails to comply with an order made under this Act, and
>
> (b) the court is satisfied that no other order under this Act will be sufficient to secure the person's compliance.
>
> (2) Subject to section 188, the court may make an order that a person be imprisoned for a term of no more than 30 days.
>
> (3) For the purposes of subsection (2),
>
> (a) a person must first be given a reasonable opportunity to explain his or her non-compliance and show why an order under this section should not be made,
>
> (b) for the purpose of bringing a person before the court to show why an order for imprisonment should not be made, the court may issue a warrant for the person's arrest, and
>
> (c) imprisonment of a person under this section does not discharge any duties of the person owing under an order made under this Act.

Before the court will even consider putting someone in jail under this section, it must first be satisfied that the person has in fact breached an order and that no other step under the *Family Law Act* is likely to get the person to comply with the order. Then, the person must be given the chance to explain why they breached the order and why they shouldn't be sent to jail.

Parenting time and contact

The *Family Law Act* has special rules about enforcing orders, awards and agreements about parenting time and contact. The rules about withholding parenting time or contact from someone entitled to parenting time or contact are in sections 61 and 62 of the act, and the rules about a person's failure to exercise the parenting time or contact to which they are entitled can be found in section 63.

When parenting time or contact is denied

Section 61(1) of the *Family Law Act* allows a person with an order or agreement giving them parenting time or contact to apply for certain orders when their parenting time or contact has been "wrongfully denied" by a guardian. (Under section 19.20 of the act, arbitration awards are enforced like court orders, so this section applies to awards as well.) The orders that can be applied for are listed in section 61(2) and include orders that:

- the parties participate in a dispute resolution process, such as meeting with a Family Justice Counsellor or participating in parenting coordination, mediation or arbitration,
- one or more of the parties or the child attend counselling,
- the person denied parenting time or contact have make-up time with the child,
- the guardian denying parenting time or contact reimburse the person for expenses they incurred as a result of the denial, such as travel costs and child care costs,
- transfer of the child between the parties be supervised,
- the guardian denying parenting time or contact pay money into court as a guarantee that they will comply with another order made under section 61(2), and
- the guardian denying parenting time or contact report to the court.

Under section 61(2)(g), the court can also make an order that the guardian denying parenting time or contact pay up to $5,000 as a fine or to the person denied parenting time or contact.

The key to section 61 is that the denial of parenting time or contact must be "wrongful." Obviously, the intentional breach of an order, award or agreement for parenting time or contact is wrongful. However, section 62(1) of the *Family Law Act* lists some specific, and rather reasonable, circumstances in which a denial of parenting time or contact is *not* wrongful, namely when:

> (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
>
> (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
>
> (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner or nurse practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
>
> (d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;
>
> (e) the applicant
>
> (i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and

> (ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;
>
> (f) other circumstances the court considers to be sufficient justification for the denial.

(In this section, "the applicant" is the person who was denied parenting time or contact and is asking the court for an order under section 61(2).)

It's important to know that even if a particular denial of parenting time or contact isn't "wrongful" under section 62(1), the court can still order make-up time under section 62(2).

If none of the remedies under section 61 are effective in getting a guardian to comply with an order, award or agreement about parenting time or contact, the person denied parenting time or contact can apply to court for one or more of the "extraordinary remdies" described in section 231 of the *Family Law Act*. These remedies include orders that:

- the guardian be put in jail for up to 30 days, under section 231(2), and
- a peace officer "apprehend the child and take the child" to the person entitled to parenting time or contact, under sections 231(4) and 231(6).

Before the court will even consider putting someone in jail or requiring that a peace officer apprehend a child under this section, it must first, under section 231(1), be satisfied that the person has in fact breached an order and that no other step under the *Family Law Act* is likely to get the person to comply with the order.

When parenting time or contact isn't exercised

Section 63 of the *Family Law Act* talks about the other side of the problem, when someone who has parenting time or contact fails to exercise their parenting time or contact. This is an important problem because of the emotional harm that can be caused to children when an important adult in their lives has decided not to see them, or sees them only sporadically.

Section 63 applies when "a person fails repeatedly to exercise the parenting time or contact with the child to which the person is entitled under an agreement or order, whether or not reasonable notice was given." (Under section 19.20 of the act, arbitration awards are enforced like court orders, so this section applies to awards as well.) The orders that can be applied for are listed in section 63(1) and include orders that:

- the parties participate in a dispute resolution process, such as meeting with a Family Justice Counsellor or participating in parenting coordination, mediation or arbitration,
- one or more of the parties or the child attend counselling,
- transfer of the child between the parties be supervised,
- the person failing to exercise parenting time or contact reimburse the other person for expenses they incurred as a result of the failure, such as travel costs and child care costs,
- the person failing to exercise parenting time or contact pay money into court as a guarantee that they will comply with another order made under section 63(1), and
- the person failing to exercise parenting time or contact report to the court.

Although the court has the power to put someone in jail, under section 231(2) of the *Family Law Act*, if none of the remedies available under section 63 are effective in getting a person to exercise the parenting time or contact to which they are entitled, the court is more likely to make the decision to simply terminate the person's entitlement to spend time with the children.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Links

- Legal Aid BC's Family Law website's information page "Court orders" [7]
  - See "Change an order or set aside an agreement made in BC" and "When can you change a final order?"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 25 August 2022.

References

[1] https://canlii.ca/t/55dgb
[2] https://canlii.ca/t/j4hhx

Child Support

Child Support

Child support is money paid by one parent or guardian to the other to help cover the expenses associated with raising the children. The amount of child support payable is usually fixed according to tables contained in the Child Support Guidelines, which sets support according to the number of children and the income of the person paying support. While there are some exceptions to the Guidelines, the amount of child support payable is almost always set using the tables.

This section discusses the basics of child support, and child support orders or agreements under the *Divorce Act* and the *Family Law Act*. It talks about how to get a child support order inside and outside of British Columbia. It also looks at the income tax implications of child support, what happens when someone entitled to receive child support goes on social assistance, and the rights of children to claim child support. Child support for adult children is also discussed.

Other sections in this chapter look at the Guidelines in more detail. They also talk about the exceptions to the Guidelines, how to make changes, and how to deal with arrears of child support.

Introduction

After parents separate, they usually find that their individual financial situations have gotten worse. Instead of the family income paying for one rent or mortgage payment, one phone bill, one electricity bill, one gas bill, one cable bill and so forth, the same amount of income must now cover two rent payments, two phone bills, two electricity bills, two gas bills and two cable bills. If a child lives mostly with one parent, that parent will inevitably wind up paying for more of the child's expenses for things like school fees, food and clothing, as well as accommodation. Child support is intended to help distribute the cost associated with raising a child between the child's parents and other people who may be responsible for supporting the child, including stepparents.

Child support is a payment made by one parent or guardian, the *payor*, to the other parent or guardian, the *recipient*, to help meet the costs the recipient bears paying for the child's needs. The payment of child support is intended to maintain or improve the child's living conditions. Child support is not a supplement to spousal support; it's money that is paid for the benefit of the child, not the parent with whom the child lives. Of course, there's often some overlap between the recipient's expenses and the child's expenses, like the cost of groceries and the cost of utilities.

It's important to understand that child support is not a fee paid in exchange for time with the child. With some exceptions, such as child support for children over 19 and circumstances where the child's time is being shared equally or almost equally, child support is not related to the payor's parenting time or contact.

Child support is payable on the principle that all of a child's parents have a legal duty to financially contribute to the child's upbringing. The simple fact of being a parent triggers this obligation, even if the payor never sees the child and has no role in the child's life. Child support can also be payable by stepparents and people who are guardians and not parents, although the rules are slightly different for these people and their obligation is often affected by a biological parent's obligation.

An order for child support can be made under section 15.1 of the federal *Divorce Act* or section 149 of the provincial *Family Law Act*. Parents can agree on child support in a separation agreement, and arbitrators can make awards about child support. No matter what, the amount of support should, with only a few exceptions, satisfy the requirements of the federal Child Support Guidelines.

The Guidelines contain a series of tables, particular to each province and territory, which set out the amount payable based on the payor's income and the number of children for whom support is being paid. There are some exceptions to this basic rule; they are described later in this chapter. The tables were most recently updated on 22 November 2017. For most people, the changes resulted in a small increase in the amount of child support payable.

Both the *Divorce Act* and the *Family Law Act* require the court and parents or guardians to give child support priority over spousal support when both child support and spousal support might be payable. In other words, if there isn't enough money to pay both, child support will take priority. Going one step further, both child support and spousal support in most cases take priority over debt payments and other expenses, and both obligations survive the payor's bankruptcy.

The *Divorce Act*

Child support can be ordered under section 15.1 of the *Divorce Act*, but only if:

- the parents, or the parent and a step-parent, are or were married to each other, and
- at least one of the parents, or a step-parent, has lived in the province for at least one year immediately before a court proceeding started.

A claim for orders under the *Divorce Act* can only be started in the Supreme Court. The Provincial Court cannot deal with claims under the *Divorce Act*.

Parents who can't apply for child support under the *Divorce Act* can apply for child support under the *Family Law Act* either in the Provincial Court or Supreme Court.

Qualifying for child support

In the *Divorce Act*, children are referred to as *children of the marriage*, and a child must fall within the Act's definition of "child of the marriage" to be eligible for support. There are a couple of important definitions in section 2(1) of the act that help determine whether a child is a child of the marriage:

> "age of majority," in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age;
>
> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

As well, section 2(2) of the act says that:

> For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

Taken together, these definitions mean that:

- child support can be owing from an adoptive parent, as well as a biological parent,

- child support can be owing from stepparents (spouses who "stand in the place of a parent"),
- child support is payable until a child reaches the age of majority in the province where the child lives, age 19 in British Columbia, and
- child support can be payable after a child reaches the age of majority if the child is still financially dependent on their parents.

The *Divorce Act* says that an adult child can continue to be eligible for child support as long as they cannot "withdraw from the charge" of their parents. The two main reasons why a child might not be able to withdraw are because the child is going to university, or because the child has a serious, chronic illness that prevents them from becoming self-supporting. The factors a court will consider in deciding whether an adult child's academic career qualifies them as a "child of the marriage" often include:

- the age of the child,
- whether the academic program is full- or part-time, and whether the program is connected to the child's future employment,
- the child's ability to contribute to their own support through part-time work, student loans, grants, bursaries, RESPs, or other resources,
- the child's academic performance and dedication to their studies,
- the parents' financial situations, and
- any plans the parents may have made for the child's post-secondary schooling while they were still together.

In general, the courts will allow an adult child to benefit from child support for one program of post-secondary study — one degree or one diploma — so long as the child is enrolled full-time. Where one or both parents have high incomes and had always expected, while they were together, that the child would take an advanced degree, child support can be payable for more than one program of study.

Many post-secondary institutions consider that 60 percent of a full course load is “full-time," and the courts usually go along with that approach.

While the amount of support for adult children is presumed to be the Guideline table amount, section 3(2) of the Guidelines allows the court to order a different amount that the court considers appropriate, taking into account the child’s needs and other circumstances, and the financial circumstances of the child and the parents.

Statutory provisions

The primary sections of the *Divorce Act* dealing with child support are these:

- section 2: definitions
- section 3: the court's authority to make child support orders when a spouse is asking for a divorce order
- section 4: the court's authority to make child support orders after the court has made a divorce order
- section 5: the court's authority to change child support orders after the court has made a divorce order
- section 15.1: child support
- section 15.3: child support has priority over spousal support
- section 17: applying to change an order

The *Family Law Act*

Parents and guardians can apply for child support under the *Family Law Act* whether they are married spouses, unmarried spouses, or were in no particular relationship with each other at all but had a child together. People other than parents can also apply for child support if they are caring for a child, including grandparents who are guardians of their grandchildren and people who have been appointed as a guardian of a child.

Both the Supreme Court and the Provincial Court can make orders for child support under the *Family Law Act*.

Qualifying for child support

Definitions play an important role in determining eligibility and responsibility for child support under the *Family Law Act*, just as they do under the *Divorce Act*. Section 147 of the *Family Law Act* says that each parent and guardian of a child is responsible for the support of that child, and section 146 defines *child*, *parent* and *guardian*:

> "child" includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians;
>
> "guardian" does not include a guardian
>
> (a) who is not a parent, and
>
> (b) whose only parental responsibility is respecting the child's legal and financial interests;
>
> "parent" includes a stepparent, if the stepparent has a duty to provide for the child under section 147(4);

Section 146 also gives a definition of *stepparent* for the definition of "parent," which mentions stepparents, and says that:

> "stepparent" means a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life.

(Remember that under the *Family Law Act*, "spouse" includes married people as well as people who lived together, in a romantic relationship, for at least two years or for less than two years if they have a child together.)

Section 147 puts some really important limits on support for children, and on when stepparents are and aren't responsible to pay child support:

> (1) Each parent and guardian of a child has a duty to provide support for the child, unless the child
>
> (a) is a spouse, or
>
> (b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.
>
> ...
>
> (4) A child's stepparent does not have a duty to provide support for the child unless
>
> (a) the stepparent contributed to the support of the child for at least one year, and
>
> (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent

> last contributed to the support of the child.

Section 149(3)(b) also says that an order can't be made against a stepparent until the stepparent and parent have separated. This means that while a stepparent and a child's parent live together, the stepparent has no legal duty to support that child, unless the stepparent becomes a guardian of the child.

As you can see, these definitions cast a very wide net and it's fairly easy to qualify as a "parent" who must pay child support. A few important points come from the case law on these definitions:

- All parents are responsible to pay child support, regardless of the nature of the parents' relationship with each other.
- Child support can be paid by stepparents and by guardians who aren't parents.
- Child support can be paid for the same child by more than one parent, guardian, and stepparent.
- A duty to pay child support can end before a child turns 19, if the child becomes a spouse or has left home and is supporting themself.
- Child support can be paid after a child turns 19 if the child is unable to withdraw from the care of their parents because of illness, disability, a reasonable delay in finishing high school, or attendance at a post-secondary school.

On that last point, the factors a court will think about in deciding whether a child's academic career continues to qualify the child for support are the same factors the court will think about under the *Divorce Act*, discussed above.

Stepparents and child support

The *Family Law Act* says that stepparents can be responsible for paying child support, just as biological and adoptive parents are responsible for paying child support. This has meant that in some cases, more than one person who meets the Act's definitions of "parent" and "stepparent" are required to pay child support for the same child at the same time. In fact, there are even cases in which a parent has been involved in a series of long-term relationships, each of which were long enough to create a child support obligation for each of the parent's partners.

A 2004 case of the Supreme Court, H.J.H. v. N.H.H. [1], decided under the old *Family Relations Act*, offers some guidance for stepparents trying to stick-handle around this issue. In H.J.H., the parties had been married for less than three years when they separated. Each had been previously married, and the problem centred around the wife's child from a previous relationship and whether the husband should have to support the child. The court found that the husband, who qualified as a stepparent under the act, was not responsible for paying support, because of the combined effect of the following factors:

- the marriage was short,
- the stepparent's relationship with the child broke down shortly into the marriage,
- the stepparent had no ongoing relationship with the child, and any such relationship with the child was opposed by the parent,
- the stepparent had a modest income, from which the stepparent was already paying support for two children from his previous marriage,
- the child's biological parent was paying child support for the child, and
- the parent had extended health and dental coverage for the child through her employment.

The *Family Law Act* helps to clear up some of these confusing issues. Section 147(5) says:

> If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
>
> (a) is secondary to that of the child's parents and guardians, and
>
> (b) extends only as appropriate on consideration of
>
> (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and

(ii) the length of time during which the child lived with the stepparent.

In most cases, stepparents won't be let off the hook entirely. Most of the time, the court will take a biological or adoptive parent's obligation into account when figuring out how much child support a stepparent should pay, look at the obligation of any non-parent guardians, and require stepparents only to make a sort of top-up payment rather than pay the full amount required by the Guidelines.

A few other important points come from the case law about stepparents and child support:

- The definition of "stepparent" includes anyone who has been the spouse of a parent and contributed to the support of the child for at least one year.
- The phrase "contributed to the support of the child for at least one year" does not mean for a whole, continuous calendar year. The 1999 Supreme Court decision in Hagen v. Muir [2] talks about this issue.
- Child support obligations may end for an adult child if the child makes a decision to stop having a meaningful relationship with the parent who pays support. The 1993 Supreme Court case of Farden v. Farden [3] talks about circumstances like these.
- Whether stepparents and adult children do or don't have an ongoing relationship may be important when deciding if child support should be paid and in what amount.
- Applications for child support from a stepparent under the *Family Law Act* must be brought within one year of the date of the stepparent's last contribution to the support of the child, and can only be made after the stepparent and parent have split up.
- What qualifies as “contribution” to the support of the child depends on the facts. Trivial or off-and-on contributions may not be enough, as the court in the 2007 Supreme Court case of McConnell v. McConnell [4] discussed.

Securing a child support obligation

The court may make a number of additional orders when it makes an order for child support to help make sure that child support continues to be paid, including after the death of the payor. Under section 170 of the *Family Law Act*, the court may:

- order that a charge be registered against property to secure a duty to pay child support,
- require a payor with life insurance to maintain their insurance policy and make the other parent or the child a beneficiary of the policy, or
- order that child support will continue to be paid after the payor's death, and be paid from the payor's estate.

Before the court makes an order that requires child support to be paid from the payor's estate, section 171(1) say that the court must consider:

- whether the recipient's need for support will survive the payor's death,
- whether the payor's estate is enough to meet the recipient's needs, taking into account the interests of the people who stand to inherit from the payor's estate and the creditors entitled to be paid from the payor's estate, and
- whether any other means exist to meet the recipient's needs.

It is important to know that, under section 26 of the *Family Maintenance Enforcement Act*, a person who receives child support can register a charge against real property belonging to the payor, even if child support is up to date and there are no arrears.

Child support when the payor dies

When a payor dies, the recipient can apply to court for an order under section 171(3)(b) of the *Family Law Act* that the payor's support obligation will continue and will be paid from the payor's estate.

When a recipient applies to continue a support obligation, or if a support order says that the obligation will continue past the payor's death, the payor's *personal representative*, the person managing the payor's estate and will, has the right to argue against the recipient's application and the right to apply to change or stop the duty to pay child support.

Statutory provisions

The primary sections of the *Family Law Act* dealing with child support are these:

- section 1: general definitions
- section 146: definitions specifically about child support
- section 147: the duty to pay child support
- section 148: agreements about child support
- section 149: orders about child support
- section 150: determining how much child support should be paid
- section 152: changing orders about child support
- section 170: securing a child support obligation
- section 173: child support has priority over spousal support

Getting a child support order

There are five things the court has to think about before it can make a child support order:

1. Does the person asking for the order have the right to claim child support?
2. Is the child entitled to benefit from the payment of child support?
3. Does the person against whom the order is sought have a duty to pay child support?
4. How much child support should be paid?
5. How long should child support be paid for?

First, the court must decide that the person applying for a child support order, the *applicant*, is able to make the application. Usually, this is just a matter of fitting into the definitions in the legislation. To make an order under the *Divorce Act*, the court must have jurisdiction to pronounce a divorce, which requires that the applicant must be or have been married to the person against whom the order is sought and must have lived in the province in which the application is made for at least one year. Under the *Family Law Act*, the applicant can be anyone included in the definitions of "parent" and "guardian." If the claim is being made against a stepparent, the claim must be made within one year after the stepparent last contributed to the child's support, it must be made after the stepparent and parent have separated, and it must be made within one year of separation.

Second, the court must find that the child qualifies as a "child" under the definition in the *Family Law Act* or as a *child of the marriage* under the definition in the *Divorce Act*. Under the *Family Law Act*, the court must also decide that the child is not a spouse and has not withdrawn from the care of their parents or guardians.

It is important that the application for child support is made while the child still qualifies for child support, otherwise, the court may not have the authority to make a child support order, even a retroactive child support order. There is sometimes an exception to this general rule for applications to change child support orders made under the *Divorce Act*; the 2015 Court of Appeal decision in MacCarthy v. MacCarthy [5] and the 2017 case of Colucci v. Colucci [6] from the Ontario Court of Appeal talk about this problem. However, the Supreme Court of Canada's 2020 decision in Michel v. Graydon [7] said that child support orders under the *Family Law Act* can be changed under section 152 of the act, whether or not the child is still a "child" under the act.

Third, the court must find that the person against whom the claim is made has a duty to pay child support. This is also a matter of fitting into the definitions.

If the first three conditions have been met, the fourth decision the court must make is to figure out how much the payor should pay. The court must first decide what the payor's annual income is, using the parties' financial information, and then fix the amount of support payable according to the tables set out in the Child Support Guidelines based on the number of children and the payor's income. There are exceptions to this basic rule, which this chapter discusses in the section Exceptions to the Child Support Guidelines.

Fifth, the court will look at how long the payor's obligation should last. This issue is not always argued about, as both the *Divorce Act* and the *Family Law Act* have cut-off dates after which children are no longer eligible to receive support. Most orders and agreements say that child support shall be paid "until," for example, "the child is no longer a child of the marriage as defined by the *Divorce Act*," "the child is no longer a child as defined by the *Family Law Act*," or "the child reaches the age of 19." The question of a stop date for support usually only crops up where the child is an adult engaged in post-secondary studies or is otherwise "unable to withdraw from the charge" of their parents.

The situation can be more complicated for payors who are not parents, namely stepparents and guardians who are not parents. How much child support should be paid, and for how long, depend on whether or not the biological parent is or should be paying child support. Often a stepparent is required to pay less child support than what the Guidelines tables would normally require, taking into account what the biological parent is or should be paying. A recipient may be required to make a claim for child support against the biological parent before the court will make orders against a stepparent or a guardian who is not a parent.

Getting an order inside British Columbia

A parent or guardian who is asking for a child support order can apply for that order in either the Supreme Court or the Provincial Court. (If there are claims for divorce or dividing property, which only the Supreme Court can deal with, it usually makes sense to ask for child support in the Supreme Court. You might as well deal with everything in one court.) Whichever court the parent or guardian wants to proceed in, they must start a court proceeding. The process for starting a court proceeding is described in the chapter Resolving Family Law Problems in Court, in the section Starting a Court Proceeding in a Family Matter.

Getting an order outside British Columbia

A parent or guardian living with a child in British Columbia who wants to get child support from someone living outside of the province has three choices:

1. start the process here, in British Columbia, using the provincial *Interjurisdictional Support Orders Act* [25],
2. start a court proceeding in the place where the other parent lives, or
3. start a court proceeding here under the *Divorce Act* or the *Family Law Act*, get a child support order, and then enforce that order in the place where the other parent lives.

The *Interjurisdictional Support Orders Act* allows a person who lives in British Columbia to start a process that will result in an order being made in the jurisdiction in which the other parent lives. The applicant fills out paperwork here, and gives it to the provincial Interjurisdictional Support Services [8] office. A staff member will forward that package to the Reciprocals Office [9] where the other parent lives, and the court there will have a hearing, on notice to the other parent, which may result in a child support order being made. The law that will apply is the law where the other parent lives, which will either be the *Divorce Act*, if the other parent is outside of Canada, or the local equivalent of British Columbia's *Family Law Act*, if the other parent lives elsewhere in Canada.

The *Interjurisdictional Support Orders Act* process applies in every province and territory. However, only certain countries have agreed to the *Interjurisdictional Support Orders Act* process. If the country where the other parent lives hasn't made an agreement with British Columbia about child support orders, someone who wants to get a child

support order will normally have to start a court proceeding in the place where the other parent lives. This will require hiring a lawyer in that country, and the law that will apply will be the laws of that country, not the *Family Law Act* or the *Divorce Act*.

The countries that will cooperate with a proceeding under the *Interjurisdictional Support Orders Act* are:

- United States of America — all of the United States, including the District of Columbia, Puerto Rico, Guam, American Samoa, and the US Virgin Islands
- Pacific Ocean — Australia, Fiji, New Zealand (including the Cook Islands), and Papua New Guinea
- Europe — Austria, Czech Republic, Germany, Norway, Slovak Republic, Swiss Confederation, Gibraltar, and United Kingdom of Great Britain and Northern Ireland
- Caribbean — Barbados and its Dependencies
- Africa — South Africa and Zimbabwe
- Asia — Hong Kong and Republic of Singapore

See the Interjurisdictional Support Orders Regulation [26] for the current list.

Income tax issues

It used to be the case that the person paying child support could claim an income tax deduction for their support payments, while the recipient had to claim it as taxable income. Not anymore. Any child support payments made pursuant to a written agreement or court order made after 30 April 1997 are neither deductible for the payor nor taxable for the recipient.

The portion of a lawyer's bill attributable to obtaining, increasing, or enforcing a child support order is tax-deductible. The cost of defending a claim for child support is not deductible. Read the Canada Revenue Agency's Income Tax Folio S1-F3-C3, Support Payments [10] for the fine print, and speak to an accountant to get advice to see if you qualify to write off the portion of your lawyer's bill that relates to child support.

To claim this deduction, the lawyer must write a letter to the Canada Revenue Agency setting out what portion of their fees were attributable to advancing or enforcing a child support claim. If you intend to ask your lawyer for a letter like this, you should tell your lawyer as soon as possible — preferably the moment the lawyer takes your case! — so that they can keep a log of time spent on your claim for child support.

In a shared parenting situation, where each parent has a duty to pay child support to the other parent, the higher-income parent often just pays the difference between the higher amount they owe and the lower amount they would receive from the lower-income parent. This difference is called a *set-off amount*. In a court order or agreement, however, it matters how this arrangement is worded. Recently, the Canada Revenue Agency has decided that if the agreement or order says that only the higher income-earning parent pays child support, the Canada Revenue Agency will treat the situation as if there is only *one* payor and *one* recipient of child support.

In cases like this, the Canada Revenue Agency will not allow the parents to share child tax deductions or grants, and will not allow the parents to claim the children as dependents when they file their taxes. As a result, it's a good idea to make sure that your agreement or order says that *each* parent pays child support to the other. And it's probably best to not even mention the set-off amount actually paid. You can do the math to figure that out yourself. An agreement might, for example, say something like this:

> 1. The parenting arrangements for the children qualify as "shared parenting time" within the meaning of the federal Child Support Guidelines because Parent 1 and Parent 2 anticipate that the children will live with each of them not less than 40% of the time.
>
> 2. For the purposes of determining the amount of child support payable under the Guidelines, Parent 1 and Parent 2 agree that:

(a) Parent 1's annual income for the calculation of child support is $_____, and

(b) Parent 2's annual income for the calculation of child support is $_____,

(c) such that Parent 1 will pay Parent 2 the sum of $_____ as child support for two children, and Parent 2 will pay Parent 1 the sum of $_____ as child support for two children.

Some lawyers and accountants even suggest that actual cheques for the full amounts should be exchanged to show that each parent pays child support to the other parent.

Applying for child support from someone receiving social assistance

You can apply to receive child support from a parent who is receiving social assistance or disability social assistance, but don't expect to get much for your trouble. The Guidelines do not require that a parent pay child support if the parent's annual income is less than $12,100 per year. Social assistance or disability assistance payments, which are non-taxable, would be subject to a *gross up* for child support calculation purposes. ("Grossing-up" is explained more in the Child Support Guidelines section of this chapter, but it's essentially a process for adjusting the income used to calculate someone's child support obligation when they don't pay as much tax on their income as other people usually do.)

Even if you're not likely to get a lot of money in child support, it may be a good idea to make the application and get an order, since the order will at least establish the payor's obligation to pay child support. It's often easier to ask for an increase in the amount payable later on, when the payor is back on their feet, than it is to apply for an original child support order later on. As well, some people who might be normally responsible to pay support, like a stepparent, may lose their obligation to pay support under the *Family Law Act* if the application isn't made within a year of the person's last contribution to the child's support. It can be critical to get an order that child support be paid early on.

Children's right to claim child support

In almost all cases, it is the parent who claims child support on behalf of a child, not the child. However, the right to benefit from the payment of child support belongs to the child, not the parent. As a result, if child support is the right of the child, adult children should be able to ask for support on their own, without having to go through a parent to get it.

When there is an order between the parents

A parent can only be subject to a single order to pay child support for a particular child, and if there is an order between the parents to pay child support, an adult child cannot obtain a new order. The adult child can, however, apply to enforce the old order if their parents are not complying with the order and arrears of support are owed.

When someone does not pay child support, or pays less than they are required to pay, "arrears" build up. Arrears are the sum of money that should have been paid according to the court order or an agreement but wasn't paid. Arrears are a "judgment debt," just like any other debt owing because of a court order that requires someone to pay money to someone else. Judgment debts can be enforced under the provincial *Court Order Enforcement Act* [27], which allows the debtor's wages and benefits to be garnished, and allows real property and personal property to be sold to pay off a judgment debt. Interest, calculated under the *Court Order Interest Act* [11], is owing on judgment debts.

An adult child who is the subject of a child support order can apply to enforce any arrears as a judgment debt. The child can apply to enforce the old order starting when they become an adult able to sue someone else, age 19 in British Columbia.

The *Limitation Act* [12] does not apply to claims for arrears of child support payable under a judgment or an agreement that has been filed with the court; see section 3(1)(l) of the act.

When there isn't an order between the parents

Nothing prevents an adult child from applying for child support, as long as the child would normally be entitled to receive child support, but it can be a bit complicated.

First, the child cannot apply for child support under the *Divorce Act*, because that act only applies to people who are "spouses," defined as people who are or who used to be married to each other; under section 15.1 of the act, the court can only order a *spouse* to pay child support. The only other law that might apply is the *Family Law Act*. Section 147(1) of the *Family Law Act* says that "each parent and guardian of a child" is responsible for supporting that child; section 149(2)(b) says that a child can apply for a support order.

Second, for so long as the child's parents are together and the child continues to live with them, the child will not be entitled to ask for a child support order as the court will assume that the child's needs are being met.

Third, a child seeking a child support order must qualify as a *child*, as defined by section 147 of the *Family Law Act*, in order to claim child support. While the court cannot grant a child a support order if the child doesn't qualify as a "child" within the meaning of the act, it is also the case that children under the age of 19 are under a "legal disability," which means they cannot start a court proceeding and apply for child support on their own. This leaves two options:

1. The child is 19 or older and applies for support as an adult child "unable to withdraw" from the care of their parents, and therefore still qualifies as a "child" entitled to receive support.
2. The child is a minor, less than 19 years old, and applies for support through a "litigation guardian."

If you are a child thinking of making a claim for child support, you really should speak to a lawyer. This area of the law is not straightforward at all.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines [5]
- *Criminal Code* [3]
- *Interjurisdictional Support Orders Act* [25]
- Interjurisdictional Support Orders Regulation [26]
- *Income Tax Act* [1]
- *Court Order Enforcement Act* [27]
- *Court Order Interest Act* [11]
- *Limitation Act* [12]
- *Family Maintenance Enforcement Act* [2]

Links

- Department of Justice's website: "Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement" [9] (list of reciprocals offices by province)
- Ministry of Attorney General Interjurisdictional Support Services [13] (BC reciprocals office)
- Canada Revenue Agency's Income Tax Folio: S1-F3-C3, Support Payments [10]
- Ministry of Attorney General's website: "Family Maintenance Services" [14]
- Dial-A-Law Script "Child support" [15]
- Legal Aid BC's Family Law website's information page "Child & spousal support" [16]
  - Under "Child support"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 24 August 2022.

References

[1] http://canlii.ca/t/1gfqg
[2] https://canlii.ca/t/1d290
[3] https://canlii.ca/t/1dk6h
[4] http://canlii.ca/t/1rn88
[5] https://canlii.ca/t/gmc40
[6] https://canlii.ca/t/hnz2p
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[8] https://www.isoforms.bc.ca/
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[13] http://www.isoforms.bc.ca
[14] http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/general-supplements-and-programs/family-maintenance-services
[15] http://www.clicklaw.bc.ca/resource/1235
[16] http://www.clicklaw.bc.ca/resource/1618

Child Support Guidelines

Often referred to as just "the Guidelines," the Child Support Guidelines [5] is a federal regulation, adopted by all of the provinces except Quebec, that describes the rules that the courts must apply when making an order for child support.

The most important feature of the Guidelines is the child support tables that fix the amount of support payments according to the annual income of the person paying support, the *payor*, the province the payor lives in, and the number of children support is to be paid for. The Guidelines cover pretty much every issue involved in calculating the amount of child support, including determining income, paying for children's special expenses and extraordinary expenses, figuring out the amount of support payable when the parents have the children for an almost equal amount of time, and figuring out the amount payable when one or more of the children have their primary home with each parent.

This section talks about the basic principles of the Guidelines, the sharing of special expenses and extraordinary expenses, the calculation of income, and the circumstances in which the income of a parent's or guardian's new partner may be taken into account. It also provides an example of a typical child support order.

Basic principles

Before the Child Support Guidelines became law in 1997, a person asking for child support, the *recipient*, had to prove how much support they needed to cover the cost of raising the children and that the person from whom support payments were sought, the *payor*, had the ability to pay that amount. Now, the amount of an order, award or agreement for child support is based on the amounts set out in the tables attached to the Guidelines. The Guidelines and its tables have reduced arguments between recipients and payors about child support, and have helped to ensure that children in similar circumstances benefit from the payment of similar amounts of child support. Today, most disagreements about child support tend to focus on income, children's special expenses and extraordinary expenses, and paying child support for adult children.

In most cases, the amount of child support is calculated using the Guidelines tables. The tables are updated from time to time, and were most recently updated on 22 November 2017. (If you are using a printed version of the child support tables to figure out how much child support should be paid, make sure that your version includes the current table amounts!)

The Guidelines' key presumption is set out in section 3(1):

> Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.

This, however, is only a presumption, and can be challenged or *rebutted*, as is discussed in the next section in this chapter, Exceptions to the Child Support Guidelines. In the vast majority of cases, however, the amount of child support payable is calculated using the payor's gross yearly income, their income before taxes and most other deductions, at the time the order is made.

Over time, of course, the payor's income may go up or down. Both the payor and the recipient can make an application to change the original order or agreement so that the amount of child support reflects the payor's current income. The payor would usually make the application if their income has fallen, while the recipient would usually

make the application when the payor's income has increased. To avoid a situation where parents are continually making trips back to court to seek an adjustment of child support, it's a good idea to include a term in the court order or agreement that requires both parents to regularly exchange income information, normally every year after taxes have been filed, so that child support can be adjusted from time to time without having to go to court.

Another important presumption in the Guidelines is that the amount of support payable is set according to the number of children to which each particular support order relates. If a payor has two children from one relationship and three from another, the first order will be based on the Guidelines amount for two children and the second will be based on the amount for three children. The payor's obligation is not based on the Guidelines amount for the total number of five children.

Finally, the amount of support payable is based only on the payor's income, unless there is a shared or a split parenting arrangement, in which case both parents' incomes are taken into account.

Special expenses and extraordinary expenses

The basic amount of child support a parent pays is presumed to cover a wide variety of common day-to-day expenses associated with raising children: the child's share of housing costs, utilities, clothes and shoes, groceries, diapers, toiletries, school field trip fees, entertainment, haircuts, and so forth. The basic amount of support is not always presumed to include certain other kinds of expenses that are infrequent but costly, such as the cost of daycare or orthodontic work. In addition to the basic amount of support payable, the parents may also be required to cover their respective portions of these other expenses, as long as they qualify as *special expenses* or *extraordinary expenses* under the Guidelines.

Special expenses and extraordinary expenses are defined in section 7(1) of the Guidelines:

> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
>
> (e) expenses for post-secondary education; and
>
> (f) extraordinary expenses for extracurricular activities.

Special expenses and extraordinary expenses are shared between the payor and recipient in proportion to their incomes. These parts of the Guidelines are intended to ensure that, if either parent incurs significant additional expenses for the child's needs or activities, *both* parents will share the cost on the principle that it is in children's best interests to have such needs met or to participate in such activities.

If an expense is found to qualify as a special expense or an extraordinary expense, under the section 7(1) and section 7(1.1) definitions, the court may make an order that both parties pay extra money, in addition to the usual Guidelines amount of support, to cover all or a portion of the cost of the expense.

Qualifying expenses as "special expenses" or "extraordinary expenses"

Just because an expense appears to fall into one of the categories listed in section 7 of the Guidelines doesn't necessarily make it a shareable special expense or extraordinary expense. As well, just because an expense has been incurred doesn't mean it will automatically be shared; if you're not sure whether a planned expense will qualify as a shareable special expense or extraordinary expense, get some legal advice or talk to the other parent first to see if they will agree to share in the expense.

Special expenses are the expenses listed in section 7(1)(a), (b), (c), and (e). When the court is asked to decide whether it should make an order that an extra amount, beyond Guidelines child support, should be paid to contribute to the cost of these expenses, it must think about the test in section 7(1) and consider:

> ...the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation.

Extraordinary expenses are the expenses listed in section 7(d) and (f). When deciding whether the cost of primary- and secondary-school education expenses and extracurricular activities qualify as "extraordinary expenses," the court will apply described in section 7(1.1):

> (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
>
> (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
>
> (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
>
> (ii) the nature and number of the educational programs and extracurricular activities,
>
> (iii) any special needs and talents of the child or children,
>
> (iv) the overall cost of the programs and activities, and
>
> (v) any other similar factor that the court considers relevant.

Here's a helpful summary of how section 7(1.1) works from a 2010 case from the Supreme Court, Piper v. Piper [1]:

> "Under section 7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed or whether the expense exceeds her ability to pay without any consideration of the factors enumerated in section 7(1.1)(b). If the income cannot cover the expense, the expense is deemed to be extraordinary and the court's next analysis turns to consideration of the factors enumerated in section 7(1) which, of course, brings into consideration the parties' means and pre-separation spending pattern."

Reasonableness

For lower-income families, fewer expenses will be considered "reasonable." Daycare and medical and dental costs will almost always be considered necessary and reasonable.

For parents with more money, more expenses are likely to qualify as reasonable, including:

- cosmetic orthodontic work,
- dance, music, and art classes, swimming lessons, and summer daycamps,
- less-expensive team sports, like soccer, baseball, and basketball,
- basic high-school graduation costs, such as tickets and gown or tuxedo rentals, and
- basic post-secondary education costs, such as tuition fees for a local college or university, student fees, and textbook costs.

For parents with a lot more money, almost every big-ticket expense is likely going to be considered reasonable, including:

- multi-week summer camps and trips abroad,
- private school fees,
- expensive team sports, like hockey and horseback polo, and expensive solo sports like skiing and scuba diving, and
- post-secondary education costs, including meal plans and residence costs.

Necessity

Sometimes the needs of the child will be more important than the burden of paying the cost of the expense borne by the parents, and an expense will qualify as a shareable special expense or extraordinary expense whether the cost is a hardship to the parents or not. These expenses usually include things like:

- medical costs, including costs that aren't covered by MSP such as autism therapies,
- counselling services, where the counselling is necessary for the child's mental health,
- tutoring services, where the child needs the extra help to get through school, and
- lessons or coaching in arts and sports, where the child has a special talent that should be nurtured.

A driver training course, for example, is unlikely to qualify as an extraordinary expense on the basis of necessity, since you can learn to drive and obtain a driver's license without it, as was decided in a 2011 case, M.S.J. v. J.M.J. [2] On the other hand, if a semester with Sylvan Learning Centre will mean the difference between passing or failing a grade, the tutoring would probably be considered a necessity.

Sharing qualifying expenses

Under section 7(2) of the Guidelines, expenses that qualify as special expenses and extraordinary expenses are generally shared by the parties in proportion to their incomes, after deducting any contribution to those costs made by the child or by the government, through things like grants or tax deductions. The idea here is to look at the total pot of money available to the child — the income of the payor plus the income of the recipient — and to figure out how much each party's share of that pot is, and then pay the child's special expenses according to each parent's share.

The easiest way to calculate a parent's *proportionate share* is to add the incomes of both parents together and then figure out what percentage each income is of the total. Here are two examples.

> **Example**
>
> If one parent earns $75,000 per year and the other $25,000, the total pot available to the child is $100,000. Of that sum, the first parent contributes 75% and the second parent 25%. As a result, the first parent would be ordered to pay 75% of the cost of all qualifying expenses, and the second parent would be required to pay the remaining 25%.

> **Example**

> If one parent earns $48,000 per year and the other $62,000, the total of their incomes is $110,000. The first parent's income is 43.6% of the total, and the other parent's income is 56.4% of the total. The first parent would have to pay 43.6% of the cost of all qualifying expenses, and the second would have to pay the remaining 54.6% of those expenses.

It's important to know that the cost that is being shared is the *net cost* of an expense, in other words, the amount that is actually being paid after any third-party contributions have been applied to reduce the expense. Daycare costs, for example, are sometimes subsidized for lower-income earners, and the amount paid by a parent is deductible from their income. Post-secondary expenses might be reduced by bursaries and scholarships, or be partly paid by an RESP. The cost of prescriptions might be offset by contributions from a workplace health and dental insurance plan. It is the net cost of the expense, after deducting any contributions and other savings, that parents share.

It's also important to know that sometimes the income of a parent's new partner may be taken into consideration in determining a parent's "means" in sharing a qualifying expense. In the 2000 Supreme Court case Baum v. Baum [3], the court held that the section 7(1) consideration of the "means of the spouses" should be interpreted broadly as including all sources of income available to the paying parent, including the contribution of a parent's new partner. Also see the case of Scott v. Scott [4], another Supreme Court decision from 2000.

Calculating income

Before the court even looks at the Child Support Guidelines tables it has to decide what the parents' incomes are. The tables set out the amount of child support payable according to the payor's income, and both parents' incomes will be relevant if there are special expenses or extraordinary expenses, if each parent has the primary home of one or more children, or if the parents share the children's time more or less equally.

The Guidelines require that the court use the most up-to-date information available. Sections 15 to 20 of the Guidelines set out the rules the court must apply in determining income.

According to Rule 5-1 of the Supreme Court Family Rules [3] and Rule 4 of the Provincial Court (Family) Rules [3], when someone makes an application for child support, the payor, or both the payor and the recipient, are required to disclose their financial circumstances using a court form called a Financial Statement. Financial statements require each party to set out their income and expenses, and assets and liabilities. Certain income documents must be attached to a financial statement, typically:

1. the last three years' tax returns, and what's required is the complete income tax and benefit return, not tax return "summaries" or "informations,"
2. all notices of assessment and reassessment received for the last three tax years,
3. the party's most recent paystub, showing their earnings to date, or if the party isn't working, then their most recent WCB statement, social assistance statement, or EI statement, and
4. business records like financial statements and corporate income tax returns, if the party has a company.

The basic rule here is that a party's income for the purposes of the Guidelines is the amount stated at line 15000 of the payor's most recent tax return, although there are important exceptions that apply when a person's income is from self-employment. A party's income includes all of the party's income, not just income from a job. *Income* might include bonuses, overtime, rental income, profit from stock options, company dividends, Workers' Compensation payments, long- and short-term disability payments, personal injury awards that relate to loss of income, pension income, government benefits, interest from an investment, and so forth, as well as employment and self-employment income.

Section 2(3) of the Guidelines requires that the most current income information be used; this can include a calculation of income based on paystub evidence. Most of the time income is based on the most recent tax year, since the income information for that year is complete. This means that there is usually a one-year lag between the amount of support being paid and the payor's income. The amount of support paid in 2023 will be based on income

earned and reported in 2022, and the amount paid in 2024 will be based on income from 2023. However, if a payor's current income can be known with certainty, such as if the payor is an employee who doesn't get bonus or commission income, child support can be determined using the payor's current income.

Government benefits

Payments from WCB, EI, CPP, Old Age Security, and social assistance all count as "income" under the Guidelines. If a party is receiving these payments as a temporary substitute for employment income, the party's income may be assessed at their usual income. A temporary period on social assistance, for example, won't entitle a payor to have their income assessed at that unusually low level into the future.

Note that Canada Child Benefits are not considered income for basic child support purposes, although they may be taken into account when determining the sharing of special expenses and extraordinary expenses.

Fluctuating income

When a party's income changes from year to year for reasons beyond the party's control, such as fluctuating commission sales or bonuses that are assessed by an employer, the court may take the party's income over the past three years into consideration in setting the payor's income. In certain circumstances, the court may fix the party's income as the *average* of their income over the last three years.

Unexpected losses and gains

Where a payor has suffered an unexpected loss, such as a corporate loss or an investment loss, or enjoyed an unexpected gain, such as from cashing in RRSPs or selling stock, the court has the discretion to decide to take this into consideration in setting the payor's income, and potentially *not* consider the loss or gain, if it was a one-time occurrence.

Court awards

If a payor has received an award from a civil court proceeding, such as for wrongful dismissal or for personal injury, the court may attribute the portion of the award allocated for *lost wages* to a payor's income. The whole amount of the award, including the parts relating to pain and suffering, will not be seen as income for the purposes of the Guidelines, just the part intended to compensate for lost wages.

Windfalls

Money received from an inheritance, the sale of a house, or a lottery win does not count as income under the Guidelines. Any interest or other investment income earned or that should reasonably be earned from the inheritance or lottery win would count as income.

Imputing income

To *impute* income means to attribute income to someone, above the income they say they earn, usually to ask for a support order based on that higher amount. Typically, someone asks the court to impute income to someone when the person:

1. works in the service industry, for example as a restaurant server or a taxi driver, and receives tip income that is not reported on income tax returns,
2. has quit or been fired from their job,
3. moves from full- to part-time work without a very good reason for the change,
4. is self-employed and either receives unpaid benefits from their company, like a company car, paid meals, or a cell phone, or doesn't report the full amount of money taken from the company,

5. has refused to provide full financial disclosure,
6. has or will have income from a trust,
7. has hidden or appears to have hidden some of their income, or
8. is not using resources at hand that could generate income, such as a vacant house that could be rented out or savings that could be invested.

If the court decides to impute income to a payor, child support will be payable at the Guidelines rate for the higher income. The parties' proportionate responsibility to contribute to the cost of any qualifying special expenses and extraordinary expenses may be based on imputed income, including income imputed to the recipient.

The court can decide to impute income for the purposes of calculating child support in other circumstances, such as when the payor is intentionally underemployed or unemployed, is splitting their income with a new partner, or pays a lower tax rate than usual.

Underemployment and unemployment

Section 19(1) of the Guidelines says that:

> The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;

In other words, the court may decide that someone has a different income than that which they say they have if the person:

- has quit a job in order to avoid paying child support,
- has taken lower-paying work than they used to have, or is capable of holding, in order to minimize the amount of child support payable, or
- has tried to reduce their income by claiming unreasonable deductions.

If you're going to make an argument that income should be imputed to someone, you will have to prove that one or more of the conditions described in section 19(1) exist. If someone's underemployment or unemployment is caused by childcare responsibilities, the court will not usually impute income.

It's not enough merely to *argue* that one of the circumstances listed in section 19(1) exist, you have to be able to *prove* that the circumstance exists. The following factors were discussed in a 2003 Supreme Court case, Nahu v. Chertkow [5], in determining whether someone is intentionally underemployed or unemployed:

- the payor's education, training, and work experience,
- the payor's previous earnings and past borrowing of funds during unemployment,
- the payor's work history,

- the payor's spending patterns and lifestyle,
- the payor's efforts to upgrade their education and work qualifications,
- the nature and quality of the payor's attempts to obtain employment, and
- any evidence that the underemployment or unemployment is motivated by ill will towards the recipient.

This last point, about the payor's ill-will, has to do with the idea that the payor is able to earn more but chooses not to. In a 1999 Supreme Court case called Hanson v. Hanson [6], the court had this to say on the subject:

> [14] The following principles apply when determining capacity to earn an income.
>
> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say that he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" ...
>
> 2. When imputing income on the basis of intentional underemployment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as the availability of work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be earned on the job. ... [C]ourts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in [poorly paid] employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations [to pursue] unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

"Grossing-up" income

Section 19(1) of the Guidelines also says that:

> The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax.

Under these sections of the Guidelines, people who have a lower income tax obligation than usual, such as certain First Nations persons living on reserve who might pay no federal taxes, or persons who live in another country with a lower tax rate, can have their income *grossed up* to reflect this tax advantage when child support is determined.

The grossing-up process essentially involves figuring out the amount of money the person would have to earn to have the same after-tax income at the tax rates normally applicable to residents of British Columbia. This will result in income being imputed to the payor, at that higher amount, and a corresponding increase in the amount of child support that will be payable.

The math behind grossing up someone's income is a bit complex. Essentially, the idea is to figure out the amount of income the person would have to earn before taxes in British Columbia to receive the amount they earn after taxes. Think of it like this:

Example

Say Parent 1 earns $100,000 per year. As a resident of British Columbia, Parent 1 pays income tax at a rate of, for example, 40%. This means that Parent 1's income, net of taxes, is $60,000 per year.

Parent 2 also earns $100,000 per year. Parent 2, on the other hand, lives in Texas and has an income tax rate of, for example, 25%. This means that Parent 2's net income is $75,000 per year.

Income for the purposes of the Guidelines would normally be calculated for both Parent 1 and Parent 2 at a gross income of $100,000. In reality, though, Parent 1 has a lot less money after income taxes are paid than Parent 2 does. Parent 2 actually has a lot more money than Parent 1, and ought to pay child support based on this additional money.

Parent 2's income would be "grossed up" to figure out what income they would have to earn here to have an after-tax income of $75,000. Since Parent 2 would pay income tax at a rate of 40% here, the court would consider Parent 2 to have a gross income of $125,000 for the purposes of child support, since tax of 40% on a gross income of $125,000 leaves a net income of $75,000.

Parent 1 and Parent 2 both have incomes of $100,000 per year. Parent 1 will pay his base amount of support at that income, but Parent 2 will pay at a grossed-up income of $125,000 to reflect what they would have to earn in British Columbia to have the after-tax income of $75,000 they have living in Texas.

Grossing-up a payor's income can be a bit tricky, and requires a knowledge of the income tax laws applicable to First Nations payors earning income on First Nations reserve lands and to payors earning income outside of Canada. If you have a problem in this area, you should consider hiring a lawyer to help you.

"Grossing-down" income

The same idea about grossing income up applies, in reverse, to people who live in places with higher tax rates. Someone who lives in a place where they pay higher income taxes than they would if they lived in British Columbia can have their income grossed down to reflect the money they'd have to earn, living here, to have the same after-tax income as they do living there.

Grossing-down a payor's income is also tricky. If you have a problem in this area, you should consider hiring a lawyer to help you.

Child support and parents' new partners

Parents and guardians usually move on with their lives after the relationship that produced their children has ended. They meet new people and enter into new romantic relationships. Parents and their new partners are often concerned about how their relationship will impact on the parent's obligation to pay child support and their proportionate share of the children's special expenses and extraordinary expenses. The parent might be concerned to know whether the new partner's income will be added to their income in calculating child support. The new partner will want to know whether they are now on the hook for support and must contribute to the parent's payments.

Basic child support payments

The income of a parent's new partner is not included in calculating the amount of child support, nor is a payor's new partner obliged to pay child support. The new partner will not inherit the child support obligation in the event the parent dies, and a recipient of support won't be able to pursue the new partner for continuing or supplemental payments. If the new partner and the parent separate, however, the new partner might become obligated to pay child support if they qualify as a "stepparent" to the children. See the discussion of stepparents' obligations in the first section in this chapter, Child Support.

When calculating the base amount of child support a parent must pay — that is, the parent's obligation under the Child Support Guidelines tables, before special expenses and extraordinary expenses — the court will only look at the parent's income. The income of the new partner is not taken into account.

"Undue hardship" claims

Section 10 of the Child Support Guidelines allows people to argue that the base amount of support set out in the Guidelines tables is too low or too high and would cause them *undue hardship* if the table amount was paid. Payors will argue that the base amount is too high, while recipients will argue that it is too low. If the court agrees, the court can make a child support order that is lower or higher than the amount in the tables. This chapter discusses exceptions to the Guidelines more thoroughly in the section, Exceptions to the Child Support Guidelines.

If undue hardship is claimed, the court must look at the standard of living in each parent's *household*, rather than the standard of living of each parent alone. This means that the court, in deciding whether there is undue hardship, will look at the total expenses and total income of each parent's household, including the income of each parent's new partner. This will not cause the new partner to be liable to pay support. It just means that their income will be taken into consideration to see whether the usual table amount of support payable is too high or low.

Incomes in excess of $150,000

The tables provided in the Child Support Guidelines set out the amount of support owing by people who earn up to $150,000 per year. The Guidelines provide a mathematical formula for figuring out what parents earning more than $150,000 must pay, while people earning less than $12,000 pay nothing.

Section 4 of the Guidelines deals with parents who earn more than $150,000 each year. Under this section, the income, or lack of income, of a parent's new partner may be taken into account in deciding whether the formula gives a fair result. The calculation of support owing by parents with incomes in excess of $150,000 is discussed in more detail in Exceptions to the Child Support Guidelines.

Section 4(b)(ii) of the Guidelines says that when considering the amount payable on top of the basic amount for a person whose annual income is $150,000, the court should apply the formula but take into account:

> ... the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children ...

In other words, the income of a new partner can be taken into account, under the general heading of a person's "financial ability," in determining whether the formula amount is fair.

Special expenses and extraordinary expenses

Section 7 of the Guidelines allows for the sharing of the children's qualifying special expenses and extraordinary expenses between parents, as discussed above. In figuring out how much a parent should have to contribute to these expenses, the court is required to take into account, among other things, "the necessity and reasonableness of the expense in relation to the means of the spouses and those of the child."

A parent's new partner's income can be taken into consideration in assessing the "means of the spouses," which is exactly what the court did in the 2000 Supreme Court case of Baum v. Baum [7]. In that decision, the court held that *means of the spouses* should be interpreted broadly as including *all* of the "means" available to the paying parent, including the financial contribution of their new partner.

Again, the new partner will not be responsible to pay child support or a share of the children's special expenses or extraordinary expenses as a result; only the parent's obligations will be affected by their new partner's income.

Death of the payor

A number of readers have asked whether they will have any responsibility to make child support payments if their partner, who is a parent or guardian with an obligation to pay child support, dies. The simple answer to that question is no, they won't be responsible. The fact that they are in a relationship with a paying parent doesn't necessarily mean that they will have a duty to keep paying support if that parent dies.

While that is a good general rule, and one you can probably rely on, it is possible that a claim could be made against the new partner as a "stepparent" of the child under the *Family Law Act*. The act says that all parents, guardians, and stepparents are required to support their children, but section 147 says that stepparents who are obliged to pay child support must have contributed to the support of the child for at least one year. In other words, someone who marries or begins to live with a paying parent may have an obligation if they have contributed to the support of the child. Again, while this is technically possible, orders against new partners following the death of the paying parent are extremely rare.

Agreements and orders for child support

Orders for child support

An order for child support typically contains the following elements:

- a statement of the names and birthdates of the children for whom support will be paid,
- a declaration of the payor's income, and of the recipient's income if their income is relevant,
- an order stating the Guidelines amount payable,
- an order about the exchange of income information, and
- an order about how long child support must be paid.

These elements look like this in a typical order made under the *Divorce Act*:

> UPON the Court being advised that the children of the marriage are
>
> Jesse Ann Doe, born on 1 March 2015, and
>
> Sandra Alexandra Doe, born on 1 April 2017;
>
> AND UPON the Court finding that the Claimant's income for the purposes of the Child Support Guidelines is $72,000.00 per year;
>
> THIS COURT ORDERS that:
>
> 1. The Claimant, Jane Doe, payor, will pay to the Respondent, John Doe, recipient, the sum of $1,092 per month, commencing on the first day of April 2022 and continuing on the first day of each and every

> month thereafter until such time as the children are no longer "children of the marriage" as defined by the *Divorce Act*; and,
>
> 2. The Claimant will provide to the Respondent a copy of her income tax return on the first day of May 2023 and continuing on the first day of May for each and every year thereafter, and copies of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment she receives in respect of those income tax returns within two weeks of her receipt of the same, and the parties will adjust the amount of child support payable by the Claimant to the Respondent as of the first day of June 2023, and continuing on the first day of June for each and every year thereafter for so long as the Claimant is obliged to pay child support to the Respondent.

Under the *Family Law Act*, the order would look like this:

> UPON the Court being advised that the children are
>
> Jesse Ann Doe, born on 1 March 2015, and
>
> Sandra Alexandra Doe, born on 1 April 2017;
>
> AND UPON the Court finding that the Claimant's income for the purposes of the Child Support Guidelines is $72,000.00 per year;
>
> THIS COURT ORDERS that:
>
> 1. The Claimant, Jane Doe, payor, will pay to the Respondent, John Doe, recipient, the sum of $1,092 per month, commencing on the first day of April 2022 and continuing on the first day of each and every month thereafter until such time as the children are no longer "children" as defined by the *Family Law Act*; and,
>
> 2. The Claimant will provide to the Respondent a copy of her income tax return on the first day of May 2023 and continuing on the first day of May for each and every year thereafter, and copies of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment she receives in respect of those income tax returns within two weeks of her receipt of the same, and the parties will adjust the amount of child support payable by the Claimant to the Respondent as of the first day of June 2023, and continuing on the first day of June for each and every year thereafter for so long as the Claimant is obliged to pay child support to the Respondent.

The point of the last paragraph of each of these sample orders is to require the payor to annually provide evidence of their income to the recipient so that both parties can decide whether an increase or a decrease in the amount payable is appropriate.

If the order includes special expenses and extraordinary expenses, it will usually include the following additional elements:

- a declaration of the recipient's income (including any spousal support they might be receiving),
- an order about which of the children's expenses, or the type of expenses, that qualify as special expenses and extraordinary expenses,
- an order stating the percentage contribution due for each parent to cover the children's special expenses and extraordinary expenses, and
- an order that both parents exchange income information each year.

Disclosure of income by both parents is also required in cases where one or more children live primarily with each parent and in cases where the parents share the children's time more or less equally.

It's a good idea to specify in a child support order whether the order is made under the *Divorce Act* or the *Family Law Act* as it could have an effect on a future application to change the original order. This was very important in the 2012 Court of Appeal case of Yu v. Jordan [8].

Agreements for child support

Separation agreements, like all family law agreements, have two types of statements. The *recitals* are statements that talk about the parties, their relationship and the circumstances in which the agreement was signed. The *operative clauses* in an agreement are the parts that say what each party has promised to do.

The recitals to a separation agreement about child support would include statements like these:

> D. Jane Doe is a plumber working for ABC Plumbing, earning about $72,000 per year.
>
> E. John Doe is a graphic artist working for Sunny Skies Art and Design, earning about $40,000 per year.
>
> F. Jane and John have two children, Jesse, who is 7, and Sandra who is 5.

The operative clauses about child support might say something like this:

> 15. Jane will pay child support to John in the amount of $1,092 per month, beginning on 1 April 2022 and continuing on the first day of each month thereafter for so long as Jesse and Sandra remain "children" as defined by the *Family Law Act*.
>
> 16. Jane will give John a copy of her income tax return by no later than May 1st each year, as well as copies of each Canada Revenue Agency Notice of Assessment or Notice of Reassessment within two weeks of her receipt of the same, for so long as Jane is required to pay child support to John.
>
> 17. Jane and John will adjust the amount of child support payable by Jane to John after reviewing Jane's income tax return, and the adjusted amount will be effective as of June 1st each year.

Both court orders and separation agreements should include the children's full names, birth dates, the amounts of child support, the amounts of the children's special expenses and extraordinary expenses, and the date when payments will start. These details are important so that the orders and agreements about child support can be enforced.

Child support tables and calculators

The simplified Child Support Guidelines Tables for British Columbia [9] are available from the website of the federal Department of Justice. The federal government has published an online child support calculator [6].

The provincial government also operates the BC Child Support Info Line that offers free information about child support and the child support tables. Contact the Info Line at:

- Lower Mainland: 604-660-2192
- Outside the Lower Mainland: 888-216-2211

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines [5]

Links

- Child Support Guidelines Tables for British Columbia [9]
- Federal Department of Justice's Child Support Table Look-up [10]
- Dial-A-Law Script "Child support" [15]
- Legal Aid BC's Family Law website's information page "Child & spousal support" [16]
  - Under "Child support"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 24 August 2022.

References

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[5] http://canlii.ca/t/1pt18
[6] http://canlii.ca/t/1d2x1
[7] http://canlii.ca/t/1fm6b
[8] http://canlii.ca/t/fspd1
[9] http://laws-lois.justice.gc.ca/eng/regulations/SOR-97-175/page-10.html#h-15
[10] http://www.clicklaw.bc.ca/resource/1175

Exceptions to the Child Support Guidelines

The court can, in limited circumstances, make orders for child support in amounts that are different than what would normally be required under the Child Support Guidelines tables. These are the exceptions to the Guidelines.

The same rules apply to parents and guardians who are making agreements about child support. But unless one of the Guidelines exceptions applies, the court is unlikely to uphold an agreement that provides for a child support payment that significantly departs from what would normally be required under the Guidelines tables.

This section talks about the most common exceptions to the Guidelines tables, namely situations where:

- the payor earns more than $150,000 per year,
- one or more of the children live primarily with each parent,
- the parents share the children's time more or less equally,
- a minor child has become financially independent,
- undue hardship is claimed, and
- other arrangements have been made for the direct or indirect benefit of the children.

Payors with incomes higher than $150,000

The tables set out in the Child Support Guidelines only go up to an annual gross income of $150,000. For incomes over that amount, the Guidelines provide formulas to calculate the amount of child support payable.

However, for payors with very high incomes, the formulas can result in child support payments that are so high they might begin to exceed what could reasonably be necessary to meet the children's expenses. As a result, section 4 of the Guidelines gives the court the flexibility to make an order for child support in an amount different than that generated by the formulas. Section 4 says this:

> Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
>
> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
>
> (iii) the amount, if any, determined under section 7.

The "amount determined under section 3," under section 4(a), is the formula amount. Section 4(b) allows the court to make an order other than in the formula amount if the formula amount is "inappropriate."

If the court decides that the formula amount is inappropriate, it will look at the parents' circumstances and the factors set out in section 4(b)(ii). While there is a very strong presumption that the Guidelines formulas are appropriate, this presumption can still be challenged, and the court will usually consider the following factors in making its decision:

- the financial circumstances of the parents and the general circumstances of their children,
- the means and needs of the parents and their children,
- the parents' spending patterns before separation and the standard of living in their homes before and after separation, and

- whether the sheer magnitude of the child support payments would effectively work as an alternative payment of spousal support or as a wealth transfer beyond the purposes child support is intended to achieve.

It's important to know that there must be clear and convincing evidence that the formula amounts would be inappropriate. There is a very strong presumption in favour of the Guidelines tables and formulas, and sufficient evidence must be presented before the court will conclude that the usual support payment would be inappropriate. Each case will be assessed individually, in the context of each family's particular financial circumstances and the children's needs.

Split parenting time and shared parenting time

The fundamental purpose of child support is to help pay for the expenses incurred by the parent or guardian who has the children most of the time, on the assumption that the person who has the children most of the time will bear a greater share of the direct and indirect costs associated with the children and their upkeep. Where parents have *split parenting time*, when each parent has the primary residence of one or more of the children, or *shared parenting time*, when the parents share the children's time equally or near-equally, these costs are presumed to be shared by both parents more evenly. As a result, the Guidelines make an exception to the normal rules for calculating child support.

Split parenting time

Section 8 of the Guidelines applies to split parenting time situations. Section 8 states that:

> 8. If there are two or more children, and each spouse has the majority of parenting time with one or more of those children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Where the primary residence of the children is split between the parents or guardians, the amount of the child support payable is the difference between what each parent would have to pay the other for the support of the children in their care.

> **Example:**
>
> Say that Parent A's obligation to Parent B for the children in Parent B's care is $1,000 per month, and that Parent B's obligation to Parent A for the children in Parent A's care is $250 per month. Parent A would pay $750 per month in child support, the difference between Parent A's obligation and Parent B's obligation, and Parent B would pay nothing.

Paying the difference between the two amounts is called paying the *set-off amount* of child support.

Shared parenting time

Section 9 of the Guidelines applies to shared parenting time situations. Section 9 states that:

> 9. If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared parenting time arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

In order to fall within this exception to the Guidelines, the payor must have the children for 40% or more of their time. If the payor has this much of the children's time, the court may make an order that is different from the Guidelines tables. As a result, the two big issues here are how each party's time with the children is counted, and how the amount of child support payable should be calculated once the 40% threshold is reached.

Calculating the children's time

Problems about counting time involve the rules that will be applied in the calculation of time, such as deciding which person should get credit for the time the children are in school, whether the time the children are sleeping is counted, and whether the time the children are in the care of other people is counted. Section 9 is one of the most difficult sections of the Child Support Guidelines as a result. A few broad rules have emerged from the case law:

1. If the parents have the children for an exactly equal amount of time, the 40% requirement has been met.
2. Holiday periods in which the children spend an unusual amount of time with one parent or the other, shouldn't be used to figure out the average amount of time spent with each parent; rather, the court will look at the average amount of time spent in a typical one- or two-week period.
3. The time the children are in school or in daycare will be credited to the parent who has a right to parenting time with the children during that time, on the principle that this person is the parent who would have to care for the children on a professional development day or attend the school or daycare in the event of illness or an emergency.
4. If a parent's time with the children is specified in an agreement or a court order as concluding at the start or end of the school day, that's when that parent's time concludes and the other parent's time starts, and credit will be divided accordingly.

In the 2014 Supreme Court case of C.M.B. v B.D.G. [1], the court recognized that there is no universal formula for counting the time that children spend with each parent when the court is required to determine whether parents share parenting time for the purposes of child support. Of course, as is the case with most issues involving children, each case will be decided based on its own unique circumstances.

Calculating the amount of child support

Once the 40% threshold issue has been dealt with, the court must then decide how much child support ought to be paid, based on section 9 of the Guidelines. The intention of the legislation is to minimize differences in the children's living standards in each of their homes.

The analysis starts by determining each parent's income, and finding each parent's support obligation amount under the applicable Guidelines tables. Most of the time the amount of child support payable is the *set off amount*, which is calculated by subtracting the lower-income parent's child support obligation to the higher-income parent from the higher-income parent's obligation to the lower-earning parent. This is an easy solution to the calculation of child support and is easy to adjust when either parent's income goes up or down.

> **Example:**
>
> Say that Parent A's obligation to Parent B for the support of the children is $1,000 per month, and that Parent B's obligation to Parent A for the support of the children is $250 per month. Parent A would pay $750 per month in child support, the difference between Parent A's obligation and Parent B's obligation, and Parent B would pay nothing.

However, the court is also required to look at the increased costs associated with a shared parenting arrangement, and may conclude that the simple set-off approach is unfair. In a 2005 case from the Supreme Court of Canada, Contino v Leonelli-Contino [2], the court talked about increased costs and said that courts shouldn't just apply the off-set but carefully examine the parents' budgets and actual spending on their children to decide whether shared parenting time has resulted in increased costs to a parent. The court said that these increased expenses should then be divided between the parents in proportion to their respective incomes.

Finally, the court is also required to look at the "conditions, means, needs, and other circumstances" of each parent and the children. This gives the court a broad discretion to consider the resources and needs of the parents and the children. This might result in the income of a parent's new partner being taken into account as part of the "means" of that parent, whether the parent is the payor or the recipient.

Although the court has developed a number of different formulas to calculate the amount of child support payable in shared parenting situations, in general, the set-off approach is used. It's straightforward and easy to calculate, and makes sense to most people. The set-off approach was approved by the Court of Appeal in the 2016 case of B.P.E. v A.E. [3]

Income tax and child tax benefits

In order to ensure that both parents can share in claiming children as dependents on their tax returns and share in child tax benefits, in "split parenting time" or "shared parenting time" situations, an agreement or order should specify what amount of child support is to be paid by each parent to the other. If the agreement or court order only says that one parent will pay the set-off amount, the Canada Revenue Agency will take the position that only the receiving parent is entitled to claim the children as dependents and receive child tax benefits. CRA may request a copy of the agreement or court order to prove that the children are in a split or shared parenting situation.

Independent minor children

Eligibility for child support under both the *Family Law Act* and the *Divorce Act* is restricted to children under the age of 19, the age of majority in British Columbia, and to children who are 19 and older and are unable to live independently of their parents. Children are expected, at some point, to live on their own and become self-sufficient. This may occur before a child turns 19, and a parent may be relieved of the obligation to provide support to an independent child in such circumstances.

If a payor can prove that a minor child has voluntarily withdrawn from parental control and is living an adult, financially independent life, the child may not be entitled to benefit from child support. Children have been found to have withdrawn from their parents' care and control when they:

- are living with a boyfriend or girlfriend who provides for or helps to provide for the child's needs,
- have moved out from their parents' home and refuse to return, or
- are living on their own, maintaining a job, and paying their own bills without relying on money from their parents.

Section 147(1) of the *Family Law Act* say that:

> Each parent and guardian of a child has a duty to provide support for the child, unless the child
>
> (a) is a spouse, or
>
> (b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

A person can be a "spouse" under the *Family Law Act* if they have:

- gotten married,
- lived in a marriage-like relationship with another person for a continuous period of at least two years, or
- lived in a marriage-like relationship for a shorter period of time and have had a child with the other person.

Undue hardship

Under section 10 of the Child Support Guidelines, the court can make an award of child support that is different, usually less, than would be required by the Guidelines tables where a person would suffer *undue hardship* if the Guidelines table amount of child support were paid.

It's important to know that simply claiming that paying or receiving the table amount causes you hardship won't be enough to justify a child support order that is lower or higher than the Guidelines table amount. The hardship caused by payment or receipt of the table amount must be an *undue* hardship. According to Van Gool v Van Gool [4], a 1998 case from the Court of Appeal, "undue" means *exceptional*, *excessive* or *disproportionate*. In the 1999 Supreme Court case of Chong v Chong [5], the court held that establishing undue hardship requires proof of a "high threshold" of hardship, and that problems like a lower standard of living or financial obligations for a new family are not sufficient.

Section 10 of the Guidelines provides a list of circumstances that may cause undue hardship:

> (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
>
> (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
>
> (b) the spouse has unusually high expenses in relation to exercising access to a child;
>
> (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
>
> (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
>
> (i) under the age of majority, or
>
> (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
>
> (e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability...

Note that this list is not exhaustive, meaning that the court may take other factors, in addition to those in the list, into account in deciding applications under section 10. The test to prove that an order under the Guidelines would cause undue hardship involves two steps:

1. Under section 10(3), the court must find that the household standard of living of the parent claiming undue hardship, calculated using the formulas described in Schedule II of the Guidelines, is lower than that of the other parent.
2. Then, the court must find that an award under the Guidelines tables would in fact cause undue hardship to the payor or the recipient under section 10(1).

If you cannot prove a lower household standard of living under the first part of the test, don't bother trying to prove undue hardship under the second part of the test as your hardship claim has already been lost.

If both these steps have been met, however, the court will then decide what a reasonable child support order would be in light of the children's needs and the means of the parents. Note that the standards of living being compared are the standards of the two households. This includes all sources of income a household has, including income from the parents' new partners, if any.

Other arrangements for the children's benefit

Section 15.1(5) of the *Divorce Act* allows the court to order that an amount of child support other than the table amount be paid if it is satisfied:

> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

It's up to the parents to convince the court that they have made special financial arrangements for the children such that a child support order under the Guidelines tables would be unfair. (One example might be if the parents have decided that one parent will take less than half the value of the house, and gives the house to the other parent who continues to live in the house with the children. Another example might be if the parents have agreed that one of them will be solely responsible for significant expenses associated with the children.)

This part of the *Divorce Act* is often important because section 11(1)(b) of the act requires the court to be satisfied that "reasonable arrangements" have been made for the support of any children before signing off on a divorce. "Reasonable arrangements" usually means that the table amount of child support is being paid. However, the court can use section 15.1(5) to accept orders or agreements between the parents that a different amount will be paid, and give the parents their divorce. This is unusual and you should speak to a lawyer.

Section 150(2) of the *Family Law Act* also allows the court to make an order for child support different from the Guidelines tables if the parents agree to the order or have an agreement on child support and the court is satisfied that those arrangements are "reasonable." Section 150(4) says that the court may make such an order if it is satisfied that:

> (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
>
> (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.

Child support orders under section 150(2) of the *Family Law Act* are just as unusual as child support orders under section 15.1(5) of the *Divorce Act*.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- Child Support Guidelines [5]

Links

- Adjust your child support using the Child Support Recalculation Service (CSRS) [6]
- Dial-A-Law Script "Child Support" [15]
- Legal Aid BC's Family Law website's information page "Child & spousal support" [16]
  - Under "Child support"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 24 August 2022.

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[2] http://canlii.ca/t/1lxpf
[3] http://canlii.ca/t/gsp1w
[4] http://canlii.ca/t/1f0r2
[5] http://canlii.ca/t/1d1px
[6] https://www.clicklaw.bc.ca/resource/4982

Changing Family Law Orders, Awards and Agreements Involving Child Support

There is no such thing as an absolutely final order or agreement about child support. It is always open to the court to change an order or agreement for child support, as long as the parties' circumstances, or the circumstances of the parties' children, have changed. In general, people paying child support, *payors*, will want to ask to have support reduced or terminated when their income has decreased or the children have grown up. People receiving child support, *recipients*, will want to ask to have support increased when the payor's income has gone up or if the children's special expenses have increased.

This section talks about:

- changing orders made under the federal *Divorce Act*
- changing orders made under the provincial *Family Law Act*
- changing orders that were made before the federal Child Support Guidelines came into effect on 1 May 1997, and
- changing orders that were made outside British Columbia.

This section also discusses claims for retroactive support and the important case of D.B.S. v S.R.G. [1], a 2006 decision of the Supreme Court of Canada.

Orders made under the *Divorce Act*

Under section 5 of the *Divorce Act*, the British Columbia Supreme Court has the jurisdiction to change an order for child support as long as at least one of the spouses was normally living in British Columbia when the court proceeding to change the order was started, or if both parties agree that the court should have jursidiction, no matter which province's court made the original order.

Section 17 of the *Divorce Act* gives the court the authority to change, cancel, or suspend orders for support made under that act. "Changing" an order is called *varying* the order. Section 17 says:

> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. ...
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.
>
> (6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions. ...

> (6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.
>
> (6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

(The "applicable guidelines" means the Child Support Guidelines, a regulation that describes the rules that the courts must apply when making an order for child support.)

These parts of section 17 all boil down to the following ideas:

- A court can make an order changing a previous child support order if a change in circumstances has occurred since the order was made.
- Any new order for child support must usually be made according to the child support tables in the Child Support Guidelines.
- The court may make an order for child support different from the Guidelines tables if the parents have an order or agreement with special provisions for the direct or indirect benefit of the child that makes an order under the Guidelines tables inappropriate.
- The court may also make an order for support different from the Guidelines tables if both spouses agree to the order and reasonable arrangements have been made for the support of the children.

Before the Child Support Guidelines came into effect, an applicant had to show that there had been a serious and unforeseen change in circumstances before the court would hear an application to vary an order for child support. Now, an applicant must only show that there has been a change in income or a change in the children's expenses to prove that there has been a change in circumstances.

Section 14 of the Guidelines defines "change in circumstances."

> For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; ...

Financial statements

When an application to change a child support order is made, one or both parents will have to share their financial information. This information is almost always given in a court form called a Financial Statement, Form F8 in the Supreme Court. Like affidavits, financial statements must be sworn before a notary public, a lawyer, or a commissioner for taking affidavits.

Here are the rules about when one or both parents have to provide a financial statement:

- The payor must produce a financial statement describing their income if the payor is paying child support according to the Guidelines tables.
- Both parents must produce financial statements describing their income if each parent has the primary residence of one or more of the children or the parents share the children's time equally or near-equally.
- Both parties must produce complete financial statements describing their income, expenses, assets, and liabilities if the application includes a claim about the children's special expenses or extraordinary expenses, a claim for undue hardship, if the payor's income is above $150,000 per year, or if one or more of the children are over the age of majority.

Financial statements give the court the information it needs to make a new child support order.

Statutory provisions

These are the primary sections of the *Divorce Act* about changing child support orders:

- section 2: definitions
- section 4: the court's authority to make child support orders
- section 5: the court's authority to change orders
- section 15.1: child support
- section 15.3: child support has priority over spousal support
- section 17: applying to change an order

Agreements and orders under the *Family Law Act*

Section 148(3) of the *Family Law Act* gives the Supreme Court and the Provincial Court the authority to cancel the parts of an agreement that talk about child support, and make an order for child support in place of those parts, "if the court would make a different order" than what the agreement provides.

Section 152(1) of the act gives the court the authority to change, cancel, or suspend orders for child support made under that act. Usually, it's the Supreme Court that can change earlier Supreme Court orders and it's the Provincial Court that can change earlier Provincial Court orders. "Changing" an order is called *varying* the order. Section 152(2) says:

> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
>
> (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

The federal Child Support Guidelines have been adopted for the provincial *Family Law Act*. As a result, the rules about changing child support orders under the provincial legislation are almost exactly the same as they are under the federal *Divorce Act*, described above.

Financial statements

When an application to change a child support order is made, one or both parents will have to share their financial information. This information is almost always given in a court form called a Financial Statement, Form F8 in the Supreme Court and Form 4 in the Provincial Court. Like affidavits, financial statements must be sworn before a notary public, a lawyer, or a commissioner for taking affidavits.

Here are the rules about when one or both parents have to provide a financial statement:

- The payor must produce a financial statement describing their income if the payor is paying child support according to the Guidelines tables.
- Both parents must produce financial statements describing their income if each parent has the primary residence of one or more of the children or the parents share the children's time equally or near-equally.
- Both parties must produce complete financial statements describing their income, expenses, assets, and liabilities if the application includes a claim about the children's special expenses or extraordinary expenses, a claim for undue hardship, if the payor's income is above $150,000 per year, or if one or more of the children are over the age of majority.

Financial statements give the court the information it needs to make a new child support order.

Statutory provisions

These are the primary sections of the *Family Law Act* dealing with changing orders and setting aside agreements for child support:

- section 1: general definitions
- section 146: definitions specifically about child support
- section 148: agreements about child support, including setting aside agreements about child support
- section 149: orders about child support
- section 150: orders about child support
- section 152: changing orders for child support
- section 173: child support has priority over spousal support

Orders made before 1 May 1997

The Child Support Guidelines came into force on 1 May 1997. Section 14(3) of the Guidelines says that this change in the law allows anyone with a child support order made before 1 May 1997 to apply to change that order. If you have one of these old orders, although it's doubtful that any of these orders are still in effect, you can ask to change the order without having to show that anyone's income has gone up or down, or that the child's special expenses or extraordinary expenses have changed.

Orders and agreements made before the Guidelines came into effect are special because the payor could claim a tax deduction for their child support payments, while the recipient had to claim the payments they received as taxable income. Today, orders and agreements about child support have no income tax consequences for either the payor or the recipient of support.

Orders made outside British Columbia

It's not always easy to change an order made outside of British Columbia, mainly because the courts of this province don't have authority over the courts of other provinces, territories and countries. However, both the federal *Divorce Act* and the provincial *Interjurisdictional Support Orders Act* [25] have special provisions about how orders for child support made elsewhere in Canada can be changed by someone living in British Columbia. The *Interjurisdictional Support Orders Act* also talks about how people who live here can ask to change child support orders made in countries which have agreements with British Columbia. Orders that were made in other countries can only be changed through an application in the court that made the original order. You should speak to a lawyer in that country to get more information about your options.

If you can change an order made outside of British Columbia, the process you'll use depends on whether the original order was made under the federal *Divorce Act* or under the legislation of the place whose courts made the original order. The processes are, however, very similar.

Orders under the *Divorce Act*

Orders that were made elsewhere in Canada under the *Divorce Act* can be changed here under section 5 of the act, as long as both parties now live in British Columbia. If one or both of you live in other provinces, a person living in British Columbia can apply to change the original order using the process described in sections 18.1, 18.2 and 18.3. Here are the steps involved:

1. Submit an application to the British Columbia Reciprocals Office [13], using the forms supplied by the office.
2. The Reciprocals Office checks to make sure that your application is complete and sends it to the Reciprocals Office in the province where the other parent now lives.
3. The Reciprocals Office where the other parent lives sends the application to the court or the child support calculation service in that province.
4. If it the application is sent to a court, the court will serve the application on the other parent, along with information about what they have to do to reply to your application.
5. The court hears the application and may make an order changing the child support order, may ask for more evidence, or may dismiss the application.

In this process, there is only one hearing, and the hearing takes place in the province where the other parent lives.

It's important to know that the original order will continue in effect until and unless the court changes the order.

Orders made under other laws

Orders that were made elsewhere in Canada under provincial family law legislation, or were made in certain other countries outside of Canada, can be changed by someone living in British Columbia using the process described in sections 25, 26 and 27 of the provincial *Interjurisdictional Support Orders Act* [25].

Every province in Canada has its own *Interjurisdictional Support Orders Act* and follows the same process. The countries that also follow the *Interjurisdictional Support Orders Act* process and have agreed to cooperate with applications for changes to child support orders are:

- United States of America — all of the United States, including the District of Columbia, Puerto Rico, Guam, American Samoa, and the US Virgin Islands
- Pacific Ocean — Australia, Fiji, New Zealand (including the Cook Islands), and Papua New Guinea
- Europe — Austria, Czech Republic, Germany, Norway, Slovak Republic, Swiss Confederation, Gibraltar, and United Kingdom of Great Britain and Northern Ireland
- Caribbean — Barbados and its Dependencies
- Africa — South Africa and Zimbabwe
- Asia — Hong Kong and Republic of Singapore

See the Interjurisdictional Support Orders Regulation [26] for the current list.

Here are the steps involved in this process:

1. Submit an application to the British Columbia Reciprocals Office [13], using the forms supplied by the office.
2. The Reciprocals Office checks to make sure that your application is complete and sends it to the corresponding organization in the province or country where the other parent lives.
3. The Reciprocals Office where the other parent lives sends the application to the court in that province or country.
4. The court will then serve the application on the other parent, along with information about what they have to do to reply to your application.
5. The court hears the application and may make an order changing the child support order, may ask for more evidence, or may dismiss the application.

Under this process, there is only one hearing, and the hearing is heard by the court where the other parent lives.

It's important to know that the original order will continue in effect until and unless the court changes the order.

Retroactive orders for child support

Someone making a claim for "retroactive" child support is asking for an order that will take effect starting at some date in the past, before the claim was made or heard. Typically, someone receiving child support will ask for an increase in the amount of support payable dating back to when the payor's income went up. (Someone who is not receiving child support, but was entitled to get it, will ask for an order dating back to when they became entitled to receive child support.) If the claim is successful, the payor will be required to start making payments in the amount of the new order, plus a lump sum representing the difference between the support that was paid and the support that ought to have been paid. This can sometimes be a significant financial hardship, particularly where the period of retroactivity is long.

The courts have generally been willing to impose an ongoing duty on payors to disclose their income, whether the recipient asks for this information or not, and the courts have been increasingly willing to make retroactive orders for child support.

In 2006, the Supreme Court of Canada released its decision in four related cases, D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, and Hiemstra v. Hiemstra [1], all of which concerned retroactive child support. (These cases are referred to collectively as just "D.B.S. v. S.R.G.," the name of the lead case.)

The court decided that, under the Child Support Guidelines, child support is tied to the income of the payor, giving payors a duty to pay child support in the amount required by their income, as determined using the Guidelines tables. Because of the approach taken by the Guidelines, no order or agreement for child support is ever final. In fact, both parents have a continuing obligation to make sure that the right amount of child support is being paid as the payor's income changes from time to time, and the court will make a retroactive order when the parents fail to adjust the amount of child support on their own.

Here are a few of the things the court will think about in deciding to make a retroactive order.

- Whether the recipient delayed seeking an increase in support when they "knew higher support payments were warranted, but decided arbitrarily not to apply."
- Whether the recipient delayed seeking an increase in support because they feared the payor's reaction or lacked "the financial or emotional means to bring an application, or were given inadequate legal advice."
- Whether the payor was acting in a blameworthy manner in avoiding disclosing their income or in discouraging the recipient from seeking an increase in support.

(Blameworthy conduct is "anything that privileges the payor parent's interests over his/her children's right to an appropriate amount of support.")

In general, retroactive child support will not be awarded if the child would not actually benefit from the award, or if the award would cause serious financial hardship to the payor.

If the court decides to make a retroactive order, it then has to decide how long ago the order should start. In general, the retroactive order will start when the recipient gave notice of their intention to ask for increased child support. However, the retroactive order can start earlier than that if the payor has acted in a blameworthy manner. In cases like that, the order can start on the date the payor's income changed.

The law about retroactive child support is complicated, for both payors and recipients. If you have a problem about retroactive child support, you should look at D.B.S. v. S.R.G. and speak to a family law lawyer.

The Child Support Recalculation Service

The Child Support Recalculation Service [2] is a provincial government program created under section 154 of the *Family Law Act* that can review and adjust the amount of child support payable where the parents' incomes have gone up or down. The program is available in limited circumstances:

- you must have a Provincial Court order for child support or a written agreement about child support,
- you and the other parent must both live in British Columbia,
- the child support order must not have been based on undue hardship, self-employment income, imputed income or a pattern of income, as opposed to last year's income,
- the payor cannot be someone who stands in the place of a parent, like a non-parent guardian, and
- there must not be an application underway that might impact the amount of child support being paid.

The program may or may not be able to help if one or more of the children are 19 years old or older, the children's time is shared equally or near-equally between the parties, or if a parent's income is over $150,000 per year. The program will tell you if it can help.

The program can also recalculate parents' proportionate share of the children's special expenses and extraordinary expenses, but only if:

- both parents' incomes are stated in the order or the agreement, and
- each parent's proportionate share of the children's special expenses and extraordinary expenses are stated in the order or the agreement.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Supreme Court Act* [16]
- Supreme Court Family Rules [3]
- *Provincial Court Act* [15]
- Provincial Court Family Rules [1]
- *Interjurisdictional Support Orders Act* [25]
- Interjurisdictional Support Orders Regulation [26]
- Child Support Guidelines [5]

Links

- Ministry of Attorney General Interjurisdictional Support Services [13] (BC reciprocals office)
- Legal Aid BC's Family Law website's information page "Court orders" [7]
  - See "When can you change an order?"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 22 June 2023.

References

[1] http://canlii.ca/t/1p0tv
[2] https://childsupportrecalc.gov.bc.ca

Child Support Arrears

When a person who is obliged to pay child support fails to pay all of the child support they are required to pay, a debt begins to accumulate. The debt owing is called the payor's *arrears* of child support.

People generally have two different goals when arrears begin to mount up. The person responsible for paying support, the *payor*, likely wants the court to reduce or cancel the arrears, while the person receiving support, the *recipient*, will want the court to force the payor to pay what's owing.

This section provides an introduction to the problem of child support arrears. It also discusses the reduction and cancellation of arrears and how arrears are collected.

Introduction

If child support is owed under a court order or an agreement, a failure to pay the support owing is a breach of that order or agreement, and, in the case of orders, it's contempt of court as well. The courts, and society as a whole, place a high value on the financial support of children, and both take an extremely dim view of anyone who defaults on such an obligation in the absence of a very good excuse or some very compelling circumstances.

Someone who owes arrears of child support, the *payor*, will likely be interested in the ways that the outstanding amount can be reduced, while a person to whom support is owing, the *recipient*, will be interested in collecting the arrears. Someone who owes arrears will generally have a difficult time convincing the court to reduce their debt. On the other hand, collecting arrears can be difficult as well, if for no other reason than you can't get blood from a stone. Unless the payor has another source of funds to draw upon, a recipient may discover that the outstanding support may never be recovered.

Despite these challenges, it is possible for a payor to have their arrears reduced and, sometimes, cancelled altogether. At the same time, recipients have access to some very powerful and effective enforcement tools to collect outstanding arrears of support.

Orders for child support

Orders for the payment of child support are enforceable like any other order of the court. Someone who breaches a Supreme Court order can be punished for contempt of court. As well, under the *Family Law Act*, both the Supreme Court and the Provincial Court can require the payor to:

- provide security for their compliance with the court order, in other words, pay an amount of money into the court which the court will hold to guarantee the payment of child support,
- pay any expenses incurred by the recipient as a result of the payor's failure to pay child support,
- pay up to $5,000 for the benefit of another party or a child whose interests were affected by the payor's failure to pay child support, or
- pay up to $5,000 as a fine.

If nothing else works to ensure that the payor complies with the child support order, the court can also jail the payor for up to 30 days.

Unfortunately for people who would rather be jailed than pay, section 231(3)(c) of the *Family Law Act* says that:

> imprisonment of a person under this section does not discharge any duties of the person owing under an order.

Since orders for support require the payment of money, arrears can also be enforced as a "judgment debt" under the provincial *Court Order Enforcement Act* [27]. They can also be enforced under the *Family Maintenance Enforcement Act* [2], and section 3(1)(l) of the act says that there is no time limit within which child support arrears must be enforced.

Payors can apply for an order reducing arrears that have accumulated under both the *Divorce Act* and the *Family Law Act*. Applications like these must be made under the same legislation under which the original child support order was made.

Agreements for child support

Arrears that have accumulated under a separation agreement are owed because of the promises each party made to the other when they signed the agreement. A separation agreement is a contract that can be enforced in court, just like any other contract.

Agreements for support are most easily enforced by filing them in court. Once they are filed in court, agreements can be enforced as if they are court orders. (Although agreements can still be enforced under the law of contracts, it's a lot simpler to file them in court and take care of it that way.) Section 148(2) of the *Family Law Act* says:

> A written agreement respecting child support that is filed in the court is enforceable under this Act and the *Family Maintenance Enforcement Act* as if it were an order of the court.

Payors can apply under section 174 of the *Family Law Act* for an order reducing arrears that have accumulated under an agreement that has been filed in court just like they can for arrears accumulating under an order.

The Family Maintenance Enforcement Program

Although recipients can enforce agreements and orders for child support on their own, most of the time recipients will give that job to the BC Family Maintenance Agency [20], which has taken over the Family Maintenance Enforcement Program. BCFMA is the new name for FMEP, however the older name is still in common use. This is a provincial government program under the provincial *Family Maintenance Enforcement Act* [19] that tracks payments that are owing and those that are paid, calculates the interest owing on payments that are not made, and can impose fines when payments aren't made.

BCFMA is a free service for recipients. Its purpose is to enforce the payment of child support and children's special expenses and extraordinary expenses, although the enforcement of special expenses and extraordinary expenses through BCFMA isn't exactly straightforward. You should contact BCFMA to ask what they can or cannot do about enforcing agreements and orders about the payment of children's special expenses and extraordinary expenses.

It's important to know that BCFMA can't change agreements and orders about child support. While it can make important, judge-like decisions about who is and isn't entitled to receive child support when children are 19 years old or older, BCFMA can't increase or decrease the amount of a child support obligation and it can't reduce or cancel arrears of child support.

It's also important to know that payors who want to apply to court to reduce or cancel arrears of child support accumulating under an agreement or order that's been filed with BCFMA must serve BCFMA, as well as the recipient, with their application. BCFMA does not help recipients respond to applications to change support orders, set aside agreements, or reduce or cancel arrears. You'll have to do that on your own. But from the recipient's perspective, just having BCFMA take over enforcement of the order or agreement can be a huge relief.

Reducing and cancelling arrears

Payors may apply to court to have their arrears of child support cancelled or reduced. When arrears are *cancelled*, the debt is wiped out and the payor no longer owes money to the recipient for their past child support obligation, and any obligation they may have to contribute to the cost of the children's special expenses and extraordinary expenses. When arrears are *reduced*, there's still a debt owing to the recipient but the amount of the debt has been reduced to a smaller amount.

Arrears under the *Divorce Act*

Making an application to cancel or reduce arrears of child support is much the same kind of application as an application to change a child support order where the *Divorce Act* is involved. Like applications to change a child support order, applications to reduce or cancel arrears are made under section 17 of the act.

Section 17 of the *Divorce Act* says this about varying orders for spousal support:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; ...
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought. ...
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. ...
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

The *Divorce Act* doesn't talk about arrears specifically. The test the court will apply is similar to the test it applies for orders under the *Family Law Act*. It is difficult to persuade the court to reduce or cancel arrears, as you'll see in the next section.

Arrears under the *Family Law Act*

Unlike the *Divorce Act*, the *Family Law Act* does talk about arrears, and the test to reduce or cancel arrears of child support is *not* the same as the test to simply change an agreement or order for child support. Section 174 of the act says this:

> (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
>
> (2) For the purposes of this section, the court may consider
>
> (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
>
> (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
>
> (c) any circumstances that the court considers relevant.
>
> (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
>
> (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the *Family Maintenance Enforcement Act*, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

A similar section of the old *Family Relations Act*, the law before the *Family Law Act*, was described as a "complete code" regarding the reduction or cancellation of arrears under that act, meaning that the only ground on which a court could reduce or cancel arrears was "gross unfairness," as set out in section 96(2) of the old act. The courts have taken the same approach to section 174 of the *Family Law Act*.

The courts have interpreted "gross unfairness" under the *Family Law Act* to mean that the payor is not only incapable of repaying the arrears but is also unlikely to be able to repay them in the foreseeable future without suffering severe financial hardship. If you are asking the court to make an order reducing arrears, you must be prepared to prove that it would be not just "unfair," but *grossly* unfair for you to have to pay off the arrears. The leading case that describes the legal principles about cancelling arrears is a 1999 case called *Earle v. Earle* [1], 1999 CanLII 6914 (BC SC), in which the court said this:

> "There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so."

You must be prepared to address the criteria set out in section 174(2) of the *Family Law Act*:

- What efforts have you made to pay the child support you were required to pay?
- Why did you wait until arrears had accumulated before you tried to vary the child support order?
- Why can you not pay your arrears now?
- Are there any other circumstances, such as catastrophic business losses or the unintended loss of your employment, changes in the children's residence, or new financial obligations in relation to your family that the court should take into account?

Be prepared to provide a court form called a financial statement, Form F8 in the Supreme Court and Form 4 in the Provincial Court, that summarizes all of your assets and debts, and income and expenses, if you intend to show the

court that you cannot pay your arrears. Complete financial disclosure is absolutely essential.

Collecting arrears of support

The collection of debts and enforcement of judgments occupies a whole course at law school and is not a simple matter. The provincial government has, however, established an agency responsible for enforcing support obligations, the Family Maintenance Enforcement Program. Someone who is entitled to receive child support or spousal support under an agreement or order can sign up with this program and the program will tend to the enforcement of the agreement or order without a great deal of further involvement on the part of the recipient.

BCFMA is free for recipients. All you have to do is file your agreement or order with the program and fill out an application form. (Agreements about child support must be filed in court first.) BCFMA will take the matter from there, and the program is authorized by the *Family Maintenance Enforcement Act* [2] to take whatever legal steps may be required to enforce an ongoing support obligation, and track and collect on any unpaid support and the interest accumulating on any unpaid support.

The *Family Maintenance Enforcement Act* gives BCFMA a lot power to collect child support. The program can start and manage all of the court proceedings that can be undertaken by a private creditor, as well as some unique actions that the program alone can take. BCFMA can also:

- garnish the payor's wages,
- collect from a corporation wholly owned by the payor,
- redirect federal and provincial payments owed to the payor, like GST or income tax rebates, to the recipient,
- prohibit a payor from renewing their driver's licence,
- direct the federal government to refuse to issue a new passport to the payor or suspend the payor's current passport,
- register a lien against either personal property or real property, or both, owned by the payor, and
- get an order for the payor's arrest.

While it is possible to make collection or enforcement efforts on your own, this will cost money and time and possibly require you to hire a lawyer and bear that expense as well. Since any private collection efforts you might take may interfere with efforts being made by BCFMA , recipients enrolled with BCFMA are required to get the permission of the program's director before they take independent enforcement steps.

You can find more information about enforcing orders in the chapter Resolving Problems in Court, in the section Enforcing Orders in Family Matters. You can also find more information at the website of the Department of Justice [8], which includes a helpful overview of support enforcement mechanisms in Canada.

Separation agreements

Section 148(3) of the *Family Law Act* allows a party to an agreement, usually a separation agreement, to file the agreement in the Provincial Court or in the Supreme Court. An agreement that is filed in court can be enforced as if it were an order of the court. It is not necessary for a court proceeding to have been started before an agreement can be filed in court, nor is it necessary that the agreement be a British Columbia agreement.

BCFMA will enforce agreements for support, however they require that the agreement be filed in court first, and sent to them, with the court's stamp, before they can enforce the agreement.

You can find more information about enforcing agreements in the chapter Family Law Agreements, in particular within the section Enforcing Family Law Agreements.

Orders made outside British Columbia

It's a little harder to enforce orders for child support that are made elsewhere against payors living in British Columbia because the recipient needs the help of the British Columbia courts to collect against a British Columbia resident. However, both the federal *Divorce Act* and the provincial *Interjurisdictional Support Orders Act* have special processes that can help.

Canadian child support orders

Section 20(2) of the *Divorce Act* says that an order under the act has legal effect throughout Canada. Section 20(3) also says that such orders may be filed in the courts of any province and be enforced as if they were an order of the courts of that province. In other words, if your divorce order was made in New Brunswick and contains a term requiring that child support be paid, you can file that order in the Supreme Court of British Columbia and it will have the same effect and be enforceable here, just as if it were an order of the courts of British Columbia.

Child support orders that are made under the legislation of another province can be filed for enforcement in British Columbia under sections 17 and 18 of the *Interjurisdictional Support Orders Act* [25]. In this process, the recipient provides a copy of the order to the Reciprocals Office in their province, which then sends the order to the British Columbia Reciprocals Office [13]. The Reciprocals Office here then files the order in court, and, once filed the order has the same effect as an order of the courts of British Columbia.

You can find more information about enforcing orders generally in the chapter Resolving Family Law Problems in Court under the section Enforcing Orders in Family Matters.

Orders made outside of Canada

A number of other countries have agreements with British Columbia about the enforcement of child support orders. Recipients living in those countries can follow the *Interjurisdictional Support Orders Act* process to have their orders filed and enforced here. The countries with agreements with British Columbia are:

- United States of America — all of the United States, including the District of Columbia, Puerto Rico, Guam, American Samoa, and the US Virgin Islands
- Pacific Ocean — Australia, Fiji, New Zealand (including the Cook Islands), and Papua New Guinea
- Europe — Austria, Czech Republic, Germany, Norway, Slovak Republic, Swiss Confederation, Gibraltar, and United Kingdom of Great Britain and Northern Ireland
- Caribbean — Barbados and its Dependencies
- Africa — South Africa and Zimbabwe
- Asia — Hong Kong and Republic of Singapore

See the Interjurisdictional Support Orders Regulation [26] for the current list.

A similar process is also available under section 19.1 of the *Divorce Act*, and the same countries that have agreements with British Columbia for the *Interjurisdictional Support Orders Act* also have agreements with Canada about the enforcement of child support orders.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Court Order Enforcement Act* [27]
- *Family Maintenance Enforcement Act* [2]
- Supreme Court Family Rules [3]
- Provincial Court Family Rules [1]
- *Interjurisdictional Support Orders Act* [25]
- Interjurisdictional Support Orders Regulation [26]
- Child Support Guidelines [5]

Links

- Ministry of Attorney General Interjurisdictional Support Services [4] (BC reciprocals office)
- Legal Aid BC's Family Law website's information page "Court orders" [7]
  - See "Change an order or set aside an agreement made in BC"
- BC Family Maintenance Agency website [20] (formerly FMEP)
- Clicklaw HelpMap: Family Maintenance Enforcement Program details [2]
- Department of Justice's website "About support enforcement" [8]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, 24 August 2022.

References

[1] https://canlii.ca/t/1d20m
[2] https://clicklaw.bc.ca/helpmap/service/1082

Spousal Support

Spousal Support

Spousal support is a payment made by one spouse, the *payor*, to the other spouse, the *recipient*, to help with their day-to-day living expenses or to compensate the recipient for the impact of the financial choices the spouses made during their relationship.

Although anyone who was in a married or unmarried spousal relationship can ask for spousal support, it's important to know that there is no automatic right to receive support just because of the fact that the spouses were married or in a long relationship living together. Whether spousal support will be paid, and, if so, how much will be paid, always depends on the particular circumstances of each couple. There are also date limits for applying for spousal support, which are particularly important for unmarried spouses.

This section provides a overview of the law on spousal support. It talks about the rules under the *Divorce Act* and the *Family Law Act*, and takes a deeper dive into how spouses are determined to be entitled to received support and, if entitled, how the amount of spousal support and the length of time is should be paid are calculated. It also looks at agreements and orders about spousal support and the income tax consequences of spousal support payments. The rest of the sections in this chapter explore other issues about spousal support, including the Spousal Support Advisory Guidelines, making changes to spousal support, and the problem of arrears of spousal support.

Introduction

Just being in a spousal relationship, whether married or unmarried, doesn't give anyone a right to life-long support. You have the right to *ask* for spousal support, but you don't necessarily have the right to *get* spousal support. When a spousal relationship ends, each spouse usually needs to become self-sufficient and financially independent in a reasonable amount of time, given the circumstances. This is what the court said about spousal support in the 1997 Supreme Court case of Dumais-Koski v. Koski [1]:

> "Marriage is not a legal institution created for the redistribution of wealth."

Or, as the Alberta Court of Queen's Bench put it, in the 2005 case of V.S. v. A.K. [2]:

> "A person does not acquire a lifetime pension as a result of marriage. Likewise, marriage is not an insurance policy."

A spouse who is self-sufficient, or readily capable of becoming self-sufficient, will not usually be entitled to receive spousal support at the end of a relationship.

When thinking about a spousal support claim, the court will consider the following questions:

- Is the person applying as a *spouse*? That is, do they fit within the category of persons allowed to apply? Or, as it is sometimes put, do they have *standing* to apply?
- Is the person applying in time? That is, have they made their application within the applicable *limitation period*?
- Has the person demonstrated an *entitlement* to receive spousal support?

If all of these questions are answered “yes," then the court has to figure out the appropriate *amount* of spousal support and the length of time, or *duration*, for which spousal support should be paid.

The answers to the first two questions vary depending on the legislation the person is relying on, either the federal *Divorce Act* or the provincial *Family Law Act*. The third question, about entitlement, is common to both the *Divorce Act* and the *Family Law Act*. Generally speaking, someone will be entitled to spousal support if they:

- have suffered economic loss or hardship as a result of the relationship or the breakdown of the relationship (called *compensatory entitlement*),
- have a contract with the other spouse, like a separation agreement or another family law agreement, that requires that spousal support be paid (called *contractual entitlement*), or
- can't afford to meet their living expenses after separation and the other spouse has the ability and the disposable income to meet that need (called *needs-based entitlement*).

A person who is asking for spousal support in court must make their application based on one of these grounds. In deciding whether entitlement has been proven, the court will look at the factors and requirements set out in the legislation.

In British Columbia, the amount and duration of support are largely determined according to the Spousal Support Advisory Guidelines.

The law about spousal support

Spousal support is available for married spouses and formerly married spouses under the *Divorce Act*. Spousal support is also available to married and unmarried spouses under the *Family Law Act*, which defines "spouse" as including:

- people who are married to each other,
- people who have lived together in a "marriage-like relationship" for at least two years,
- people who lived together in a marriage-like relationship for less than two years and have a child together, and
- former spouses.

(Incidentally, the law in British Columbia doesn't talk about people who are *common-law spouses* and never has. Once upon a time, people could marry each other and create a legal relationship simply by agreeing to marry, without getting a licence from the government or having a particular kind of ceremony. Because the rights between the spouses came from principles established in the common law, these were known as *common-law marriages*. Common-law marriages were valid in England until the *Marriage Act* of 1753, better known by its full and much more flowery name, *An Act for the Better Preventing of Clandestine Marriage*. Please don't use the term "common-law marriage." It doesn't mean what most people think it means and is two-and-a-half centuries out of date.)

Spousal support is available for all spouses, whether of the same or opposite sexes, and can be agreed to in a separation agreement or ordered by the court.

The *Divorce Act*

The federal *Divorce Act* only applies to people who are or were married to each other. In addition to divorce, the *Divorce Act* also talks about orders for spousal support and changing orders for spousal support.

Only the Supreme Court can deal with claims under the *Divorce Act*.

Standing

If the claim for spousal support is being made under the *Divorce Act*, the spouses must be or have been married to each other, and the spouse asking for spousal support must have lived in the province in which the court proceeding is started for at least one year before the proceeding started.

Limitation period

The *Divorce Act* doesn't have any rule about when an application for support can be brought following divorce. Under the *Divorce Act*, a spouse is *always* a spouse entitled to apply for support, no matter how long the spouses have been separated or divorced. Nonetheless, the court may dismiss a claim based on delay. (If you wait several years, the court may wonder whether you really needed support at all!) Even though there are no time limits, it's still important to pursue a claim for spousal support as soon as reasonably possible.

Entitlement

The objectives that the court will look at in deciding whether a spouse is entitled to spousal support are set out at section 15.2(6) of the *Divorce Act*, and are discussed in more detail below. If a spouse is entitled to spousal support, the factors that the court will review to determine the amount of support and the length of time for which it should be paid are set out in section 15.2(4).

Determining the amount and duration of support

If a spouse is found to be entitled to receive spousal support, the Spousal Support Advisory Guidelines will be used to help decide how much support should be paid and for how long it should be paid.

Statutory provisions

These are the primary sections of the *Divorce Act* dealing with spousal support:

- section 2: definitions
- section 3: the court's authority to make spousal support orders when a spouse is asking for a divorce order
- section 4: the court's authority to make spousal support orders after the court has made a divorce order
- section 5: the court's authority to change spousal support orders after the court has made a divorce order
- section 15.2: spousal support orders
- section 15.3: child support has priority over spousal support
- section 17: changing spousal support orders

The *Family Law Act*

The provincial *Family Law Act* applies to married spouses and to unmarried spouses. The *Family Act* talks about orders for spousal support, changing orders for spousal support, both going forward and going back in time, and arrears of spousal support.

Both the Provincial Court and the Supreme Court can deal with claims under the *Family Law Act*.

Standing

If the claim for spousal support is being made under the *Family Law Act*, the spouses must be married to each other or qualify as unmarried spouses. Section 3 of the *Family Law Act* defines "spouse" as someone who:

- is married to another person,
- has lived with another person in a "marriage-like relationship" for at least two years, or
- has lived with another person in a marriage-like relationship for less than two years and has had a child with that person.

A *marriage-like relationship* is a committed romantic relationship, not a relationship between people who are just roommates. The courts take a holistic approach in deciding whether a particular relationship is "marriage-like" or not. The relationship doesn't need to be monogamous and the parties don't need to share bank accounts and financial obligations, sleep in the same bed, plan together for their retirement or deaths, or have children together. The courts will decide whether a relationship is "marriage-like" based on all of the circumstances of the relationship. For examples of how the court thinks about unmarried relationships, read the 2007 case of Austin v. Goerz [3] and the

2015 case of Weber v. Leclerc [4].

Limitation periods

Section 198(2)(a) of the *Family Law Act* says that married spouses must start a court proceeding asking for spousal support within two years of the date of their *divorce* or an order *annulling* their marriage. A divorce is an order under the *Divorce Act* declaring that a marriage is over. An "annulment" is a decision, under the old common law rules about marriage, that a marriage is void or invalid for some reason.

Section 198(2)(b) says that unmarried spouses must start a court proceeding within two years of the date of their *separation*. “Separation” doesn't necessarily mean that you've moved out. Lots of people separate but continue to live in the same home because it's inconvenient or expensive to move out. Section 3(4) of the *Family Law Act* says that evidence of separation includes:

- one spouse telling the other of their intention to end the relationship and separate permanently, and
- then acting in a way that shows that the relationship is over.

The sort of behaviours that helps to demonstrate that a relationship is over include things like changing your Facebook status, telling friends and family that the relationship is done, closing a joint bank account, starting to date other people or opening a profile on a dating app, moving into the guest room or sleeping on the couch, going to social events by yourself, and, of course, moving out.

It's important to know that if you've led your spouse to think that the relationship is continuing, or that you don't intend on relying on the time limit within which spousal support claims must be brought, you may not be able to count on the limitation period preventing your spouse from bringing a claim after you've been separated for two years.

The limitation period under the *Family Law Act* will also be suspended while the spouses are engaged in "family dispute resolution with a family dispute resolution professional." This means that you are:

- actively involved in mediation, a collaborative settlement process or arbitration,
- using a parenting coordinator, or
- getting help from a family justice counsellor.

Entitlement

The objectives that the court will look at in deciding whether a spouse is entitled to spousal support are set out at section 161 of the *Family Law Act*. If a spouse is entitled to spousal support, the factors that the court will review to determine the amount of support and the length of time for which it should be paid are set out in section 162. Sections 161 and 162 are discussed in more detail later on in this section. The *Family Law Act* objectives and factors for spousal support are the same as the *Divorce Act* objectives and factors.

Determining the amount and duration of support

If a spouse is found to be entitled to receive spousal support, the Spousal Support Advisory Guidelines will be used to help decide how much support should be paid and for how long it should be paid.

Statutory provisions

These are the primary sections of the *Family Law Act* dealing with spousal support:

- section 1: general definitions
- section 3: the definition of "spouse" and how unmarried people qualify as "spouses"
- section 161: the objectives of spousal support
- section 162: the factors used to determine the amount and duration of spousal support
- section 163: agreements about spousal support
- section 164: setting aside agreements about spousal support

- section 166: the effect of certain kinds of misconduct on spousal support
- section 167: changing spousal support orders
- section 168: reviewing arrangements for spousal support
- section 170: other terms that can be included in support orders
- section 171: spousal support after the payor's death
- sections 172 and 173: spousal support and child support
- section 174: cancelling or reducing arrears of spousal support
- section 198: the time limits within which claims for spousal support must be made

Spousal support and child support

Section 15.3 of the *Divorce Act* and section 173 of the *Family Law Act* state that child support must take priority over spousal support. When the payor cannot pay both spousal support and child support, the court is required to make an order for child support at the expense of an order for spousal support. Children come first.

Spousal support and the division of property

The issues of spousal support and the division of family property are somewhat intertwined. Before the *Family Law Act* became law, the court had to think about spousal support after any property had been divided between the spouses. In other words, how property was divided could have an impact on a spouse's entitlement to spousal support, so that either no support should be paid, or that just a little support should be paid as a sort of top-up to the property the spouse received.

Under the *Famaily Law Act*, the order is reversed. The court considers spousal support first and the division of property might be adjusted if the payor of spousal support can't afford to pay the amount of support the recipient is entitled to.

Spousal support, fault and misconduct

Divorce in Canada has been *no-fault* since the *Divorce Act* was updated in 1985. The old *Family Relations Act* took the same approach to spousal support when it was introduced in 1972, and that approach largely continues in today's *Family Law Act*.

A "no-fault" system means that the behaviour of the spouses during their relationship, and the reasons why their relationship ended, have nothing to do with whether spousal support is payable, how the children wind up being cared for, or how property and debt are divided. Whether someone was abusive or a cheater, for example, is not relevant to the court's consideration of these issues. In fact, section 15.2(5) of the *Divorce Act* says:

> In making an order [for spousal support] the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

The Supreme Court of Canada, in a 2006 *Divorce Act* case called Leskun v. Leskun [5], confirmed that the misconduct of the spouses must not be taken into consideration in making a decision about whether spousal support should be paid following the end of their marriage. But even in Leskun, the court distinguished between the bad behaviour itself and the *effects of the misconduct* on the parties after separation:

> "There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly

> relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount. The policy of the [*Divorce Act*] however, is to focus on the consequences of the spousal misconduct not the attribution of fault."

Think of it like this. The fact that a spouse cheated during the relationship doesn't impact their entitlement to spousal support, the amount that the payor has to pay or the amount that the recipient is entitled to get. Say, however, that the misconduct was physical, psychological or emotional abuse, which left the recipient unable to return to work. The fact of the abuse doesn't impact the recipient's entitlement, but the *effect* of the abuse, in terms of its impact on the recipient's ability to return to work, is what would likely entitle the recipient to spousal support.

The *Family Law Act* takes a slightly different approach. Some kinds of misconduct will be considered. Section 166 says this:

> In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably
>
> (a) causes, prolongs or aggravates the need for spousal support, or
>
> (b) affects the ability to provide spousal support.

In other words, under the *Family Law Act*, the court cannot consider misconduct generally, just like under the *Divorce Act*, but the court *can* look at the effects of the parties' behaviour on whether the recipient is doing the things that need to be done to become economically self-sufficient or whether the behaviour of the payor has undermined their ability to pay support.

Entitlement, amount and duration

When somebody has the standing to ask for spousal support, the next question is whether they are *entitled* to receive spousal support. Once entitlement is established, the next questions are how much support should be paid, sometimes called the *quantum* of support, and the length of time for which spousal support should be paid, or the *duration* of spousal support.

Establishing entitlement

Spousal support is paid for one of two reasons:

- to help the recipient meet their financial needs when they can't meet them on their own, or
- to compensate the recipient for the impact of the financial decisions the spouses made during their relationship.

The first type is usually called *needs-based support.* The second is called *compensatory support.*

Of course, some reduction in the family standard of living is inevitable after separation. No matter if just one spouse was working during the relationship or both worked, the fact is that during the relationship there was only one rent or mortgage payment to make, only one hydro bill, and only one cable bill. After the relationship ends, there are two rent payments, two hydro bills, and two cable bills, all of which must be paid out of the same pool of income that supported the family before separation.

There is no automatic obligation to pay spousal support, or entitlement to receive spousal support, the way there is for child support. As a result, the entitlement of someone to receive spousal support will be decided on the particular circumstances of that person and their relationship with the other spouse. In general, the court will think about entitlement taking into consideration the following factors, among others:

- **Length of relationship:** The longer the relationship, the more likely it is that an order for spousal support will be made. As well, the longer the relationship is, the stronger will be the presumption that the spouses should have an equal or almost equal standard of living at its conclusion.

- **Difference in incomes:** The greater the difference in the spouses' incomes at the end of a relationship, the more likely it is that an order for spousal support will be made, even if the support will only be paid for a short period of time. However, the fact that one spouse's income is higher than the other's doesn't mean that the lower-earning spouse is automatically entitled to spousal support.
- **Economic disadvantage:** The more economic opportunities a spouse has lost as result of the relationship, such as job skills, job opportunities, raises and promotions, or employability, the more likely it is that an order for spousal support will be made.
- **Earning capacity:** The more one person's earning capacity is reduced because of family obligations, like child care or a serious illness for example, the more likely it is that an order for spousal support will be made.

Under section 160 of the *Family Law Act*, when a spouse applies for spousal support, the court must determine whether they are entitled to support by considering the *objectives* set out in section 161. If the court finds that they are entitled to spousal support, the court must then determine how much support should be paid and for how long by considering the *factors* set out in section 162.

Section 15.2(6) of the *Divorce Act* and section 161 of the *Family Law Act* set out the objectives for a spousal support order:

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

The first three objectives are fairly straightforward and are self-explanatory. The last one deserves some comment.

The effect of section 15.2(6)(d) of the *Divorce Act* and section 161(d) of the *Family Law Act* is to create an expectation that a recipient of spousal support will make their best efforts to become financially independent and self-sufficient at some point following separation. A spousal relationship is not intended to be a lifelong meal ticket; at some point, a dependant spouse must usually become independent. This can have an impact on both the amount of spousal support and the length of time support should be paid.

Section 15.2(4) of the *Divorce Act* and section 162 of the *Family Law Act* set out the factors for a spousal support order:

> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during the period they lived together; and
>
> (c) an agreement between the spouses, or an order, relating to support of either spouse.

These factors help the court decide how much spousal support should be paid and for how long, but the court will consider facts about the spouses, their relationship, and their circumstances in addition to these.

Establishing amount

Once a person is found to be entitled to spousal support, the amount of spousal support has to be calculated. It's difficult to predict exactly how much spousal support will be paid in any given case. Many different factors can influence the amount of spousal support. The "amount" of support is the amount that should be paid each month, although it is possible to pay a spousal support obligation through one, big lump sum payment. An arrangement that requires spousal support obligations to be paid each month, or on any other regular, recurring basis, is called a *periodic payment* arrangement.

The amount of spousal support is generally calculated using the Spousal Support Advisory Guidelines. The Advisory Guidelines is an academic paper, published by the federal Department of Justice, which describes a number of mathematical formulas that calculate the amount of spousal support payments based on each person's income, the length of their relationship, the age of their children, and other factors. You can find the Advisory Guidelines in a separate section of this chapter.

You can visit DivorceMate's website for their free spousal support calculator [6]. This calculator is very good for simple situations, but if there is anything complicated about your circumstances you may want to meet with a lawyer who has bought DivorceMate's professional software. This will let the lawyer give you some fairly fine-tuned numbers. This chapter's section on the Spousal Support Advisory Guidelines discusses the Advisory Guidelines formulas in a lot more detail.

In addition to considering the Spousal Support Advisory Guidelines, it is important that each party prepare a sworn court form called a financial statement whether a court proceeding has been started or not. In Provincial Court, the form uses is a Form 4 Financial Statement, and in Supreme Court, the form used is a Form F8 Financial Statement. Financial statements set out each spouse's income and assets, expenses and liabilities in detail.

When a spousal support calculation is done according to the Spousal Support Advisory Guidelines, the calculation sets out three amounts of possible spousal support: a low amount, a middle-range amount, and a high amount. There can be hundreds of dollars difference between the low and high amounts of spousal support. The expenses and debts of the parties, described in their financial statements, can help the court decide whether spousal support should be at the low amount, the middle-range amount, the high amount, or in some other amount.

In most cases, spousal support payments will leave both parties, not just the spouse who earns more money, with enough to look after their living expenses. Although spouses usually share in the financial consequences of the end of their relationship, the court will not force someone into bankruptcy to provide support for the other spouse. There certainly are times, however, when a support order will be difficult for a payor and may result in the payor incurring debt.

Sometimes there's simply not enough money coming in to cover child support, the payor's day-to-day needs, and the day-to-day needs of the recipient. In cases like that, both the *Divorce Act* and the *Family Law Act* require child support to take priority over spousal support, and the amount of spousal support paid may not be enough to cover the recipient's needs.

Establishing duration

Once a spouse's entitlement to receive spousal support is established and the amount of support payments has been fixed, the next step is to look at the length of time for which the support payments should be made. For people leaving long relationships, spousal support might be paid permanently or until retirement. For people in shorter relationships, particularly where the recipient is either working outside the home or capable of working outside the home, support might only be payable for a fixed length of time.

There are a number of different ways that an agreement or order for spousal support can deal with the issue of time:

- **Lump-sum payments:** Instead of ongoing monthly payments, it can sometimes be better to pay a single lump sum for all of the support payments. Of course, the payor has to be able to pay a lump sum like that, and not

everyone can. This way there is no time issue at all. The recipient's entitlement to support is satisfied when the lump sum payment is made.

- **Division of property:** It is possible that the way the family property and family debt is divided could satisfy the goals of spousal support. It's also possible that a payor could agree to give the recipient more of the family property in order to avoid a spousal support obligation. This is another way of avoiding time issues. The recipient's entitlement to support is satisfied when the property is divided.
- **Review dates:** An order or agreement can say that when a certain date arrives or a certain event occurs, the amount of spousal support or the recipient's entitlement to receive support will be *reviewed*. This is sometimes easier to accept than a fixed date on which support will terminate, but it does mean that the parties will have to argue about the issue in the future. Again.
- **Escalated payments:** If someone wants to pay spousal support for as short a time as possible but can't make a lump-sum payment, the payor might be able to get an order or agreement requiring larger monthly payments but over a shorter period of time.

The Spousal Support Advisory Guidelines are used to calculate a range of time for which spousal support should be paid, in addition to calculating how much support should be paid. Where a couple have children, time is based on the dates the youngest child will enter and exit school, or, sometimes, on the length of the spouses' relationship. Where a couple doesn't have children, time is based on the length of the couple's relationship.

Orders and agreements for spousal support

Spousal support is a very grey area of the law, with few hard and fast rules. As a result, every order or agreement dealing with spousal support will be tailored to the particular circumstances of the parties, including orders and agreements that say that no spousal support will be paid.

Interim orders and agreements

Interim orders are temporary orders made once a court proceeding has started. Interim orders are not meant to be permanent. They last until another interim order is made or the proceeding wraps up with a trial or a settlement. Likewise, *interim agreements* are agreements made when settlement discussions have started, and they are meant to last only until a final agreement is negotiated.

The court will think about the same things when it hears an application for an interim spousal support order as it does at the hearing for a final order. At least, that's the general rule. In reality, however, the court usually takes a pretty rough and ready approach to interim applications based on something called the *means and needs* test. This test asks:

- Does the person making the application, the *applicant*, have a need for support?
- Does the other person, the *respondent*, have the means to pay it?

The court will not usually attempt to decide whether the applicant's need is related to the relationship or its breakdown when making an interim order for spousal support. In a 2005 case called L.G.B. v. M.A.C.M. [7], the court said that interim spousal support should generally only be awarded where an obvious case for entitlement is made out. Spousal support will often be awarded on an interim basis when:

- there are young children who need a stay-at-home caregiver,
- the applicant is unemployed at the time of the application and hasn't worked outside the home for a number of years,
- the applicant is unemployed and faces barriers to employment, such as a lack of training, illness or poor language skills, or
- the applicant is employed but unable to pay the household bills without help.

Of course, *need* alone isn't enough, and the person against whom the application is brought must have the ability to actually *pay* support. Whether the payor has the means to pay support is usually figured out by looking at the payor's

monthly income, less any child support obligations, and less their reasonable monthly expenses. If there is money left over, the payor's *disposable income*, some or all of that money will be available for spousal support.

Depending on the respondent's ability to pay, the amount of spousal support awarded may be enough to equalize the spouses' incomes and, sometimes, even enough to help the applicant have more or less the same standard of living that the spouses had before they separated.

Final orders and agreements: Periodic payments

Under the *Divorce Act* and the *Family Law Act*, the court may make an order for spousal support for regular payments, called *periodic payments*, to be paid for a fixed period of time (a *definite* term), or to be paid without a particular end date (an *indefinite* term). Whether an order requires that spousal support be paid for a definite or indefinite term will depend on the particular circumstances of each case. In general, however, the longer the relationship was and the older the parties are, the more likely it is that the court will make an indefinite order for spousal support.

It's important to know, however, that "indefinite" doesn't mean permanent. It just means that and end date can't be set when the order is made.

Indefinite obligations

Indefinite orders for spousal support are often made in one or more of the following circumstances:

- the spouses' relationship was lengthy,
- the recipient is unable to re-enter the workforce because of physical or mental health issues,
- the recipient is elderly and unable or unlikely to re-enter the workforce,
- the recipient's child care or other obligations make it impossible for them to re-enter the workforce, or
- the consequences of the breakdown of the relationship, including mental health issues such as depression, have left the recipient unable to work.

An indefinite order or agreement for spousal support can also set out the conditions when the spousal support obligation may end. The most typical of these conditions are:

- the recipient remarrying or living with another person in a marriage-like relationship for longer than a certain amount of time,
- the recipient obtaining employment and earning more than a specified amount,
- the payor retiring, or
- the death of either the recipient or the payor.

Reviewable orders and agreements

Under section 168 of the *Family Law Act*, an order or agreement that requires the payment of spousal support can be *reviewable*. A reviewable order or agreement for spousal support is an order or agreement that says that spousal support will be paid indefinitely, but that the payor's obligation to pay support or the recipient's entitlement to receive it will be reviewed at a later date, called a *review date*. A review date may be a particular day, usually not sooner than a few years after the date of the agreement or order, or it may be triggered by a particular event such as:

- the children leaving home,
- the recipient recovering from an illness,
- the recipient becoming employed or finishing a course of training or education,
- the recipient or the payor reaching a certain age or retiring,
- the recipient or the payor beginning to receive pension benefits,
- the sale of a property, or
- the recipient entering into a new married or cohabiting relationship.

When the review date arrives, the obligation to pay spousal support does not automatically expire unless the order or agreement expressly says so. The obligation usually continues until the review finally takes place, whether the review is started by the recipient or the payor.

At the review, either spouse may usually seek to cancel or extend the support obligation, or to reduce or increase the amount of spousal support paid. The review will usually be based on parties' financial circumstances at the time of the review, but can take into account other factors, like the recipient's health, the recipient's efforts to find employment, or the payor's financial circumstances. A reviewable order or agreement can specify how the review will be conducted, which might be by mediation, a collaborative settlement process, or arbitration. Reviews don't have to happen in court.

Definite-term obligations

Orders or agreements which say that spousal support will be paid for a specific period of time are usually made when it is clear that the recipient has the ability to become self-sufficient within a fairly short amount of time or the payor's resources are limited. Definite-term orders and agreements for spousal support are often made where one or more of the following conditions apply to a relationship:

- the recipient is in a new relationship and the new person's income is expected to contribute to the recipient's needs,
- the recipient has relevant job training or skills at the time that the relationship breaks down and is expected to return to work in short order,
- the recipient had a successful career before or during the relationship and is expected to return to work in short order,
- the recipient needs a bit of time to adjust to their new living circumstances and will become self-sufficient relatively quickly, or
- the recipient is ill or disabled at the time of the making of the order or agreement but is expected to recover and re-enter the workforce.

The length of time for which support must be paid is usually be determined using the Spousal Support Advisory Guidelines and may reflect one or more of the following factors:

- the length of the parties' relationship,
- the extent and nature of the parties' employment during their relationship,
- the time the court estimates it will take the recipient to complete job training, if unemployed,
- the amount of the recipient's income, if employed,
- the payor's retirement date,
- the recipient's anticipated length of recovery from an illness, or
- the age at which the children will enter school or the age at which they can enter daycare.

Final orders and agreements: Lump-sum payments

A *lump sum* order or agreement for spousal support requires the payor to make a large, one-time-only payment of spousal support. This kind of spousal support payment is fairly rare, partly because the payment of a lump sum of spousal support is often difficult to distinguish from the division of property, partly because a lump-sum payment may not adequately address the need the payment of spousal support is meant to address, and partly because few payors can afford to make a lump-sum payment.

Whether the court is dealing with an application for lump-sum spousal support rather than the more usual periodic-payment support obligation, the court will usually be concerned that the payment of spousal support isn't just a substitute for the division of family property. The court will also be concerned that a lump-sum payment may not actually help the recipient become financially independent.

Payors are sometimes interested in lump-sum spousal support payments for the reason that the single payment will allow them to wash their hands of the other spouse and have done with the support obligation immediately, rather than having to deal with the other spouse on a continuing basis. Recipients are usually interested in lump-sum spousal support payments where the cash is needed to make a down payment on a property, start a business, or for some other purpose that will contribute to their future security.

The court may be prepared to make an order for a lump sum, either alone or in addition to a periodic support order, where:

- the payor has a history of failing to make periodic support payments,
- the payor has been dishonest or deceitful during the trial, particularly with respect to their finances,
- there is so much anger and animosity between the parties that the payor is unlikely to comply with an order for periodic payments,
- the money is necessary to provide a home for the recipient,
- the money is necessary to give the recipient financial security that cannot be had by periodic payments,
- the payor is financially well-off and can afford to make the payment,
- the payor is able to pay a lump sum and the likelihood of the payor being able to make future periodic payments of support is low,
- the money will promote the recipient's self-sufficiency, or
- periodic payments will not encourage the recipient to become self-sufficient.

Lump-sum awards are available on interim applications, but such awards are unusual.

Under the Spousal Support Advisory Guidelines, the amount of lump-sum payments is determined by multiplying the amount of support by the number of months support must be paid for, and then taking into account the tax impact on the payor from paying spousal support (payors get to deduct the support they pay from their income, just like RRSP contributions) and the tax impact on the recipient from receiving spousal support (recipients must declare the support they get as taxable income, as if the money came from employment)

Ensuring spousal support is paid

Under section 170 of the *Family Law Act*, the court may make a number of additional orders when it is making an order for spousal support that can help to ensure that spousal support continues to be paid, including after the death of the payor. The court may:

- order that a charge be registered against property,
- require a payor with life insurance to maintain that policy and specify that a spouse will be the beneficiary of the policy, or
- order that spousal support continue to be paid after the payor's death and be paid from their estate.

Before the court makes an order that requires spousal support to be paid from the payor's estate, under section 171(1), the court must consider:

- whether the recipient's need for support will survive the payor's death,
- whether the payor's estate is sufficient to meet the recipient's needs, taking into account the interests of the people who stand to inherit from the payor's estate and the creditors entitled to be paid from the payor's estate and,
- whether any other means exist to meet the recipient's needs.

Spousal support when the payor dies

When a payor dies, the recipient can apply to court for an order under section 171(3)(b) of the *Family Law Act* that the payor's support obligation will continue and be paid from their estate.

When a recipient applies to continue a support obligation or if a support order says that the obligation will continue past the payor's death, the payor's *personal representative*, the person managing the payor's estate and will, has the right to defend against the recipient's application or to vary or terminate a continuing obligation.

Spousal support and income tax

A spouse who pays support on a periodic basis is entitled to claim the whole amount of their payments as a deduction against their taxable income, just like an RRSP contribution. The recipient is obliged to claim the support they have received as taxable income, just like employment income, and the recipient will wind up owing money to the government each year when their taxes are due.

To claim spousal support payments as a tax deduction, the agreement or order that requires the payor to make the spousal support payments must clearly state that the payments are for *spousal support* and the payments must be *periodic* in nature, rather than paid as a lump sum or through the division of property. Without these clear statements, the federal *Income Tax Act* [8] requires the payments to be treated as child support payments, and child support payments are neither tax deductible for the payor nor taxable income for the recipient.

It's important to know that lump-sum spousal support payments are neither deductible for the payor nor taxable for the recipient.

Ensuring spousal support is deductible

If you want to ensure that the money you are paying as spousal support is deductible, there are a couple of important points you must pay attention to in order to satisfy the tax people:

- **Court orders:** The order must clearly state a fixed, periodic sum that is being paid, and this fixed sum must be described as *spousal support*.
- **Separation agreements:** In addition to a term describing a fixed, periodic sum as spousal support, the agreement must also state that the parties have been separated since a certain date and intend to continue to live separate from each other. Payments for child support and spousal support should never be expressed as a single amount.
- **Unwritten agreements:** In general, the tax department will not recognize anything other than a written separation agreement or a court order. There are some exceptions to this rule, but you really should arrange your support payments more formally.
- **Proof of payment:** CRA may want proof you made the payments you are seeking to deduct. If you can't get receipts, make sure you can document the payments you made. E-transfers or bank records in the correct amount may not be enough. It has to be recorded as spousal support somehow, such as on cheques with "spousal support" noted in the memo line. Cash payments are the worst. If you must pay in cash, get a receipt!

Payors and payroll source deductions

People paying periodic spousal support usually wait until they file their income taxes to claim their deduction and get a tax refund. However, you don't have to wait if you don't want to.

A *source deduction*, or payroll deduction, is an amount of money your employer is required to deduct from your paycheque and remit to the Canada Revenue Agency. Your employer calculates your source deduction based on the salary or wages they are paying you and the tax rate for your income. If you want, you can ask your employer to take into account any periodic spousal support you're paying. This will reduce the income taxes your employer deducts from your paycheque. Your employer may have to get approval from the Canada Revenue Agency [9] to adjust to your source deductions for income tax.

Unexpected taxes for recipients

People receiving periodic spousal support have to pay income tax on their support, as if their support payments were employment income.

Recipients may also be subject to other tax consequences that aren't so obvious. One of the more common ways this can happen is if the payor is making the payments indirectly, through a company they own. For example, say that Bob, the owner of Bob's Brewery, writes his spousal support cheques on the company bank account of Bob's Brewery instead of from his personal chequing account. In a case like this, the recipient risks having the payor declare the money to have been paid as a corporate dividend or as salary, as if the recipient were a shareholder or employee of the company.

In the case of spousal support payments that are declared as salary, the recipient might also face an unexpected bill for missed payments to Employment Insurance premiums or Canada Pension Plan contributions, as well as for unpaid tax on the payments from the Canada Revenue Agency [10]. In the case of support paid as a dividend, the payments might be taxed at the corporate tax rate, which may be higher than the recipient's personal tax rate.

The easiest way to guard against unexpected taxes is to ensure that the payments are made from the payor's personal bank account.

Taking taxes into account

When it will be difficult for a recipient to pay the tax owing on spousal support, a couple can agree to deal with these taxes in one of two ways if the recipient is to avoid a big bill in April:

- the payor could pay more in spousal support to account for the tax consequences, or
- the payor could simply pay the tax owing by the recipient when the recipient files their tax return.

When someone pays more support, the recipient must put the extra amount aside for tax time, or their bill to the Canada Revenue Agency will just be that much higher. Since it can be a bit difficult to figure out how much money the recipient will have to pay in taxes, you might want to talk to an accountant to get the number right.

When someone agrees to pay the taxes owing on account of the spousal support and the recipient has other sources of income, it can be very difficult to figure out exactly how much of the recipient's tax bill results from their receipt of spousal support. This is another good time to hire an accountant.

Deductibility of legal fees

The portion of a lawyer's bill attributable to *getting*, *increasing* or *enforcing* a spousal support order for periodic payments is tax deductible by the recipient. A payor cannot deduct legal fees paid to establish, negotiate, contest, reduce or terminate the amount of spousal support. Read the Canada Revenue Agency's Income Tax Folio: S1-F3-C3, Support Payments [10] for the fine print.

To claim these deductions, the lawyer must write a letter to the CRA setting out what portion of their fees were attributable to advancing a spousal support claim. If you intend to ask your lawyer for a letter like this, you must tell your lawyer as soon as possible, preferably the moment the lawyer takes your case. It may be impossible for your lawyer to winnow out the portions of their account spent on spousal support after the fact.

Spousal support and death

As a general rule, if the payor dies, support ends. Under the *Family Law Act*, however, a recipient spouse may apply to have support continue, to be paid by the estate of the deceased spouse. Section 171 lists the factors the court must consider:

- the need of the recipient,
- the size of the estate,
- the claims of the estate's creditors and beneficiaries, and
- whether any other practical means exist to meet the need of the recipient, such as life insurance, although life insurance isn't always available or affordable.)

There is no limitation period to ask for spousal support payments to continue past the death of the payor, but as a practical matter, recipients should apply as possible. Otherwise, they risk the estate being wound up and paid out.

It's important to know that if an order for spousal support already provides for support to continue past the death of the payor, the payor's estate can apply to have the support payments reduced or ended.

If the recipient dies, the obligation to pay spousal support ends. However, questions can come up about arrears of support owing by the payor at the time of their death. The answer to those questions isn't always clear. The case law seems to depend in part on whether the recipient had been actively pursuing payment of the money owed to them and whether the recipient had been spending their own savings to make up for the shortfall.

The *Divorce Act* does not talk about what happens if someone paying spousal support dies the way the *Family Law Act* does. If your spousal support order was made under the *Divorce Act*, an application to make the payor's estate liable for continuing spousal support will not possible. You must have an agreement or court order about the effect of the payor's death that was made before their death. If you asking for spousal support and you think you may need some security in the event the payor dies, apply for such an order or negotiate such an agreement now. If you wait, you may lose the chance.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Income Tax Act* [8]

Documents

- Spousal Support Advisory Guidelines [9]
- Canada Revenue Agency's Income Tax Folio: S1-F3-C3, Support Payments [11]

Links

- Department of Justice's website "About spousal support" [12]
- Ministry of Attorney General's website "Family Maintenance Services" [13]
- Legal Aid BC's Family Law website's information page "Child & spousal support" [10]
  - See "Spousal support"
- BC Family Maintenance Agency website [20]
- Dial-A-Law Script "Spousal support" [14]
- Clicklaw listing of resources on spousal support [15]
- DivorceMate's free basic spousal support calculator [16]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 1 July 2022.

References

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[15] https://www.clicklaw.bc.ca/global/search?k=spousal%20support
[16] http://mysupportcalculator.ca

The Spousal Support Advisory Guidelines

The *Spousal Support Advisory Guidelines* [1] is an academic paper published by the federal Department of Justice in July 2008. It is not a law and is not expected to become a law. However, when a spouse is entitled to receive spousal support, lawyers, mediators, arbitrators and judges often use the Advisory Guidelines to figure out how much spousal support should be paid, and how long spousal support should be paid for.

This section provides an introduction to the Spousal Support Advisory Guidelines. It discusses what the courts have had to say about the Advisory Guidelines and describes how its formulas work, how they can be restructured for fairness, and the exceptions to the formulas.

An introduction to the Spousal Support Advisory Guidelines

In 2001, the federal Department of Justice formed an advisory working group to look into the feasibility of creating uniform guidelines for the calculation of spousal support the way the Child Support Guidelines have created standards for the calculation of child support. The group was composed of judges, family law lawyers, law school faculty members, and social workers, and was led by Professors Carol Rogerson and Rollie Thompson, both gifted and highly qualified academics with strong backgrounds in family law.

In January 2005, Professors Rogerson and Thompson released their first paper, Spousal Support Advisory Guidelines: A Draft Proposal, for public comment and feedback. After touring the country speaking to judges, lawyers, and academics, and monitoring the case law on the draft Advisory Guidelines as it developed over several years, Rogerson and Thompson released their final paper, Spousal Support Advisory Guidelines, in July 2008. This was supplemented by other materials, including the Revised Users Guide [2], published in 2016.

The legal status of the Advisory Guidelines

The Advisory Guidelines is not a law, and people involved in family law disputes are not bound by it. In fact, in July 2008, the Department of Justice said that it had no plans to turn the Advisory Guidelines into a law and that it didn't intend to do so.

I've heard nothing to suggest a contrary intention since.

The British Columbia Court of Appeal, however, has said that the court must consider the Advisory Guidelines when making orders about spousal support, and the decisions which fall substantially outside the ranges suggested by the Advisory Guidelines may be appealable. Lawyers, mediators, arbitrators and judges now routinely use the Advisory Guidelines in making decisions about spousal support. Read more below under the heading "The state of the law in British Columbia."

The Advisory Guidelines in a nutshell

The Spousal Support Advisory Guidelines is an attempt to capture how most court decisions on spousal support have determined how much support should be paid, and how long support should be paid for, in a number of mathematical formulas. Professors Rogerson and Thompson say that the Advisory Guidelines is not intended to *change* the law on spousal support, but is intended to normalize future decisions about spousal support based upon how the general majority of past court decisions have dealt with the issue.

Income sharing

The essential concept underlying the Advisory Guidelines is the calculation of spousal support amounts based on the total disposable income available to both parties, rather than looking at each party's needs and means separately. The formulas work with the total amount of money collectively available to a couple.

Income *sharing* does not mean an *equal division* of income, however. When child support is being paid, the Advisory Guidelines proposes a spousal support range equal to between 40% and 46% of the total disposable income available to both parties. When no child support is paid, the Advisory Guidelines gives the recipient a share of the difference between the recipient's income and the payor's income which increases with the length of the relationship.

Entitlement to support

The Advisory Guidelines does not deal with whether a spouse is entitled to receive support. Entitlement is, of course, the first question to be decided when dealing with an application for spousal support. The Advisory Guidelines will only be used when a spouse is found to be entitled to spousal support.

Amount of support

When no child support is paid, the length of the relationship is central in determining both the amount of support payable and the duration for which support must be paid: the longer the relationship, the more support is paid, and the longer it will be paid for. The parties' gross incomes are used to determine spousal support.

Where child support is paid, the amount of support payable will be calculated taking into consideration the payment of child support and the different tax rules relating to spousal support and child support. The parties' net incomes are used to determine spousal support.

Duration of support

In many cases, the Advisory Guidelines sets out a range of years that support will be paid for. In certain cases, such as when the relationship is long, where the dependant spouse is older, or when child support is paid, support will be paid for an unspecified period of time.

The key factors in determining the length of time for which support will be paid are the length of the relationship, including any period of time married spouses lived together before they got married, the age of the recipient, and the age of the spouses' youngest child.

Upper and lower income limits

The Advisory Guidelines has both floors and ceilings: where a payor's income is below $20,000, no spousal support will be payable; and, where a payor's income exceeds $350,000, the payor should usually pay at the amount for incomes of $350,000.

In the case of ceilings, the payor's income above $350,000 will be taken into account at the discretion of the court. Although, in the 2014 case of Hathaway v. Hathaway [3], the Court of Appeal warned that the court would still have to be given reasons to depart from the Advisory Guidelines ranges, even when the payor's income is substantially above $350,000.

Exceptions to the formulas and restructuring the results

To every rule there is an exception, and the Advisory Guidelines is no different. The ranges the Advisory Guidelines formulas produce aren't carved in stone. Factors such as advanced age, illness, debt load, and so on may suggest that the results for amount, duration, or both should be changed or ignored altogether.

The Advisory Guidelines also allows for the restructuring of a support award to pay more for a shorter time, to pay less for a longer time, or to pay it all up front in one lump sum. Restructuring keeps the total amount paid within the results generated by the Advisory Guidelines formulas.

DivorceMate's spousal support calculator

Until relatively recently, my enthusiasm for the Advisory Guidelines was primarily tempered by the lack of public, free spousal support calculators. This seemed to me to be an appropriate function of government, particularly as it was government that funded the Advisory Guidelines project. Making things worse, the two main manufacturers of spousal support software, DivorceMate and ChildView, wouldn't sell their product to people who weren't employed in the justice system in some capacity. This left good, high-quality calculators only available to lawyers and judges, and that didn't seem fair.

This all changed in April 2011 when DivorceMate stepped up to the plate with a free public website, mysupportcalculator.ca [16]. The website performs child support calculations under the Child Support Guidelines and spousal support calculations under the Spousal Support Advisory Guidelines. The results of the online spousal support calculations don't precisely match the results produced by their bells-and-whistles product for professionals and don't account for all of the factors that can impact on the results. However, the results will be fine for most people most of the time. DivorceMate deserves much credit for making this resource available, and I thank them for it.

The views of the courts

On 4 July 2005, the British Columbia Supreme Court released its first judgment considering the Advisory Guidelines, in the case of W. v. W. [4]. The court said that the Advisory Guidelines "provide a cross check against the assessment made under existing law," and that the formulas provided in the Advisory Guidelines are "consistent with the law in British Columbia." She then made an order for spousal support using the Advisory Guidelines as a check, without expressly applying the Advisory Guidelines to determine the issue. The Advisory Guidelines, she held, is not law, and is not intended to become law.

On 19 July 2005, the court released its second judgment on the Advisory Guidelines, M.S. v. W.S. [5]. In this case, the court held, rather emphatically, that the court is not bound by the Advisory Guidelines in determining spousal support and that "equitable distribution can be achieved in a variety of ways and need not be calculated according to a strict formula."

This view was softened later in 2005 by the Court of Appeal in the case of Yemchuk v. Yemchuk [6]. In this case, the court held that the Advisory Guidelines reflects the general results seen in the case law on spousal support. While the court stopped well short of saying that the Advisory Guidelines must be used to determine spousal support, it did consider the Advisory Guidelines to be a useful tool and a factor to be considered in making an orders for spousal support, and made an order for support that was within a hair's breadth of the numbers the Advisory Guidelines formulas produced.

As a result of Yemchuk, the Advisory Guidelines became a factor to be taken into account in fixing the amount and duration of an order for spousal support, but that it is no more than a factor. This changed with Redpath v. Redpath [7], a 2006 decision of the Court of Appeal, in which the court held that it is an appealable error for a judge to fail to consider the results produced by the Advisory Guidelines. This moves things well beyond Yemchuk, as now trial courts were *required* to consider the Advisory Guidelines formula results in making a decision on spousal support. In 2010, the Court of Appeal went even further in Domirti v. Domirti [8], which held that awards of spousal support that fall substantially outside the Advisory Guidelines may be appealable.

The law in British Columbia, then, is that the results of the Advisory Guidelines calculations must be considered when making a decision on spousal support. The Advisory Guidelines is, in other words, all but mandatory in this province.

The formulas

The Advisory Guidelines describes two basic formulas:

- **The *Without Child Support* formula:** used when child support is not being paid, as might be the case if the couple have no children or if all of the children are adults and financially independent at the time of separation.
- **The *With Child Support* formula:** used when there is a legal obligation to pay child support, whether child support is actually being paid or not.

The *With Child Support Formula* is designed for situations where the person receiving spousal support is also the person receiving child support. Since this isn't always the case and the amount of child support that's being paid isn't always the amount required by the Child Support Guidelines, the Advisory Guidelines has variations of the *With Child Support Formula* that can be used when:

- the children's parenting time is shared equally or near-equally between the spouses,
- the children's parenting time is split, so that one or more children live primarily with each spouse,
- the person receiving spousal support is the person paying child support, and
- all of the children for whom support is being paid are older than the age of majority, 19 in British Columbia.

The *Without Child Support* formula

The *Without Child Support Formula* is fairly straightforward.

Amount: The amount of support is 1.5 to 2 percent of the difference between the spouses' gross incomes for each year of marriage.

> **Example**
>
> Say a relationship is 10 years long, and Party A has a gross income of $50,000 and Party B has an income of $20,000. The difference between the parties' incomes is $30,000. Party B would have a share in the difference of 15 to 20 percent (1.5 times 10 and 2 times 10), or between $4,500 and $6,000 per year. On a monthly basis, support would be paid at $375 to $500.

Duration: The length of time support will be paid is 0.5 to 1 year for each year of the relationship. If a couple have been together for more than 20 years, or if the age of the dependant party plus the number of years of the relationship equals 65, support will be paid indefinitely, for an unspecified length of time.

> **Example**
>
> Using the same facts, support would be payable for 5 to 10 years (0.5 times 10 and 1 times 10). If, however, the dependent party was 55 at the time of separation, support would be paid indefinitely (55 years of age plus 10 years equals 65).

The maximum *amount* payable under the Without Child Support Formula ranges from 37.5 percent of the difference between the spouses' gross incomes to 50 percent of the difference between the parties' net incomes, that is, their incomes calculated after taxes and benefits.

The maximum *time* spousal support can be payable under this formula ranges from an amount of time equal to the duration of the spouses' cohabiting relationship to an indefinite amount of time.

The factors this formula uses are:

- the payor's gross income,
- the recipient's gross income,
- the length of time the spouses lived together, and
- the recipient's age.

The main *With Child Support* formula

This formula is a lot more complex. In the *With Child Support Formula*, child support is taken out of the payor's gross income and the recipient's income, taxes and payroll deductions are taken into account, and government benefits are added to the recipient's income. The reason why child support is deducted from the recipient's income is to reflect the costs that parents bear in raising the children.

Amount: The amount of support is 40 to 46 percent of the payor's individual net disposable income plus the recipient's net disposable income.

(The "payor's net disposable income" is their gross income, minus taxes and minus their child support obligation, including the tax credits they receive as a result of paying spousal support. The "recipient's net disposable income" is their gross income, minus taxes and minus their notional child support obligation, plus any government benefits they receive, less the taxes payable as a result of receiving spousal support.)

> **Example**
>
> Say the spouses have an 8-year-old child, the payor has a gross income of $50,000 and the recipient has an income of $20,000. The payor's net disposable income is $26,710 ($50,000 minus taxes of $15,570, minus annual child support of $5,112, minus EI deductions of $772, minus CPP deductions of $1,831). The recipient's net disposable income is $15,045 ($20,000 minus taxes of $4,410, minus notional child support of $2,052, minus EI deductions of $396, minus CPP deductions of $816, plus child tax benefit

of $1,208, plus national child benefit of $1,511).

The family's total net disposable income is $41,755 ($26,710 plus $15,045). 40 percent of the net disposable income is $16,702; 46 percent of the income is $19,207. After deducting the recipient's net disposable income, the difference between the recipient's income and 40 percent of the family's disposable income is $1,657 per year, and $4,162 for 46 percent.

On a monthly basis, spousal support would be between $138 and $346. The total the payor would pay each month would be spousal support plus $426 in child support.

Duration: The length of time for which support will be paid ranges from the longest of two formulas used to determine the low end of the range to the longest of two formulas used to determine the high end of the range. If a couple have been together for more than 20 years, or if the age of the dependant party plus the number of years of the relationship equals 65, support will be paid for an indefinite, unspecified length of time

The *low range* formulas for duration are:

1) 0.5 years for each year of the relationship

2) the length of time remaining until the youngest child starts full-time school

The *high range* formulas for duration are:

1) 1 year for each year of the relationship

2) the length of time remaining until the youngest child finishes full-time school

I told you it was complex. To quote Professor Thompson, "this is not a calculation you can do on the back of an envelope, you will need a computer program." This formula requires a detailed understanding of how income is determined under the Advisory Guidelines and of the various government benefits, tax deductions, and tax credits that can apply to adjust net income. I've written a paper on the subject for the Department of Justice, "Obtaining Reliable and Repeatable SSAG Calculations [9]," which is available to the public. Be warned, however. It's a bit dry.

The maximum amount payable under this formula is the range the formula sets out: 40 to 46 percent of the difference between the payor's net disposable income and the recipient's net disposable income.

The maximum time spousal support can be payable under this formula is an indefinite, unspecified amount of time.

The factors this formula uses are:

- the payor's gross income,
- the recipient's gross income,
- the length of time the spouses lived together,
- the recipient's age,
- the number of children child support is payable for, and
- the number of years until the youngest child starts and leaves full-time school.

Restructuring the results of the Advisory Guidelines formulas

The Spousal Support Advisory Guidelines includes a few ways to accommodate circumstances that might make the formulas' results unfair to the spouses involved. The Advisory Guidelines requires that the spouses first attempt to use the usual ranges to solve the problem, but allows for the results to be *restructured* if adjustments within the ranges fail to solve the problem.

There are three ways the results can be restructured:

- pay more spousal support each month, but for a shorter period of time,
- pay less each month, but pay for a longer period of time, or
- pay the total amount payable over the period of the award in a single lump sum.

The point of each option is that the total amount payable under the formula results stays the same. The total amount is just paid sooner or later.

Restructuring will not work if the length of time support is to be paid for is indefinite. In cases like this, the best option is probably to build in a review date, a date on which the recipient's entitlement to receive spousal support will be checked.

Exceptions to the Advisory Guidelines formulas

If adjusting support within the ranges doesn't work and if restructuring support doesn't work, Chapter 12 of the Advisory Guidelines contains exceptions, which are recognized categories of departure from the formula outcomes that have been included in the Advisory Guidelines so that parties can accommodate their special circumstances. According to Spousal Support Advisory Guidelines: The Revised User's Guide [10], a 2016 update from Professors Rogerson and Thompson, there has been "a steady increase in the use of the [Advisory Guidelines] exceptions, better every year, and a growing body of case law applying them, including appellate level decisions."

Greater need for compensation

In shorter relationships, the results produced by the formulas might not reflect a recipient's right to be compensated for a sacrifice made in the course of the relationship. Circumstances that might fall into this exception would include: giving up a job to be with the payor; or, moving across the country to be with the payor and losing a job or a business.

Under this exception, the results produced by the formulas for amount and duration will not apply.

Illness

The length of time the formulas require support to be paid may not be adequate for a recipient who is ill or disabled, or otherwise unable to become self-sufficient.

Under this exception, the results produced by the formula for duration will not apply.

Payment of family debts

A payor who winds up being responsible to pay for debts incurred during the relationship may not be able to meet the payments required by the formula for amount. This will particularly be the case for families whose debts exceed their assets.

Under this exception, the results produced by the formula for amount will not apply.

Other support obligations

In cases where a payor has an obligation to provide support to other people, such as prior spouses or children from previous relationships, the payor may not be able to pay spousal support at the amount required by the formula.

Under this exception, the payor's income is adjusted to deduct the amount of support paid as a result of the previous relationship before calculating the amount of spousal support to be paid for the present relationship.

Other exceptions

The Advisory Guidelines allows still other exceptions from the formulas to address situations where: a child has special needs that result in the parents having greater expenses than other parents; a relationship was very short but resulted in significant economic loss to the recipient, like the loss of a career opportunity or an expensive move; where payment of support within the ranges for amount is not sufficient to meet the recipient's needs; and, the payor's income is not taxed.

If you think your situation falls into one of these exceptions, or one of the exceptions discussed above, you should seriously consider hiring a lawyer for advice about your options and how the Advisory Guidelines may apply.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*

Documents

- Spousal Support Advisory Guidelines [1]
- Obtaining Reliable and Repeatable SSAG Calculations [9], by JP Boyd

Links

- DivorceMate's free basic spousal support calculator [16]
- Legal Aid BC's Family Law website's information page "Child & spousal support" [10]
  - See "Spousal support"
- Dial-A-Law Script "Spousal support" [14]
- Department of Justice's website "About spousal support" [11]
- Spousal Support Advisory Guidelines: The Revised User's Guide [12]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 29 June 2022.

References

[1] http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html
[2] https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/index.html
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Changing Family Law Orders, Awards and Agreements Involving Spousal Support

An order for spousal support can be changed by another order. An agreement on spousal support can be changed by another agreement or, if the parties can't agree, be set aside by the court and replaced with an order about spousal support.

The test the courts use when deciding to change arrangements for spousal support depends on whether it is an order or agreement the court is being asked to change, or, in the case of an order, whether the order is an interim order or a final order. Whichever test is used, there must usually be a good reason why a change is necessary.

This section talks about changing interim orders and final orders for spousal support, changing orders that were made in a different jurisdiction, and changing agreements for spousal support.

Changing interim orders for spousal support

An *interim order* is a kind of temporary order that is made after a court proceeding has started but before the proceeding is finally resolved by a trial or settlement. Changing an interim order can mean either replacing it with a final order at trial or making another interim order before trial.

The Court of Appeal has said that interim orders for spousal support are intended to be temporary, rough-and-ready decisions intended only to tide the parties over until a final order is made, rather than an exhaustive review of the merits of a claim for spousal support. As such, the courts often prefer not to change interim orders on an interim basis; rather, they would prefer the parties go straight to trial. In the 1999 case of Hama v. Werbes [1], the Supreme Court said that interim orders should only be varied on an interim basis when:

> "...there is a compelling change in circumstances, such that one or both of the parties would be seriously prejudiced by waiting until trial."

This "compelling change in circumstances" must be serious and of such importance that one or both of the parties will be severely disadvantaged unless the matter is addressed immediately. From the point of view of the spouse receiving support, the *recipient*, a compelling change in circumstances might be:

- a loss of other income, such as employment income or WCB benefits, without which the recipient cannot support themselves on the amount of spousal support presently being paid,
- an unexpected increase in expenses, such that the amount of spousal support being paid becomes inadequate, or
- an unexpected increase in child care obligations, for example, because of the extended illness of a child or the birth of a new child, such that the spousal support paid is no longer adequate.

From the point of view of the spouse paying support, the *payor*, a compelling change might be:

- a loss of income, or an unexpected but long-lasting drop in income, such that they can no longer afford to make the spousal support payments ordered, or
- an unexpected increase in the payor's child care or child support obligations, such that their disposable income has decreased and the spousal support payments cannot be maintained.

The *Family Law Act* is intended to expand the range of circumstances in which an interim change of an interim order might be allowed; read about sections 216(3) and (4), below. There are no similar provisions in the *Divorce Act*, but courts are sometimes influenced in how they read one law by changes in another.

If the court agrees and changes an interim order before trial, the new order will also be an interim order and will remain in effect until the issue of spousal support is determined by a final order following trial or a settlement... or until it is varied by another interim order.

The *Divorce Act*

Interim orders for spousal support can be made under section 15.2(2) of the federal *Divorce Act*. Section 17(4.1) of the act allows the court to change, or *vary*, these orders if there has been:

> ... a change in the condition, means, needs or other circumstances of either former spouse . . . since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Only the Supreme Court can make or vary orders under the *Divorce Act*, and the act only applies to people who are or were married to each other.

The process for making interim applications in Supreme Court is described in the chapter Resolving Problems in Court, in the section Interim Applications.

The *Family Law Act*

Orders for spousal support can be made under section 165 of the provincial *Family Law Act*. Section 216(1) of the act allows the court to make interim orders for spousal support, and, under section 216(3) and (4), the court can also vary such orders:

> (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
>
> (a) a change in circumstances has occurred since the interim order was made;
>
> (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
>
> (4) In making an order under subsection (3), the court must take into account all of the following:
>
> (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
>
> (b) the length of time that has passed since the interim order was made;
>
> (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
>
> (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
>
> (ii) would not necessarily reflect the final arrangement between the parties;
>
> (d) whether a trial has been scheduled;
>
> (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

Interim orders for spousal support under the *Family Law Act* can be made and varied by both the Provincial Court and the Supreme Court. Only the Provincial Court may vary Provincial Court orders and only the Supreme Court may vary Supreme Court orders. The *Family Law Act* applies to married spouses and unmarried spouses.

The process for making interim applications is described in the chapter Resolving Problems in Court, in the section Interim Applications.

Changing final orders for spousal support

A *final order* for spousal support is an order made following a trial or made by the agreement of the parties as a settlement of a court proceeding. Changing an order is called *varying* an order.

In general, a final order is just that, final. Without an appeal, a final order represents the end of a court proceeding and cannot be changed. This rule is applied a little less strictly in family law proceedings, and someone who wants to vary a final order for spousal support must be able to show that there has been a serious change in circumstances since the final order was made.

Changing an order refusing support

It used to be the case that a claim for spousal support that was rejected in a final judgment was permanently dismissed, such that any future application for support could not proceed, no matter how things might have changed for someone in financial need.

A 2003 case from the Court of Appeal, Gill-Sager v. Sager [2], called into question just how "final" final orders about spousal support should be. Without deciding clearly whether an order dismissing support could be revived, the court recommended that final orders should only dismiss claims for spousal support with liberty to for the spouse asking for spousal support apply again for spousal support in the event of a material change in circumstances.

Since the Gill-Sager case, the Court of Appeal has now clarified that even a complete refusal of a spousal support claim can be revived if there has been a material change in circumstances, see the 2018 case of Sandy v. Sandy [3]. While cases like these may be rare, they do happen, especially if spousal support was dismissed only because the paying spouse could not afford to pay both child and spousal support, and the children are now grown up and no longer in need of child support.

Changing an order granting support

When a party asks to vary a final order for spousal support, they must show that there has been a *material change in circumstances* affecting one or both of the spouses. A "material change" is a significant change. In the 1996 case of T. (T.L.A.) v. T. (W.W.) [4], the Court of Appeal said that a material change is one which is "substantial, unforeseen and of a continuing nature." In the 1995 case of G. (L.) v. B. (G.), the Supreme Court of Canada said that a material change is one which, if known at the time of the original order, would have resulted in a different order being made.

Section 17(4.1) of the *Divorce Act* says this on the subject:

> Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Section 167 of the *Family Law Act* says this:

> (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into

> consideration:
>
> (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

Although both the *Divorce Act* and the *Family Law Act* say that a change in the "condition, means, needs or other circumstances" of a spouse is required, the *Family Law Act* provides two additional factors that would allow the court to change a final order about spousal support: when new evidence or proof comes to light; or, when improper disclosure is discovered after the last hearing. In other words, when you learn that the order was based on incorrect or misleading information.

Changing reviewable orders for support

Reviewable orders for spousal support are orders that impose an obligation to pay spousal support, but allow the order to be reassessed every now and then. Reviewable orders will say something like this:

> "The Claimant shall pay spousal support to the Respondent in the amount of $_____ per month, commencing on the first day of June 2022, and continuing on the first day of each and every month thereafter, subject to a review by either on or after 1 June 2032."

The most important thing about reviewable orders is that the spouses do not have to establish a material change in circumstances before the review happens. Because of this, however, courts prefer that reviewable orders say exactly what is to be reviewed and why. Otherwise, the court has to reconsider the question of spousal support without any baselines or guidance from the first order, including whether spousal support should continue at all, or in what amount, or for what period of time.

When the review date for an order for spousal support arrives, the payor's obligation to keep making the support payments does not end. The payor's obligation does not end or reduce until the review is held. If neither spouse is goes ahead with the review, the order continues to be in effect exactly as written.

A review of spousal support can be handled through negotiation, collaborative settlement processes, mediation, arbitration, or court. If one of the spouses applies to court for the review, the court will hear the matter *de novo*, as a fresh hearing, in other words, as if the question of spousal support was being decided for the first time. There is no need to establish a change in circumstances at a review hearing.

Changing consent orders for support

A *consent order* is an order that the parties agree the court should make. When someone applies to change a consent order, they need to prove, as the Supreme Court of Canada decided in a 2011 case called L.M.P v. L.S. [5], that there been a material change in the means and needs of either spouse that, if known of at the time of the original order, would have resulted in a different order being made.

Orders made outside of British Columbia

It's not always easy to change an order made outside of British Columbia, mainly because the courts of this province don't have authority over the courts of other provinces, territories and countries. However, both the federal *Divorce Act* and the provincial *Interjurisdictional Support Orders Act* [25] have special provisions about how orders for spousal support made elsewhere in Canada can be changed by someone living in British Columbia. The *Interjurisdictional Support Orders Act* also talks about how someone who lives here can ask to change spousal

support orders made in countries which have agreements with British Columbia. Orders that were made in other countries can only be changed through an application in the court that made the original order. You should speak to a lawyer in that country to get more information about your options.

If you can change an order made outside of British Columbia, the process you'll use depends on whether the original order was made under the federal *Divorce Act* or under the legislation of the place whose courts made the original order. The processes are, however, very similar.

Orders under the *Divorce Act*

Orders that were made elsewhere in Canada under the *Divorce Act* can be changed here under section 5 of the act, as long as both spouses now live in British Columbia. If one or both of you live in other provinces, a person living in British Columbia can apply to change the original order using the process described in sections 18.1, 18.2 and 18.3. Here are the steps involved:

1. Submit an application to the British Columbia Reciprocals Office [13], using the forms supplied by the office.
2. The Reciprocals Office checks to make sure that your application is complete and sends it to the Reciprocals Office in the province where the other spouse now lives.
3. The Reciprocals Office where the other spouse lives sends the application to the court in that province.
4. If it the application is sent to a court, the court will serve the application on the other spouse, along with information about what they have to do to reply to your application.
5. The court hears the application and may make an order changing the spouse support order, may ask for more evidence, or may dismiss the application.

In this process, there is only one hearing, and the hearing takes place in the province where the other spouse lives.

It's important to know that the original order will continue in effect until and unless the court changes the order.

Orders made under other laws

Every province in Canada has its own *Interjurisdictional Support Orders Act* and follows the same process. The countries that also follow the *Interjurisdictional Support Orders Act* process and have agreed to cooperate applications change spousal support orders are:

- United States of America — all of the United States, including the District of Columbia, Puerto Rico, Guam, American Samoa, and the US Virgin Islands
- Pacific Ocean — Australia, Fiji, New Zealand (including the Cook Islands), Papua New Guinea
- Europe — Austria, Czech Republic, Germany, Norway, Slovak Republic, Swiss Confederation, Gibraltar, United Kingdom of Great Britain and Northern Ireland
- Caribbean — Barbados and its Dependencies
- Africa — South Africa, Zimbabwe
- Asia — Hong Kong, Republic of Singapore

See the Interjurisdictional Support Orders Regulation [26] for the current list.

Here are the steps involved in this process:

1. Submit an application to the British Columbia Reciprocals Office [13], using the forms supplied by the office.
2. The Reciprocals Office checks to make sure that your application is complete and sends it to the corresponding organization in the province or country where the other spouse lives.
3. The Reciprocals Office where the other spouse lives sends the application to the court in that province or country.
4. The court will then serve the application on the other spouse, along with information about what they have to do to reply to your application.
5. The court hears the application and may make an order changing the spousal support order, may ask for more evidence, or may dismiss the application.

Under this process, there is only one hearing and the hearing is heard by the court where the other spouse lives.

It's important to know that the original order will continue in effect until and unless the court changes the order.

Changing agreements for spousal support

People can make an agreement that spousal support will or will not be paid, without having to go to court. Usually a deal on spousal support is worked out in a separation agreement, but marriage agreements and cohabitation agreements can also talk about whether support will be payable when a relationship ends. Family law agreements are discussed in more detail in the Family Law Agreements chapter.

Family law agreements and contract law

Family law agreements are private contracts reached between two people, just like other kinds of contracts. While family law agreements can be attacked, and enforced, on the principles of contract law, the support provisions of an agreement can also be argued under the *Divorce Act*. This is because a couple's private agreement on spousal support doesn't prevent the court from making an order for support under the *Divorce Act*.

However, the court will usually give considerable deference to family law agreements and will prefer to make an order that reflects the terms of the agreement that the spouses reached for themselves. Without proof of something like duress or coercion, or some other problem, the court will treat the agreement as representing the honest and informed intentions of the parties to settle their dispute.

Because of the deference the court will usually give to an agreement, it can sometimes be necessary to attack the agreement itself under the law that applies to contracts. An agreement might be found to be invalid for one or more of the following reasons:

- one of the spouses was forced to enter into the agreement,
- one spouse was too much under the influence or control of the other party in consenting to the terms of the agreement,
- the agreement is fundamentally unfair, or
- one spouse lied to the other spouse or hid information from that spouse, and these misleading representations were the basis on which the agreement was executed.

All of these arguments are based on the law of contracts, not on a particular piece of legislation.

If the court sets aside an agreement for spousal support, the person asking for support must convince the court that it should make an order for spousal support under section 15.2 of the *Divorce Act* or section 165 of the *Family Law Act*. This application will be treated the same way that all other applications for spousal support are treated.

Agreements for spousal support and the *Divorce Act*

In the 2003 case of Miglin v. Miglin [5], the Supreme Court of Canada decided that the material change test shouldn't apply to changing agreements and described a three-step test to be used when deciding whether a change is warranted:

1. Was the agreement negotiated and entered into fairly? In other words, was there an equality of bargaining power?
2. If the circumstances that the agreement was entered into were reasonable, did the agreement meet the objectives for spousal support set out in section 15.2 of the *Divorce Act* at the time it was made?
3. If the agreement met the objectives set out in the *Divorce Act*, does the agreement still reflect the original intention of the parties. and does it continue to meet the objectives for spousal support set out in the *Divorce Act*?

If the court can answer all three questions “yes,” then the agreement will survive. But if the answer to any of the three is “no,” then the court may make an order about spousal support that is different from the agreement.

Agreements for spousal support and the *Family Law Act*

The *Family Law Act* provides some important rules about agreements dealing with spousal support. First, under section 165(3), the court cannot make an order for spousal support if there is an agreement on spousal support, including an agreement that support will not be paid, until the agreement is set aside. Second, under section 164, two tests are set out to help the court decide when an agreement on spousal support should be set aside.

Under the first test, at section 164(3), the court must look at the situation of the spouses when they were negotiating and signing their agreement. Like in the Miglin case, the court is required to consider whether any of these circumstances existed when the spouses made their agreement:

> (a) a spouse failed to disclose income, 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 party'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.

The last part of this test, at subsection (d), is about whether there is a defect under the law of contracts that might make the agreement void or voidable. The other parts of the test are all about the fairness of the spouses' negotiations.

Now, even if there are no issues with an agreement under section 164(3), the second test, at section 164(5), allows the court to set aside agreements that are "significantly unfair" taking into account:

> (a) the length of time that has passed since the agreement was made;
>
> (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
>
> (c) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (d) the degree to which the spouses relied on the terms of the agreement;
>
> (e) the degree to which the agreement meets the objectives set out in section 161.

(Section 161, mentioned in subsection (e), is the part of the *Family Law Act* that sets out the objectives of spousal support.)

If the court sets aside an agreement for spousal support, the person asking for support must convince the court that it should make an order for spousal support, under section 165 of the *Family Law Act*. This application will be treated the same way that all other applications for spousal support are treated.

Amending the agreement

It may be possible to avoid court altogether if the spouses can agree about the new arrangements and are willing to change the part of the agreement that deals with spousal support. All things considered, this is a much cheaper and much less confrontational way of dealing with the problem. It may well be that the payor is willing to agree to continue or start paying spousal support, or that the recipient is willing to agree to a reduction in the amount of spousal support being paid.

Family law agreements are changed by executing another written agreement that updates the original agreement. Changing an agreement is called *amending* the agreement. These agreements are usually called "amending agreements," "amendment agreements," "addendum agreements," or something else to that effect, and only deal with the part of the original agreement that needs to be changed. They are much shorter than the agreements that they amend, and the text of the agreement usually says something like this:

> Frank and Manjeet agree that their separation agreement, executed on 1 January 2022, will be amended by cancelling Paragraph 12 of that agreement and replacing it with the following:
>
> Neither party shall be entitled to receive spousal support from the other.

An amending agreement can also:

- reduce the amount someone must pay as spousal support,
- increase the amount payable as spousal support, or
- impose a new obligation to pay support.

Spousal support and retirement

The retirement of a spouse often qualifies as a material change in circumstances. For the payor, retirement usually means less income is available to pay spousal support. For the recipient, retirement can mean less support is needed to supplement the income they get from a pension or some other kind of retirement benefit. Section 169 of the *Family Law Act* allows for a review in either event. Under section 17 of the *Divorce Act*, you can apply to vary an order for spousal support if you can show that retirement does in fact represent a material change in circumstances.

It's important to know that the court will not automatically change a spousal support obligation just because you or your spouse have retired. Too many payors make this assumption, retire, and then are surprised when the court does not reduce support. Here are some of the questions the court will need answered before it does anything to change a spousal support obligation:

- Does the payor have no choice about retiring, for example, because of a mandatory retirement age, or a medically necessity? (In circumstances like these, the court is most likely to agree to change a spousal support obligation.)
- How would a change in spousal support affect the recipient? Can they also retire? Do they still have employment income? Do they have any retirement income of their own? Is spousal support still necessary?
- When the payor retires, will they have other sources of income? Do they have another job lined up, or are they intending on going into business for themselves?
- Are there pensions, RRSPs and other retirement savings that were divided when the spouses divided the family property? How will income from these assets affect the spouses' financial situations?

It's also important to know that in some cases the court has ordered that a spousal support obligation continue, despite the payor's decision to retire.

In most cases, if retirement is an issue, the spouses should try to negotiate or mediate a resolution, or to apply to court, *before* they have made any irrevocable changes in their employment.

Spousal support and new partners or spouses

People often assume that people receiving spousal support stop being entitled to receive support when they remarry or repartner. This may be the case when spousal support was agreed to or ordered on the basis of the recipient's needs. It is rarely the case when spousal support was agreed to or ordered for compensatory reasons.

When spousal support is agreed to or ordered because of the recipient's needs, the recipient's entitlement to receive support may end when their need for financial help ends, or lessens, because of the support they receive from a new spouse or partner. This is especially the case when the recipient lives with their new spouse or pattern, shares expenses with them, or receives financial assistance from them.

When spousal support is agreed to or ordered to compensate the recipient for the financial consequences of the decisions the spouses made during their relationship, the obligation to pay spousal support may not end until the recipient has been fully compensated. As a result, compensatory spousal support agreement and orders are a little sticky; the duty to pay can survive after the recipient gets a new job or a better-paying job, or if the recipient repartners or remarries. Payors cannot count on a change in the recipient's relationship status affecting their spousal support obligation.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Interjurisdictional Support Orders Act* [25]
- Interjurisdictional Support Orders Regulation [26]

Links

- Ministry of Attorney General Interjurisdictional Support Services [13] (BC reciprocals office)
- Legal Aid BC's Family Law website's information page "Court orders" [7]
  - Under the section "Change an order or set aside an agreement made in BC"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 29 June 2022.

References

[1] http://canlii.ca/t/1d1rl
[2] http://canlii.ca/t/5cdj
[3] http://canlii.ca/t/hrwn6
[4] http://canlii.ca/t/1f0dj
[5] https://canlii.ca/t/fpddd

Spousal Support Arrears

When a person who is obliged to pay spousal support fails to pay all of the spousal support they are required to pay, a debt begins to accumulate. The debt owing is called the payor's *arrears* of spousal support.

People generally have two different goals when arrears begin to mount up. The person responsible for paying support, the *payor*, likely wants the court to reduce or cancel the arrears, while the person receiving the support, while the *recipient*, will want the court to force the payor to pay what's owing.

This section provides an introduction to the problem of spousal support arrears. It discusses the reduction and cancellation of arrears of spousal support and the collection of arrears.

Introduction

If spousal support is owed under a court order or an agreement, a failure to pay the support owing is a breach of that order or agreement, and, in the case of orders, it can be contempt of court as well. The court places a high value on the financial support of spouses and will usually take an extremely dim view of anyone who defaults on such an obligation in the absence of a very good excuse or some very compelling circumstances.

A person who owes arrears of spousal support, the *payor*, will likely be interested in the ways that the outstanding amount can be reduced, while a person to whom support is owing, the *recipient*, will be interested in collecting the arrears. Someone who owes arrears will generally have a difficult time convincing the court to reduce their debt. On the other hand, collecting arrears can be difficult as well, if for no other reason than that you can't get blood from a stone. Unless the payor has another source of funds to draw upon, a recipient may discover that the outstanding support may never be recovered.

Despite these challenges, it is possible for a payor to have their arrears reduced and, sometimes, cancelled altogether. At the same time, recipients have access to some very powerful and effective enforcement tools to collect outstanding arrears of support.

Orders for spousal support

Orders for the payment of spousal support are enforceable like any other order of the court. Someone who breaches a Supreme Court order can be punished for contempt of court. As well, under the *Family Law Act*, both the Supreme Court and the Provincial Court can require the payor to:

- provide security for their compliance with the court order, in other words, pay an amount of money into the court which the court will hold to guarantee the payment of child support,
- pay any expenses incurred by the recipient as a result of the payor's failure to pay child support,
- pay up to $5,000 for the benefit of another party or a child whose interests were affected by the payor's failure to pay child support, or
- pay up to $5,000 as a fine.

If nothing else works to ensure that the payor complies with the child support order, the court can also jail the payor for up to 30 days.

Unfortunately for people who would rather be jailed than pay, section 231(3)(c) of the *Family Law Act* says that:

> `imprisonment of a person under this section does not discharge any duties of the person owing under an order.`

Since orders for support require the payment of money, arrears can also be enforced as a "judgment debt" under the provincial *Court Order Enforcement Act* [27] for up to 10 years after the obligation to pay support has ended.

Payors can apply for an order reducing arrears of spousal support that have accumulated under a court order under both the *Divorce Act* and the *Family Law Act*. Applications like these must be made under the same legislation under

which the original spousal support order was made.

Agreements for spousal support

Arrears that have accumulated under a separation agreement are owed because of the promises each party made to the other when they signed the agreement. A separation agreement is a contract that can be enforced in court, just like any other contract.

Agreements for support are most easily enforced by filing them in court. Once they are filed in court, agreements can be enforced just like they are court orders. (Although agreements can still be enforced under the law of contracts, it's a lot simpler to file them in court and take care of it that way.) Section 163(3) of the *Family Law Act* says:

> A written agreement respecting spousal support that is filed in the court is enforceable under this Act and the *Family Maintenance Enforcement Act* as if it were an order of the court.

Payors can apply under section 174 of the *Family Law Act* for an order reducing arrears that have accumulated under an agreement that has been filed in court just like they can for arrears accumulating under an order. Alternatively, they can apply to set aside or change the agreement, going back in time or going forward, under sections 164 and 167 of the *Family Law Act*, or ask for a spousal support order on terms different than their agreement under section 15.2 of the *Divorce Act*.

The Family Maintenance Enforcement Program

Although recipients can enforce orders and agreements for spousal support on their own, most of the time recipients will give that job to the BC Family Maintenance Agency [1], which is the name for what many still know as the Family Maintenance Enforcement Program. BCFMA is the new name for FMEP. This is a provincial government program under the provincial *Family Maintenance Enforcement Act* [2] that tracks payments that are owing and those that are paid, calculates the interest owing on payments that are not made, and can impose fines when payments aren't made.

BCFMA is a free service for recipients. Its purpose is to enforce the payment of spousal support.

It's important to know that BCFMA can't change agreements and orders about spousal support. BCFMA can't increase or decrease the amount of a spousal support obligation and it can't reduce or cancel arrears of spousal support. BCFMA does not help recipients respond to applications to change support orders, set aside agreements, or reduce or cancel arrears. You'll have to do that on your own. But from the recipient's perspective, just having BCFMA take over enforcement of the order or agreement can be a huge relief.

Reducing and cancelling arrears

Payors may apply to court to have their arrears of spousal support cancelled or reduced. When arrears are *cancelled*, the debt is wiped out and the payor no longer owes money to the payor for their past spousal support obligation. When arrears are *reduced*, there's still a debt owing to the recipient but the amount of the debt has been reduced to a smaller amount.

There are two ways to apply to court for orders reducing or cancelling arrears, and each has its own advantages and disadvantages. The first approach is to say, “Yes, that is the proper amount of arrears. I owe that, but I can’t pay it. Please give me a break on paying the debt I oew.” As you might expect, the courts usually take a fairly dim view of this approach, and the payor will have to show that payment of the amount of support owing will cause them significant hardship.

The second approach is to say, “Yes, this is the amount I owe under the original order or agreement, but my situation changed. If I had applied to change the order or agreement when my financial circumstances changed, the amount would have been reduced. Please let me apply now and recalculate how much I owe in light of my new financial

circumstances." This application asks the court to change the order or agreement going back in time, called a *retroactive variation* of the original order or agreement. The court will still require the payor to explain why they deserve a second chance, but it may be a little easier to persuade the court to do this than to just cancel or reduce the arrears owing.

Section 174 of the *Family Law Act* allows people to ask for a reduction or cancellation of arrears, and section 167 allows people to apply for the retroactive variation of support orders. Payors have a choice. This is important, because it's may be a little easier to succeed on a retroactive variation than on an application to cancel or reduce of arrears. Just be sure you are clear with the court which route you are taking.

Retroactively varying spousal support obligations

Section 17 of the *Divorce Act* says this about varying orders for support:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; ...
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought. ...
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration. ...
>
> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former 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;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Section 167 of the *Family Law Act* explicitly mentions the court's power to retroactively vary a support order. It says this:

> (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

> (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
>
> (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
>
> (a) the order is necessary to relieve economic hardship that
>
> (i) arises from a change described in subsection (2) (a), and
>
> (ii) is related to the relationship between the spouses, and
>
> (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

In 2006, the Supreme Court of Canada established rules for applying for retroactive child support, or for a retroactive *increase* in child support, in the case of D.B.S. v S.R.G. discussed in the chapter on Child Support, under the section Making Changes to Child Support. In 2014 the case of G.M.W. v D.P.W. [2], our Court of Appeal said these principles also apply to applications for a retroactive *reduction* of child support. Both involve child support, but the rules are similar for spousal support, as the New Brunswick Court of Appeal said in its 2010 decision in P.M B. v. M.L.B. [3]:

> "I acknowledge D.B.S. v. S.R.G. speaks only of retroactive variation orders involving child support. Nothing is said about the analytical framework to be applied in regard to spousal support. For purposes of deciding this appeal, and as a general proposition, I can see no valid policy reason for distinguishing between child and spousal support when it comes to the retroactive variation of support arrears. ... Once the notion of fault is removed from the legal equation, be it the fault of the payer or payee, there is no need to distinguish between retroactive variation orders involving a decrease in child as opposed to spousal support."

When hearing applications to retroactively reduce a spousal support obligation, the court must consider:

- the circumstances surrounding the delay in bringing the application to change the original order, and
- any hardship caused by making or not making the order, to either party.

The payor's delay might be explained if the recipient promised not to rely on the full amount or enforce the full amount payable, if the payor couldn't pursue the application because of illness or disability, or if the payor couldn't get appropriate information or advice. But the delay has to be explained somehow. The courts will not be sympathetic to payor who knew they were getting into debt but just chose to let it slide.

Hardship, on the other hand, is a two-way street. The court has to consider the position of both the payor and the recipient. If the recipient relied on the order or agreement and went into debt in the expectation that the arrears would eventually be paid, that fact suggests that the original order or agreement should not be reduced. If, on the other hand, it was clear to both spouses that the order or agreement was unreasonable in light of their circumstances, that fact suggests that the original order or agreement should be reduced. A retroactive reduction will not usually be

ordered if the reduction would require the recipient to pay back money already received and spent.

It is important to know that successful retroactive variation applications will only result in arrears being reduced to what they should have been if the order or agreement had been adjusted in a more timely manner. If arrears would have accumulated even on the new amount of spousal support, those arrears are still owing.

Reducing and cancelling arrears without variation

The *Divorce Act* doesn't talk specifically about the reduction and cancellation of arrears. Instead, section 17 of the act says this:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses;

Applications to reduce or cancel arrears of spousal support under the *Divorce Act* aren't often pursued, but do happen. Haisman v. Haisman [4], a 1994 decision of the Alberta Court of Appeal, and Earle v. Earle [5], a 1999 decision of our Supreme Court, are good examples of how the court deals with these applications.

The *Family Law Act* does talk about arrears. Section 174 says this:

> (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
>
> (2) For the purposes of this section, the court may consider
>
> (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
>
> (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
>
> (c) any circumstances that the court considers relevant.
>
> (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
>
> (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the *Family Maintenance Enforcement Act*, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

In general, under the *Family Law Act*, arrears will only be cancelled if a payor can show they are unable to pay the arrears "now and in the future", which is what the Court of Appeal said in the 2015 case of MacCarthy v. MacCarthy [6].

If you are asking the court to make an order reducing or cancelling arrears, you must be prepared to prove that it would be not just *unfair*, but *grossly unfair* for you to have to pay off the arrears. The courts have interpreted "gross unfairness" under the *Family Law Act* to mean that the payor is not only incapable of repaying the arrears but is also unlikely to be able to repay them in the foreseeable future without suffering severe financial hardship. If you are asking the court to make an order reducing arrears, you must be prepared to prove that it would be not just "unfair," but *grossly* unfair for you to have to pay off the arrears. The leading case that describes the legal principles about cancelling arrears is a 1999 case called Earle v. Earle [1], in which the court said this:

> "There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so."

You must also be prepared to address the factors set out in section 174(2).

- What efforts have you made to pay the spousal support you were required to pay?
- Why didn't you try to change the spousal support before arrears had accumulated?
- Why can't you pay the arrears now?
- Are there any other circumstances, such as catastrophic business losses or an unintended loss of employment, or new financial obligations in relation to a new family, that the court should take into account?

Be prepared to provide a court form called a financial statement, Form F8 in the Supreme Court and Form 4 in the Provincial Court, that summarizes all of your assets and debts, and income and expenses, if you intend to show the court that you cannot pay your arrears. Complete financial disclosure is absolutely essential.

Collecting arrears of support

The collection of debts and enforcement of judgments occupies a whole course at law school and is not a simple matter. The provincial government has, however, established an agency responsible for enforcing support obligations, the BC Family Maintenance Agency, or BCFMA (formerly the Family Maintenance Enforcement Program, or FMEP). Someone who is entitled to receive child support or spousal support under an agreement or order can sign up with this program and the program will tend to the enforcement of the agreement or order without a great deal of further involvement on the part of the recipient.

BCFMA is free for recipients. All you have to do is file your agreement or order with the program and fill out an application form. (Agreements about spousal support must be filed in court first.) BCFMA will take the matter from there, and the program is authorized by the *Family Maintenance Enforcement Act* [2] to take whatever legal steps may be required to enforce an ongoing support obligation, and track and collect on any unpaid support and the interest accumulating on any unpaid support.

The *Family Maintenance Enforcement Act* gives BCFMA a lot power to collect spousal support. The program can start and manage all of the court proceedings that can be undertaken by a private creditor, as well as some unique actions that the program alone can take. BCFMA can also:

- garnish the payor's wages,
- collect from a corporation wholly owned by the payor,
- redirect federal and provincial payments owed to the payor, like GST or income tax rebates, to the recipient,
- prohibit a payor from renewing their driver's licence,
- direct the federal government to refuse to issue a new passport to the payor or to suspend the payor's current passport,
- register a lien against personal property and real property owned by the payor, and
- get an order for the payor's arrest.

While it is possible to make collection or enforcement efforts on your own, this will cost money and time and possibly require you to hire a lawyer and bear that expense as well. Since any private collection efforts you might take may interfere with efforts being made by BCFMA, recipients enrolled with BCFMA are required to get the permission of the program's director before they take independent enforcement steps.

You can find more information about enforcing orders in the chapter Resolving Family Law Problems in Court within the section Enforcing Orders in Family Matters. You can also find more information at the website of the Department of Justice [8], which includes a helpful overview of support enforcement mechanisms in Canada.

Separation agreements

Section 163(3) of the *Family Law Act* allows a party to an agreement, usually a separation agreement, to file the agreement in the Provincial Court or in the Supreme Court. An agreement that is filed in court can be enforced as if it were an order of the court. It is not necessary for a court proceeding to have been started before an agreement can be filed in court, nor is it necessary that the agreement be a British Columbia agreement.

BCFMA will enforce agreements for support, however they require that an original copy of the agreement be filed in court and sent to them, with the court's stamp, before they can enforce the agreement.

You can find more information about enforcing agreements in the chapter Family Law Agreements, in the section Enforcing Family Law Agreements.

Orders made outside British Columbia

It's a little harder to enforce orders for spousal support that are made elsewhere against payors living in British Columbia because the recipient needs the help of the British Columbia courts to collect against a British Columbia resident. However, both the federal *Divorce Act* and the provincial *Interjurisdictional Support Orders Act* have special processes that can help.

Canadian spousal support orders

Section 20(2) of the *Divorce Act* says that an order under the act has legal effect throughout Canada. Section 20(3) also says that such orders may be filed in the courts of any province and be enforced as if they were an order of the courts of that province. In other words, if your divorce order was made in Prince Edward Island and contains a term requiring that spousal support be paid, you can file that order in the Supreme Court of British Columbia and it will have the same effect and be enforceable here, just as if it were an order of the Supreme Court of British Columbia.

Spousal support orders that are made under the legislation of another province can be filed for enforcement in British Columbia under sections 17 and 18 of the *Interjurisdictional Support Orders Act* [25]. In this process, the recipient provides a copy of the order to the Reciprocals Office in their province, which then sends the order to the British Columbia Reciprocals Office [13]. The Reciprocals Office here then files the order in court, and, once filed the order has the same effect as an order of the courts of British Columbia.

You can find more information about enforcing orders generally in the chapter Resolving Family Law Problems in Court under the section Enforcing Orders in Family Matters.

Orders made outside of Canada

A number of other countries have agreements with British Columbia about the enforcement of spousal support orders. Recipients living in those countries can follow the *Interjurisdictional Support Orders Act* process to have their orders filed and enforced here. The countries with agreements with British Columbia are:

- United States of America — all of the United States, including the District of Columbia, Puerto Rico, Guam, American Samoa, and the US Virgin Islands
- Pacific Ocean — Australia, Fiji, New Zealand (including the Cook Islands), Papua New Guinea
- Europe — Austria, Czech Republic, Germany, Norway, Slovak Republic, Swiss Confederation, Gibraltar, United Kingdom of Great Britain and Northern Ireland
- Caribbean — Barbados and its Dependencies
- Africa — South Africa, Zimbabwe
- Asia — Hong Kong, Republic of Singapore

See the Interjurisdictional Support Orders Regulation [26] for the current list.

The same sort of process is also available under section 19.1 of the *Divorce Act*, and the same countries that have agreements with British Columbia for the *Interjurisdictional Support Orders Act* also have agreements with Canada

about the enforcement of spousal support orders.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Family Maintenance Enforcement Act* [19]
- *Court Order Enforcement Act* [21]
- *Interjurisdictional Support Orders Act* [22]

Links

- BC Family Maintenance Agency website [7] (formerly FMEP)
- Department of Justice: Provincial and Territorial Information on Interjurisdictional and International Support Order Enforcement [8]
- Spousal support resources on Clicklaw [9]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 30 June 2022.

References

[1] http://www.bcfma.ca
[2] http://canlii.ca/t/g80ht
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[4] http://canlii.ca/t/1p6l3
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[9] https://www.clicklaw.bc.ca/global/search?f=Family+law%7c1160&so=v

Property & Debt

Property and Debt in Family Law Matters

This chapter focuses on the division of property and debt between spouses according to the provincial *Family Law Act*. Under these parts of the *Family Law Act*, the term "spouse" includes both *married couples* and *people who lived together in a marriage-like relationship for at least two years*.

The basic approach to property under the *Family Law Act* is pretty straightforward. When spouses separate, each spouse keeps the property they brought into the relationship, as well as specific kinds of assets they got during the relationship, and the spouses equally share the rest of the property they own together or separately. The property that each spouse keeps is called "excluded property." The property they accumulated during their relationship and share is called "family property."

The same rules apply to debts. Spouses are presumed to share responsibility for the debts that accumulated during their relationship, but remain separately responsible for debts they had before the relationship began.

The federal *Divorce Act* doesn't deal with the division of property or debt, so when you're looking at who gets what after separation you need to look at the *Family Law Act*.

The *Family Law Act* is still relatively new, having replaced the old *Family Relations Act* in 2013. If what you've read so far about property division seems unfamiliar, it might be because you know more about the rules for dividing property under the old law. The *Family Relations Act* talked about "matrimonial property," which made sense because it only applied to married people. Property qualified as shareable matrimonial property if it was "ordinarily used for a family purpose," regardless of whether it was brought into the relationship or acquired afterward. The *Family Law Act* takes a very different approach to how property is divided.

This introductory section of the chapter provides basic information about property and debt, including the new rules about pets. It also talks about the rules about property that apply to couples who aren't spouses, and looks at some of the income tax issues that can come up when dividing property. The sections of the chapter that follow will go into:

- Basic Principles of Property and Debt in Family Law, which covers the rules around the division of property and debt in a lot more detail,
- Protecting Property and Debt in Family Law Matters, which discusses the steps you can take to protect family property before and after separation, and
- Dividing Property and Debt in Family Law Matters, which explains how property and debt are divided by judges and arbitrators (when things end with a court order or an arbitrator's award) or by spouses (when the spouse reach an agreement).

Division of property and debt under the *Family Law Act*

The two parts of the *Family Law Act* that talk about the division of property and debt only apply to people who are *spouses*. Note that the definition of spouse for these two parts of the Act are a bit different from the rest of the Act (for example the parts of the Act that deal with child or spousal support). When it comes to the division of property and debt, a spouse is either:

- someone who is married or was married to someone else, or
- someone who is or was living in a "marriage-like relationship" with someone else for at least two years.

People who lived together for less than two years are *not* spouses for these parts of the *Family Law Act*, whether they've had a child together or not.

Property and debt can be divided under the terms of a cohabitation agreement or a marriage agreement that the spouses made around the time they began to live together, or under the terms of a separation agreement that they made around the time they separated. If the spouses can't reach an agreement, a court can make an order about the division of property and debt.

Court proceedings for the division of property and debt must be started within two years of:

1. the date of *divorce* or *annulment* for married spouses, or
2. the date of *separation* for unmarried spouses.

Categories of property and debt in family law

The *Family Law Act* talks about three things when it comes to dividing property and debt: *family property*, *excluded property*, and *family debt*.

All property owned by either or both spouses (including property owned by a spouse jointly with a third party such as a parent) at the date of separation is *family property* unless it is *excluded property*. Family property includes things like real property, bank accounts, pensions, businesses, debts owing to a spouse, and so forth. Family property is presumed to be shared equally between spouses, regardless of their use of or contribution to that property.

Excluded property is any property that is excluded from the pool of family property to be split between spouses. This includes the property a spouse owned before the date of marriage or the date the spouses began living together, whichever is earlier, plus certain kinds of property acquired during the spouses' relationship, including:

- property that was bought using property that one spouse already owned before the relationship,
- inheritances and gifts (provided that the gift is a gift to just the spouse and not to the couple), and
- certain kinds of insurance proceeds and court awards.

Excluded property is presumed to remain the property of the one spouse who owns it, but the increase in value of the excluded property becomes family property and is shared.

All debt incurred by either or both spouses from the date of marriage or the date the spouses began living together, whichever is earlier, to the date of separation is *family debt*. Responsibility for family debt is presumed to be shared equally between spouses, regardless of their use of or contribution to that debt.

Special treatment for pets

As of 15 January 2024, the *Family Law Act* also addresses family pets, which used to be treated as any other property under the Act. Before this time, pets were like any other asset. If one person brought a dog into the relationship, the animal was excluded property. If two spouses got a cat while they were together, the cat was family property.

The Act now imposes special rules around what happens to pets after spouses separate, and refers to these animals as *companion animals*. Section 1 defines a companion animal as "an animal that is kept primarily for the purposes of companionship". Section 3.1 further clarifies that dogs under the *Guide Dog and Service Dog Act* [1], any animal that kept "as part of a business", and agricultural animals are not *companion animals*.

See the section discussion on these special rules for companion animals under the Dividing Property and Debt in Family Law Matters section of this chapter. Meanwhile, as you read this page just keep in mind that the information about excluded property and family property will not necessarily apply to these animals.

Beginning and ending a spousal relationship

As you can see, certain dates in a couple's relationship are really important. The date a relationship begins — the earlier of the dates the spouses begin to live together or marry — is the date that separates the excluded property brought into the relationship from the family property acquired during their relationship and is the date when spouses begin to share responsibility for new debts. The date the spouses separate, generally speaking, marks the end of the accumulation of shared property and shared debt.

Living together and marrying

Under section 3(3) of the *Family Law Act*, a relationship between spouses begins

> ... on the earlier of the following:
>
> (a) the date on which they began to live together in a marriage-like relationship;
>
> (b) the date of their marriage.

Since the definition of *spouse* at section 3(1)(b)(i) includes people who have lived together "for a continuous period of at least 2 years," once you have reached the two-year mark:

- you and your partner are spouses, and
- your relationship as spouses began two years earlier, on the date you began to live together.

Separating

Although a married couple are married until they get a divorce, the key date for the division of property and debt under the *Family Law Act* is the date of separation. The *separation date* is important for both married spouses and unmarried spouses.

Although many people move out when they separate, some couples separate and remain living under the same roof. A physical separation is not necessary to prove separation. What is necessary is an intention to end both the relationship and the intimacies that go along with it. Often the decision to separate is made by both spouses, but it only takes one spouse to decide to end a relationship, and one spouse's decision to separate doesn't require the consent of the other spouse.

Section 3(4) of the *Family Law Act* says this:

> (a) spouses may be separated despite continuing to live in the same residence, and
>
> (b) the court may consider, as evidence of separation,

> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

In other words, to separate, one spouse should announce the end of the relationship and then take steps that would demonstrate an intention to end the relationship. Separation is discussed in more detail in the chapter Separating and Getting Divorced.

Property brought into the relationship

Under section 85(1)(a), property that was brought into a relationship is excluded from the pool of family property that is supposed to be divided equally between spouses. Under section 96, the court "must not" order a division of excluded property, except in limited circumstances. A spouse is therefore normally entitled to keep the excluded property they owned when the relationship began. Under section 85(2), however, it is up to the person who's saying that property is excluded property to prove that the property is excluded property.

For most couples, property brought into a relationship will form the largest component of a spouse's excluded property. However, when most people marry or move in together, counting up their assets is not the foremost thing on their mind. This means that you may wind up having to do some historical accounting to figure out what you each owned years ago. Whether you're just starting a relationship or are trying to figure out what you once had, these are the documents you need to look for:

- bank statements for the period that includes the date you began to live together or got married, whichever came first,
- RRSP, RIF, LIRA, and other retirement savings account statements for the same period,
- any employee pension statements that cover the date you began to live together or got married,
- mutual fund and other investment account statements for that period,
- any BC Assessment statements for the year in which you began to live together or got married,
- mortgage and line of credit statements for the period that includes the date you began to live together or got married, and
- credit card and loan statements for that period.

It will be a harder to look back in time to figure out the value of things like cars, motorcycles, trailers, boats, snowmobiles, and so on. If you're entering a relationship now, it will be helpful to look up the Canadian Black Book [2] or Kelley Blue Book [3] estimated values for vehicles. Boats and trailers may need to be specially valued by a dealer. It is important to note that you cannot exclude the *value* of the property calculated from the start of the relationship. For example, let's assume one party owned a car worth $20,000 at the beginning of the relationship. Say it is only worth $10,000 at the time of separation. That party gets to keep the car itself, but does not get $20,000 worth of property out of *family property*. If the car was traded in towards the purchase of a second car during the relationship, however, the trade-in value would be *excluded property*.

Property and debt acquired during the relationship

In most circumstances, the property either or both spouses acquire during their relationship will be family property, but there are some important exceptions.

Understanding family property

Under section 84(1) of the *Family Law Act*, family property is broadly defined as the property owned by one or both spouses on the date of their separation, including any property bought after separation with family property. Section 84(2) gives some examples of specific assets that are family property, including:

- interests in companies, businesses, partnerships, and ventures,

- money owed to a spouse, and
- bank accounts, savings, pensions, and RRSPs.

While that sounds pretty broad, you have to read section 84 as being "subject to section 85" to understand that *family property* does not actually include *excluded property*. Family property does, however, include the amount that any excluded property grows in value during the relationship.

Under section 81, family property is presumed to be shared between the spouses equally, regardless of their use or contribution to that property. Note that while sharing equally is the presumption, there are circumstances (discussed in section 95) where it would be *significantly unfair* to do so, in which case a judge can order that family property be divided unequally. This is also called *reapportionment* of family property.

For information on how to share CPP credits see How Do I Divide Our CPP Pensions after We're Divorced?. It's located in the Helpful Guides & Common Questions part of this resource.

Understanding excluded property

Under section 85(1), excluded property is property acquired by a spouse before the relationship began, plus specific kinds of property that was acquired during the relationship, namely:

- gifts from a third party (provided that the gift is a gift to the spouse and not to the couple),
- inheritances,
- certain court awards and settlements,
- certain insurance payments, and
- property held in trust, providing that the spouse didn't put the property into the trust.

Excluded property also includes any new assets that were *derived* from other excluded property. This is also contained in section 85(1)(g). For example, if you owned a house before the relationship, but sold it during the relationship and used some of the money to buy a condo, and the rest of the money to top up your RRSPs, then both the condo and the money that's now in RRSPs would be excluded property. This is true even if you registered the new condo in your spouse's name, or in both your names. Provided that the money used to acquire this new property is clearly derived from the excluded property, the *Family Law Act* treats this newly acquired property as excluded property.

Excluded property that is acquired during a relationship is presumed to remain the property of the spouse who owns it. While section 85(2) says that it's up to the person claiming excluded property to *prove* that it is in fact excluded, the legislation is clear — especially since the *Family Law Act* was amended and section 85(3) was added in May 2023 — that transferring it into the name of the other spouse, using it to buy new property, or using it to pay down the mortgage on the family home, does not mean that the asset itself (or its cash equivalent) ceases to qualify as excluded property.

Note that while the presumption is you don't share excluded property, there are circumstances (discussed in section 96) where the judge can order that excluded property be divided and shared with the other spouse. This is another form of *reapportionment*, and can happen when a judge decides that:

- family property or debt exists outside of BC and cannot practically be divided, or
- it would be significantly unfair not to divide the excluded property given the duration of the relationship and:
  - the other spouse's contributions to the preservation, maintenance, improvement, operation or management of the excluded property,
  - any agreement the spouses had about the excluded property, or
  - if unequal reapportionment of family property or debt under section 95 would not be enough to address the extent significant unfairness.

understanding family debt

Under section 86, family debt is all debt incurred by either or both spouses during their relationship up to the date of their separation, but can include debt incurred after separation if the debt was incurred to maintain family property, like a loan taken out to pay the property taxes.

This definition means that debt incurred by a spouse before the spouses married or began to live together is that spouse's personal debt; it's only the new debt that they share. Under section 81, responsibility for family debt is presumed to be shared between the spouses equally, regardless of their use or contribution to that debt. This said, there are circumstances (discussed in section 95) where it would be *significantly unfair* to make the parties equally responsible for a debt, in which case a judge can order that family debt be divided unequally. This is called *reapportionment* of family debt.

Dividing property and debt: an example

Let's look at an example to make things a bit easier to understand.

> Harkamal moved in with Baljinder in 2018, when Baljinder's home was worth $800,000 and had no mortgage.
>
> Harkamal starts going to college in 2019 and takes a personal loan to help pay for her tuition fees, lab fees, and textbook costs. Baljinder keeps working while Harkamal is at school and not working. With his income, Baljinder pays property taxes, car insurance, utilities, groceries, and so forth. He's also able to put some money away into RRSPs for the first time ever.
>
> Harkamal and Baljinder separate in 2022. When they separate, Harkamal owes $18,000 for her personal loan, Baljinder's house is worth $1,000,000 and Baljinder has saved $30,000 in RRSPs.

In this example, Baljinder's house is his *excluded property*. It was worth $800,000 when Harkamal began living with him, and it has increased in value by $200,000. The *family property* is the RRSPs that Baljinder saved, plus the increase in value of Baljinder's house during the relationship. The *family debt* is Harkamal's loan which was incurred entirely during the parties' relationship and is now up to $18,000.

Boiling this all down, subject to a claim for reapportionment, Baljinder would get:

- $800,000 as the value of the home he brought into the relationship,
- $100,000 for one-half of the growth in the value of his house to the date of separation,
- RRSPs worth $15,000, and
- responsibility for $9,000 of Harkamal's loan.

Harkamal would, subject to a claim for reapportionment, get:

- $100,000 for one-half of the growth in the value of Baljinder's house,
- RRSPs worth $15,000, and
- responsibility for the remaining $9,000 of her loan.

Property claims and people who aren't spouses

People who are not spouses within the *Family Law Act* definition at section 3, described above, cannot make a claim for the division of property or debt through that act. When people who aren't spouses own an asset jointly, like a house or a car, they are presumed to each be entitled to half of the value of that property. Where a person claims a share of property owned only by the other person, they will have to prove an entitlement to that asset through the principles of the common law.

Jointly-owned assets

Where a couple are both on the title of an asset, whether the family home, a car, or a bank account, they are each assumed to have an equal interest in the asset. When one party refuses to give the other their share of that asset, it is open to that person to start a court proceeding for either:

1. an order for the sale of the asset and the division of the proceeds of the sale, or
2. an order for payment in compensation for their interest in the asset.

Where real property is jointly owned, it is possible to make a claim under the provincial *Partition of Property Act* [1]. Section 2 of this act says that:

> (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.
>
> (2) Subsection (1) applies whether the estate is legal or equitable or equitable only. This act allows a co-owner, including someone with only an equitable interest in the property, potentially including an interest under the law of trusts as discussed below, to apply for an order that the property be sold and the proceeds of the sale divided.

In other words, if you jointly own real property with your partner, you can apply to court for an order that the property be sold and the proceeds of the sale be split between you.

Individually-owned assets

Where a person who is not a spouse believes that they should have an interest in property owned only by the other person, a claim against that property can only be made under the common law, specifically the law of equity and the law of trusts.

The essential point of this sort of claim is that the non-owning party has, or should be considered to have, a stake in property owned by the other party. The non-owning party's interest in that property is said to be held *in trust* for the non-owning party by the person who owns the property on paper. The non-owning party is the beneficiary of that trust and should be entitled to receive compensation for their interest in the property under the trust.

There are three kinds of trust claim that may be made:

- a constructive trust,
- an express trust, and
- a resulting trust.

A *resulting trust* happens when the behaviour of the parties will let the court infer the existence of a trust relationship; an *express trust* is a trust relationship that people intentionally enter into; and, a *constructive trust* is imposed in order to compensate someone for their interest in property when the interest can't be paid out immediately. Resulting and constructive trusts are the most common kinds of trusts involved in family law disputes about property.

Needless to say, this area of the law can be complex. If you find yourself in a situation where your only claim to an asset or a share of an asset is through trust law, it is recommended that you consult with a lawyer to handle your claim.

Resulting trusts

A resulting trust can be created in the following circumstances:

- one party loans or gives money to the other party to allow them to buy an asset, and the person buying the asset owns the asset in their name alone, or
- one party transfers property to another without payment.

In each case, the person who transfers the money or asset to the other party is said to retain an interest, called a *beneficial interest*, in the property even though the property is held by the other party in their name alone. In a court proceeding based on a resulting trust, the person making the claim, the *claimant*, is asking for compensation for their beneficial interest in the property owned by the *respondent*, the person against whom the claim is brought.

Unjust enrichment and constructive trusts

A constructive trust is called *constructive* because the claimant is asking the court to create or impose a trust on the respondent where there wasn't one before. According to the Supreme Court of Canada's decision in the 1980 case of *Pettkus v. Becker* [4], [1980] 2 S.C.R. 834, one of the most important cases on constructive trusts, the court will impose a trust on a respondent where the claimant is able to show that the respondent has been *unjustly enriched* as a result of the claimant's labour or other services. Unjust enrichment is shown by proving that:

1. the respondent was enriched as a result of the claimant's contributions,
2. the claimant was correspondingly deprived, and
3. there is no legal reason for the respondent's enrichment.

Enrichment means to have received a benefit or advantage, such as money or the benefit of unpaid labour or other services. *Deprivation* means to have lost the value that might have been otherwise received for the claimant's benefit or advantage, such as the loss of the money or the wages that might have been paid for labour or other services. The deprivation must *correspond* to the enrichment, in the sense that the claimant was deprived of exactly the thing from which the respondent benefited. If the claimant can show these things, they will have established that the respondent was *unjustly enriched* by their contributions, and the court may impose a constructive trust to fix the situation.

(There are two other cases from the Supreme Court of Canada that are critical in understanding constructive trusts, a 1993 case called *Peter v. Beblow* [5], [1993] 1 S.C.R. 980, and a 2011 case called *Kerr v. Baranow* [6], [2011] 1 S.C.R. 269. To get a proper understanding of the law relating to constructive trusts, you should read all of *Pettkus v. Becker*, *Peter v. Beblow*, and *Kerr v. Baranow*.)

Here's an example where a couple doesn't live together long enough for the *Family Law Act* to apply, and so (because they are not yet legally spouses) an *unjust enrichment* and *resulting trust* claim might be the only option:

> Frank moves into a home owned by Lois. Frank's role in the relationship is that of a homemaker while Lois works outside the home and brings home the bacon. Frank also, out of the kindness of his heart, helps Lois with her web design company, doing her books because he used to be a bookkeeper.
>
> Lois doesn't pay Frank for his labour; perhaps it's understood that Frank is helping out with a common cause, since Lois's company is what provides the family with its income, or perhaps Frank's help is just one of the things he does because he loves Lois. Either way, payment isn't offered and it's not asked for, as is often the case when people are in a relationship.
>
> Frank's labour in the home, cooking, cleaning, and tidying, allows Lois to devote her time to the web design company, and saves her from having to hire a housekeeper and a cook, not to mention having to hire an office manager for the company.
>
> Frank, on the other hand, is losing something. Frank could have sold his services as a housekeeper, a launderer, and a cook. Frank could certainly have worked as an office manager or bookkeeper for some other company. Furthermore, Frank has made a positive contribution to Lois' company and helped it thrive and prosper.

> The months pass. Lois's company has grown in value, and the relationship comes to a tragic end when Frank discovers that Lois' trips to visit the handsome internet service provider in Alberta were for both business and pleasure.

In this example, Lois was unjustly enriched by Frank's labour in the home and his contribution to the web design company, as she didn't have to hire an office administrator or a housekeeper. Frank, on the other hand, lost out on months of wages as an office administrator, and months of wages as a housekeeper. Lois was enriched by exactly the thing Frank was deprived of: his labour, and the financial value and benefit of his labour.

Once an unjust enrichment has been found, the court must determine what the appropriate remedy would be to compensate the applicant for their interest in the property. The court will often determine the value of the trust based on the value of the contribution made by the applicant to the property or the purchase of the property.

In the example above, a concrete value can be attached to Frank's contributions to the company and to his labour in the home: what would it have cost to hire a housekeeper and a bookkeeper during that period? Or, how much did Lois' company grow in value as a result of Frank's efforts? This is the beginning of fixing a dollar value on Frank's interest in the company and in Lois's house.

Again, trust claims are complex and the case law supporting and opposing such claims is massive. If you are not married to the person, and if you have not lived with them long enough to qualify as an *unmarried spouse* under the *Family Law Act*, but you still wish to make claim against property owned only by your partner, I recommend that you obtain help from a lawyer.

Tax issues

For many people, there will be no tax impact from the division of their assets. There will, however, be a tax impact if the division creates what the Canada Revenue Agency [7] deems to be *income*.

The most common kind of taxable income people have is employment income. Some other kinds of taxable income include:

- the money you get when you cash in an RRSP,
- money received by a shareholder from a company as a dividend or from the sale of their shares,
- the interest you get from a loan you've made to someone else, and
- the profit realized from the sale or transfer of real property that isn't the family's principle residence.

When you report this sort of income in your tax return, the CRA considers it to be taxable income, income that may be taxable at different rates.

The purpose of this part of this section is to alert you in a general way to the possibility that there may be tax implications as a result of family property being divided, and that there are sometimes ways to avoid this sort of unfairness. This is, however, a complex area of family law, and if you have a problem of this nature, you really should get the advice of a lawyer who specializes in tax issues; store-bought or online tax software will not identify these issues. You probably don't want to pay any more tax than is absolutely necessary!

Avoiding unfairness

The tax consequences of a particular arrangement in a court order or separation agreement can be taken into account when property is being divided, since the payment of tax by one party may fundamentally change the fairness of the agreement or order. Consider this example:

> Say Eli receives $1,000,000 in cash and George receives a rental house worth $1,000,000, and the cash and the rental house are all part of the family property. At first glance, this seems like a fair, equal split of the family property, which together comes to a total of $2,000,000. In fact, it isn't.

> No tax will be payable by Eli as a result of receiving the cash. Tax will be payable by George if the rental house has to be sold, since it was a rental property and not the family's primary residence. What if the capital gains tax that George has to pay when he sells the rental property is $200,000? In that case, Eli has received $1,000,000 and George has effectively received only $800,000. If you count the tax that George has to pay, the division of the family property wasn't equal at all.
>
> To make the split equal, Eli should receive $900,000 and George should receive $100,000 plus the rental house so that each spouse will have $900,000 once the rental house is sold.

The same problem can arise if one spouse has to sell an asset in order to satisfy an order or agreement for the division of property and debt, such as making a lump-sum payment to equalize the value of the assets held by each party. This may result in the CRA assessing an extra amount of taxable income to the party who had to sell the asset, with the consequence of an additional tax debt owed by that party to the CRA.

There is an easy way to avoid unfair tax consequences and preserve the intention of the agreement or court order: the agreement or order can recognize the negative tax consequences of a particular term and compensate the affected spouse, as in the example involving the rental house above. If you need to convince a court to take tax considerations into account in dividing assets, there are three general rules you should keep in mind:

- each case will depend on the particular circumstances of the parties,
- you should be able to provide an estimate of the tax which will be payable, and
- you must be able to show that the sale or transaction that will result in tax being payable is likely to occur in the reasonably near future.

Dividing RRSPs

Normally, if you wish to cash out an RRSP, you have to pay tax on the RRSP as if the RRSP was taxable income, like employment income. Under the federal *Income Tax Act* [1], transfers of RRSPs between spouses are tax neutral, under what are called the *tax-free spousal rollover* provisions of the act.

When RRSPs are to be transferred between spouses according to a separation agreement or court order, the RRSPs are simply transferred between the spouses' RRSP accounts without having to cash them out, and no tax is payable. Your bank or credit union can provide you with the form to do this.

Real property

When a piece of property is to be transferred between spouses according to a separation agreement or court order, the parties should consult the Ministry of Finance's *Tax Bulletin PTT 003* [8]. Spouses can take advantage of the tax-free status of transfer of real property if the transfer is required by a family agreement or court order. The form is normally completed during the process of transferring title to the property at the Land Title and Survey Authority, and no tax will be payable on the transfer. The Land Title and Survey Authority form needed to do this is now completed and submitted online, and a copy of the signed separation agreement or court order or divorce decree needs to be submitted with the return.

Resources and links

Legislation

- *Family Law Act*
- *Partition of Property Act* [1]
- *Income Tax Act* [1]

Links

- Dial-A-Law Script "Dividing Property and Debts" [9]
- Justice Education Society's handbook *Parenting After Separation: Finances* [10]
- Legal Aid BC's Family Law in BC website's information page "Property & debt" [11]
  - See "Dividing property and debts"
- Ministry of Finance's *Tax Bulletin PTT 003* [8]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, October 19, 2023.

References

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[9] http://www.clicklaw.bc.ca/resource/1240
[10] http://www.clicklaw.bc.ca/resource/1529
[11] http://www.clicklaw.bc.ca/resource/4656

Basic Principles of Property and Debt in Family Law

As we discussed in the overview Property and Debt in Family Law Matters section of this chapter, the *Family Law Act* says that spouses who are married or who lived together in a marriage-like relationship for at least two years are presumed to:

- keep for themselves any property they brought into the relationship (the *excluded property*),
- be individually responsible for the debt they brought into the relationship (*excluded debt* is not a defined term in the Act, but judges sometimes call it that),
- share in the property they acquired during their relationship, plus the value increase of any excluded property during that time (the *family property*), and
- share responsibility for the debt accumulated during the relationship, including increases to any excluded debt during the relationship (the *family debt*),

This all sounds pretty straightforward, but there are lots of details that can make the division of property and debt complicated.

This section talks about how property and debt are divided between spouses under the *Family Law Act*, how they used to be divided under the *Family Relations Act*, and how these two methods or regimes are different. It explains what property is shareable family property, and what property is excluded from division. It also looks at the role marriage agreements and cohabitation agreements can play in controlling the impact of the *Family Law Act*.

Introduction

The basic plan for the division of property and debt under the provincial *Family Law Act* is pretty straightforward. You keep what you bring into the relationship, and you split what you get as well as any value that has accumulated in excluded property (i.e. increase in value of excluded property) during the relationship. Of course it's a lot more complicated than this, but that's the basic concept the *Family Law Act* is built on.

Part 5 of the *Family Law Act* deals with the division of property and debt, and provides the definitions of:

- *family property* (s.84) and *family debt* (s.86) — presumed to be shared between spouses, and
- *excluded property* (s.85) — presumed to remain the sole property of the spouse who owns it.

Part 6 of the *Family Law Act* talks about the division of pensions between spouses and says which portion of a pension is supposed to be shared and which parts remain the property of the pension member.

This section looks into the nooks and crannies of Part 5 of the act in some detail, but it doesn't say much about pensions because the division of pensions can be extremely complicated. For information about that, you should speak to a family law lawyer. A pension can be a very valuable asset. It is important to include it when dividing property.

Do you have *standing* and the right to make a claim under the *Family Law Act*?

In legal terms, *standing* refers to the right to bring a claim before a judge. Under the *Family Law Act*, spouses can ask the Supreme Court to divide property and debt upon separation.

Here's the bare essentials for the purposes of the sections of the Act that deal with property division:

- If you are married, then you are a spouse. You have standing.
- If you are unmarried, but have lived together in a marriage-like relationship for at least two years, then you are a spouse. You have standing.
- If you are unmarried, but have *not* lived together in a marriage-like relationship for at least two two years, then you are not a spouse. You do not have standing.

Here's the formal language from section 3:

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

Note that subsection 3(1)(b)(i) adds a twist. It creates different definitions of *spouse* (and therefore different requirements for *standing*) depending on which part of the *Family Law Act* the claim is made under. For other parts of the Act, if you lived in a marriage-like relationship *and had a child together*, it doesn't matter how long you lived together. For the property and pension division-related sections in Parts 5 and 6 of the Act, you can disregard this subsection. Just having a child together won't give you *standing*.

Again, unless you're married, living together for less than two years means you do not have *standing* to make claims for property division under the *Family Law Act*.

Common law claims for people in shorter relationships

If you were in a domestic relationship with someone for less than two years, you *might* have potential equitable claims that you can raise. Examples of equitable claims include unjust enrichment and constructive trust claims, and resulting trust claims. Common law couples used to make unjust enrichment and constructive trust claims, and resulting trust claims all the time before the *Family Law Act* granted them property division rights.

The challenge is that equitable claims are much more complicated, require a lot of evidence, and are harder to succeed with. This is especially true for short-term relationships, and it must be said that the history of facts required to build a strong case for unjust enrichment in a domestic relationship usually takes time to ripen. Unless a significant event occurred during the brief relationship (like a home was purchased by the couple, but one of them gained much for almost nothing, while the other lost a lot for no good reason), claims to another person's property based on having run some errands, done some chores, or gratuitously performed some favours for 18 months will be hard to substantiate.

Common law claims that apply to unmarried people who have lived together for less than two years spouses are discussed in this chapter under the Property and Debt in Family Law Matters section.

Period of entitlement

Period of entitlement refers to the time frame during which spouses have a valid claim to divide up family property or family debts. Sorting out when this period starts, and when it ends, is critical. In simple terms, the entitlement period starts when individuals either get married, or start living together in a marriage-like relationship, whichever is earlier. The period ends when they separate.

Starting date

The *start date* for the period of entitlement is the date the spouses' relationship begins. This is obviously important because that's when you determine the value of all the assets, and all the debts, that the individuals brought into the relationship. The source for this is found in the definition of *excluded property* at section 85:

> (1) The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began

The start date with respect to the accumulation of *family debt* is stated more simply in section 86:

> Family debt includes all financial obligations incurred by a spouse
>
> (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate

End date

The *end date* for the entitlement period is found in the definition of *family property*, and is presumed to be "the date the spouses separate". The source for this is section 84(1):

> Subject to section 85 [excluded property], family property is all real property and personal property as follows:
>
> (a) on the date the spouses separate, property
>
> (i) that is owned by at least one spouse, or
>
> (ii) in which at least one spouse has a beneficial interest

As you can see, the date when "the relationship between the spouses began" and the date "the spouses separate" are very important. These are the dates that mark the end of acquiring excluded property and personal debt, the start of acquiring shareable family property and family debt, and the end of acquiring family property and family debt.

Date of cohabitation and the date of marriage

Section 3(3) of the *Family Law Act* tells us when a relationship between spouses begins:

> (3) A relationship between spouses begins on the earlier of the following:
>
> (a) the date on which they began to live together in a marriage-like relationship;
>
> (b) the date of their marriage.

For married spouses, their relationship starts on the earlier of the date they began to live together in a marriage-like relationship or got married. For unmarried spouses, once the parties have lived together for two years, their relationship as spouses is considered to have started on the date they began to live together.

The date of a couple's marriage is pretty obvious. It isn't always so obvious when a couple "begins" to live together in a marriage-like relationship. The judge in a 2003 case from the Saskatchewan Court of Queen's Bench, *Yakiwchuk v. Oaks* [10], 2003 SKQB 124, (and a case that has been followed here in BC) expressed the problem this way:

> "With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of 'public' declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to 'be together'. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people 'ease into' situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist."

Hands up, anyone who has ever begun to "cohabit with little forethought or planning?"

In this day and age, relationships are no longer defined by financial dependence, sexual relationships, or the mingling of property and finances alone. A judge cannot simply go through a checklist to conclude that a marriage-like relationship exists, and if a judge tries to use a simple checklist (as some have), then their decision is at the risk of an appeal. According to numerous Court of Appeal cases in this province, a judge has to determine when (or if) a marriage-like relationship began by looking holistically at a bunch of contextual factors. A judge must decide whether or not a relationship is marriage-like from an objective perspective.

L.T.F. v R.B.F [8], 2023 BCSC 834, is a recent case where the court summarizes leading cases and various factors to bear in mind when trying to determine the starting date of a relationship. Read the section on Unmarried Spouses in the chapter on Family Relationships, under the heading *Qualifying as an unmarried spouse*, to learn more about when marriage-like relationships begin.

The date of separation

Separation usually needs three things:

1. *Intention*: one spouse decides that the relationship cannot continue
2. *Communication*: the spouse says the relationship cannot continue
3. *Action*: the spouse then takes steps to end the partnership-like qualities of the relationship, usually by:
   - stopping sleeping together,
   - stopping doing chores for the other person,
   - stopping going out together as a couple, and so on.

Section 3(4) offers some guidance on when a spousal relationship ends.

> (4) For the purposes of this Act,
>
> (a) Spouses may be separated despite continuing to live in the same residence, and
>
> (b) the court may consider, as evidence of separation,
>
> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

It's easy to imagine that the date of separation could be argued about, especially if the spouses reconciled for a bit or if a spouse's commitment to ending the marriage-like aspects of a relationship wavered from time to time. See *McDowell v Andrews* [1], 2018 BCSC 2216, for an example of a relationship where the beginning and the end were hard to pin down, as was the *marriage-like* and *non-marriage-like* phases of it.

In order to avoid spending money on lawyers arguing about this issue, you might consider documenting the date of separation in some way, perhaps by sending a letter or an email to your spouse stating your intention to separate. Do remember to keep a copy.

Time limits for making property division claims

Section 198(2) of the *Family Law Act* imposes time limits for bringing claims for the division of property and debt. Understanding these limits is crucial for both married and unmarried spouses:

- Married spouses: Claims must be made within *two years* of the date of the *divorce* or an *annulment* of the marriage.
- Unmarried spouses: Claims must be made within *two years* of the date of *separation*.

Paused time limits

Under section 198(5) the two year time limit is paused if parties are engaged in *family dispute resolution* with a qualified *family dispute resolution professional* as defined in section 1 of the Act.

If you are involved in mediation, arbitration, or a collaborative dispute resolution process in an effort to resolve property division issues then the time limits for making a claim are probably on pause.

Make sure that if you're using someone to help resolve your issues without going to court, that the person meets the definition of a *family dispute resolution professional* under the *Family Law Act* and part 3 of the accompanying Family Law Act Regulation [2], otherwise time limits will not be paused.

Section 198(3) presents another important exception to the standard two-year time limit for property division claims following separation or divorce. This exception applies where a spouse seeks to set aside or replace an existing agreement and they have grounds to do so because a specific wrong was done:

- A spouse can apply to set aside or replace an agreement within *two years* from the date they first discovered, or reasonably ought to have discovered, grounds for making the application.
- Valid grounds for such an application may include situations like nondisclosure of significant assets, fraud, or undue influence at the time of making the agreement.

This exception allows for flexibility in cases where a spouse was coerced or deceived in a way that would have influenced their decision at the time of the agreement.

Example scenarios where time limits could be paused:

- Anju and Kishore, an unmarried couple, separated on January 1, 2022. They started mediation with a certified family dispute resolution professional on December 1, 2023. The two-year time limit for Anju to bring a property division claim pauses on December 1, 2023, extending beyond the original deadline of January 1, 2024.
- Mei and Luis, married, were granted a divorce on June 15, 2021. They began collaborative negotiation on June 1, 2023. Mei's time to file a property division claim, which would have ended on June 15, 2023, is extended due to their participation in the dispute resolution process.
- Fatima and Jamal, who divorced in 2020, had an agreement regarding property division. In 2023, more than two years after the divorce, Fatima discovered that Jamal had failed to disclose significant assets during their negotiations. She applies to set aside the agreement under section 198(3) of the Act within two years of discovering this non-disclosure. This application is valid as it is based on grounds of nondisclosure of significant property, which is a recognized reason for setting aside an agreement under the Act. This exception recognizes the importance of fair and informed consent in family law agreements and provides a remedy for situations where this standard may have been compromised.

For more detailed information, consider seeking legal advice or consulting the full text of the *Family Law Act*.

The philosophy behind the *Family Law Act* and its scheme for dividing property

The scheme for dividing property under the *Family Law Act* is technically described as a *deferred partnership of acquests* regime. The *deferred partnership of acquests* regime focuses on property accumulated during the relationship, with both spouses having a presumed equal interest in such property that's only realized upon (and is therefore "deferred" until) separation. It emphasizes the timing and manner of acquisition of family property rather than how the property was used. Property acquired before the relationship or through certain means (like inheritance) is typically excluded, and known as "excluded property."

BC's old *Family Relations Act*, which was retired in 2013, used a *deferred community of property* regime. The *deferred community of property* differs from the *deferred partnership of acquests* regime by focusing on how property was used. If property was "ordinarily used for a family purpose" it was considered for division, regardless of when or how it was acquired. This meant that the ownership of property was less significant than how it was utilized within the family context. Consequently, most assets owned by the spouses, irrespective of their individual contributions or the name on the title, were often subject to equal division upon separation.

The *Family Relations Act* and the *Family Law Act*

Under the *Family Relations Act*, married spouses shared in all property that was "ordinarily used for a family purpose." This meant that you didn't need to look at who owned something on paper, how something was acquired, or whether property was acquired before or during the relationship. What mattered was how the property was *used*. For most couples, *everything* they had wound up being ordinarily used for a family purpose in one way or another.

Under the *Family Law Act*, use is irrelevant. In fact that's exactly what section 81(a) says:

> spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution

What matters now, under the *deferred partnership of acquests* regime, is *when* property was acquired and *how* property was acquired:

- On the date of separation, each spouse is only presumed to have an interest in the assets that accumulated during their relationship (but not assets that can be traced to the other spouse's excluded property).
- Property bought before the spouses' relationship began is presumed to be excluded property.
- Property acquired during the relationship, but which was bought using money that can be traced to excluded property, is also presumed to be excluded property.

Under the old *deferred community of property* regime of the *Family Relations Act*:

- Both spouses were presumed to have an interest in all property on the date of separation.

Transition provisions

The *Family Law Act* became law in British Columbia on 18 March 2013. All of the parts of the act about children and support applied to everyone right away, including people who were in the middle of a court proceeding. However, under section 252(2), married spouses who had started a court proceeding about the division of property or had an agreement about the division of property must continue under the old *Family Relations Act* as if it hadn't been cancelled, unless the spouses agree otherwise:

> (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.

This rule only applies to married spouses because only married spouses could make property claims under the *Family Relations Act*; it is not possible for unmarried spouses to "start or continue" a claim under that act.

The division of family property under the *Family Relations Act* is discussed later on in this section.

Who gets what under the *Family Law Act*

Property division is covered under Part 5 of the *Family Law Act*. This chapter has already introduced the general rules around property and debt division:

- family property and family debt are shared, while
- excluded property is not.

A convenient way to think about the presumptions on what you keep versus what you share based on sections 84, 85, and 86 are:

What you keep	What you share
Excluded property you brought into the relationship • What you brought into the relationship, but the increased value since then is shared.	**Real and personal property owned at separation** • All real and personal property owned by either spouse (including a beneficial interest) as of the separation date, unless it's excluded property.
Specific excluded property received during the relationship • Inheritances • Gifts from a third party (if solely to you and not the other spouse) • Settlements, awards, or non-property insurance payouts not for lost income.	**Specific types of family property (unless excluded)** • Shares or interests in corporations • Interests in partnerships, businesses, or ventures • Refunds, including tax refunds, owed to either spouse • Money in accounts at financial institutions in either spouse's name • Entitlements under pensions, retirement savings, or income plans • Property disposed of after the relationship began but still under control or authority
Beneficial interest in a discretionary trust established by someone else • Your beneficial interest in a discretionary trust established by someone else, without your contribution.	**Assets derived from the sale or conversion of family property after separation** • Any assets derived from the sale or conversion of family property done after separation.
Assets derived from the sale or conversion of excluded property • Any assets derived from the sale or conversion of any of the other kinds of excluded property.	**Increase in value of excluded property** • The increase in value of any excluded property since it was brought into the relationship or since it was acquired, whichever is later.

Debt brought into the relationship
• Any debt that you brought into the relationship, but the increase in debt since then is shared.
	Certain cases of trust property contributions
	• In cases where either spouse contributed to a trust, particularly if:
	  • The contributing spouse is a beneficiary with a vested interest in the trust
	  • The contributing spouse has the power to transfer trust property to themselves or terminate the trust, resulting in the property reverting to them.

	Increases in debt brought into the relationship • The interest that accrues on any debts either spouse brought into the relationship, calculated from the beginning of the relationship until separation.

General outline for Part 5 of the Act

Part 5 deals with:

- the definitions of *family property*, *excluded property*, and *family debt,*
- the rules for how the division of property and debt are to be accomplished, and the exceptions to those rules,
- orders for the division of property and debt, including when the court can divide family property unequally or divide excluded property, and
- agreements for the division of property and when the court may set those agreements aside.

For a discussion about pets (specifically *companion animals*), and how these animals are now treated as a special kind of property in Part 5 of the Act since amendments took effect on January 14, 2024, see the Dividing Property and Debt in Family Law Matters section of this chapter.

Family property and family debt

Family property is defined at section 84(1) of the *Family Law Act*. It basically says that family property is:

- all the property owned by either or both spouses *on the date of their separation*,
- minus *excluded property*.

Family property also includes property that is bought *after separation*, but using money that was derived from and can be traced back to family property. For example if a spouse uses money from a joint bank account to buy a new car after separation, the new car will still be family property.

Section 84(2) gets into the specifics of the sorts of things that might be family property:

> (2) Without limiting subsection (1), family property includes the following:
>
> (a) a share or an interest in a corporation;
>
> (b) an interest in a partnership, an association, an organization, a business or a venture;
>
> (c) property owing to a spouse
>
> (i) as a refund, including an income tax refund, or
>
> (ii) in return for the provision of a good or service;
>
> (d) money of a spouse in an account with a financial institution;
>
> (e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;
>
> (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
>
> (g) the amount by which the value of excluded property has increased since the later of the date
>
> (i) the relationship between the spouses began, or
>
> (ii) the excluded property was acquired.
>
> (3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which

> (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
>
> (b) the spouse has a power to transfer to themselves that part of the trust property, or
>
> (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

Boiling this all down somewhat, family property includes:

- a spouse's business, regardless of the nature of the business interest,
- money owed to a spouse,
- bank accounts, savings accounts, investment accounts and pension accounts,
- family property that a spouse transferred after separation but can get back, and
- property in a trust that the spouse created and can get back.

Perhaps most importantly, under section 84(2)(g), family property includes the increase in value of a spouse's *excluded property* after it was received or brought into the relationship.

The definition of family debt is at section 86 and is much shorter:

> Family debt includes all financial obligations incurred by a spouse
>
> (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
>
> (b) after the date of separation, if incurred for the purpose of maintaining family property.

In other words, all of the debt accumulating from the date the spouses began to live together or got married, whichever is earlier, to the *date of separation* is family debt. Family debt includes debt that is incurred *after separation* if the debt was incurred for family property, for example if a spouse takes out a loan to make the mortgage payments on the family home. Since the family home is family property, the loan is a family debt that both spouses are responsible for.

Separation

When the spouses separate, all of the family property owned by either or both spouses becomes equally owned by both spouses as *tenants in common*. If only one spouse owns an asset, both of the spouses become equal owners of the asset as tenants in common. If both spouses own an asset as joint tenants, the joint tenancy is severed and both of the spouses become equal owners of the asset as tenants in common. This is all a bit complicated to explain, so please bear with me.

How property is owned

Two or more people can own the same property in one of two ways:

1. they can own the property as "joint tenants", or
2. they can own it as "tenants in common."

Joint tenants

When two or more people own a thing as *joint tenants*, they are each owners of the whole thing. This is a fuzzy kind of shared ownership because the interests of one owner can't be separated out from the interests of the other owner(s) because they each own the whole thing. To put it another way, a joint tenant doesn't own a particular slice of the pie, a joint tenant owns the whole pie.

When a joint tenant dies, their interest in the asset disappears, and the surviving joint tenants continue to own the whole asset as they always had. As a result, joint tenancies are extremely handy estate planning tools: the *right of survivorship* means that the legal interests of a joint tenant in a house does not pass through probate when the joint tenant dies; the surviving joint tenants simply and automatically continue forward as owners of the whole interest in the property.

Tenants in common

When people own a thing as *tenants in common*, each owner's interest in a property is separate and distinct. The tenants in common of a property each own their particular slice of the pie; collectively, they all own the whole pie, but individually they just own their personal share. If you had two joint tenants of a house, each would have a *divided one-half interest*.

Because each owner's interest is separate (i.e. divided) from the other owners, a tenant in common can sell their share in the asset to someone else, put a mortgage on their interest or use it as collateral, or give it to someone else as a gift. If a tenant in common dies, their interest in the thing becomes a part of their estate to be distributed according to their will.

The effect of separation

Section 81(b) of the *Family Law Act* states:

> on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

From a family law perspective, the most important thing about owning an asset as tenants in common, which is how assets are owned after the spouses separate, is this idea of two separate interests in an asset. Say the family home is registered in only one spouse's name and that spouse goes bankrupt. If there has been a separation and each spouse takes a one-half interest as a tenant in common, the only part of the house that can be taken by the bankrupt spouse's trustee is the bankrupt spouse's one-half interest; the other spouse's interest in that asset will be preserved from the bankrupt spouse's creditors, and it doesn't matter who owns the asset on paper. This can be hugely important.

Family law lawyers describe the effect of a separation as "crystallizing" the spouses' interests in the family property because the separation makes each spouse the legal owner of one-half of the family assets in a way that is also binding on people outside the relationship, like creditors, trustees in bankruptcy, potential purchasers, and so forth. After a separation happens, all a creditor can lien or seize to secure or pay a debt is the debtor's half-share of an asset, regardless of whether the debtor was the sole owner or the joint owner of the asset before the separation.

Under the *Family Law Act* there is no requirement that the parties start a court proceeding or sign an agreement in order to be separated.

The valuation of property and valuation date

Although the pool of family property to be shared between spouses is crystallized when the separation happens, under section 87(b), the *value* of the family property is not fixed until the date of the trial or agreement that divides the property. This makes sense, because it can take two or three years for the division of property to wrap up at a trial, and it can take four or five months to finish an agreement for the division of property. With respect to daily use bank accounts (i.e. bank account where your pay is deposited and you pay your monthly bills), it has become more

common for the court to value such bank accounts based on its value as at the date of separation instead of the date of the trial or agreement.

Under section 87(a), the value of property is its *fair market value*, the amount a reasonable buyer would pay for the property *in its current condition*, not the purchase price of the property, the insured value of the property, or the replacement cost of the property. In other words, the value of the reconstituted leather living room suite you got from the Brick for $999 five years ago isn't what *you* paid for it, it's the $100 that someone would likely give you for it at the date of the trial or agreement.

Excluded property

The definition of *family property* at section 84 starts from the assumption that *all property* either or both spouses own on the date of separation is shareable family property, with the exception of *excluded property*.

Excluded property is defined at section 85(1):

> (1) The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began;
>
> (b) inheritances to a spouse;
>
> (b.1) gifts to a spouse from a third party;
>
> (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
>
> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
>
> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
>
> (f) property held in a discretionary trust
>
> (i) to which the spouse did not contribute,
>
> (ii) of which the spouse is a beneficiary, and
>
> (iii) that is settled by a person other than the spouse;
>
> (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

To boil all this down, a spouse's excluded property is all the property that the spouse owns on the date of cohabitation or the date of marriage, whichever is earlier. Other property acquired during the relationship can also be a spouse's excluded property, including:

- gifts (provided that the gift is to the spouse alone and not a gift to the couple),
- inheritances,
- court awards,
- insurance payments, and
- property held in a trust that was contributed by someone else.

Perhaps most importantly, under section 85(1)(g), excluded property includes property bought during the relationship with excluded property. This is another kind of *tracing* provision, because you trace the money (or other value) used to pay for a recently acquired piece of property to prove that it came from, or was *derived* from, property that was excluded.

Say, for example, that a spouse receives an inheritance of $10,000 and buys a collection of vintage Pyrex. The Pyrex collection would be that spouse's excluded property because it was bought with excluded property, even if the Pyrex collection was used in the day-to-day course of the couple's life together. Remember, whether something was "ordinarily used for a family purpose" is not a consideration under the *Family Law Act*.

Burden of proof is on the spouse claiming exclusion

Under section 85(2), the spouse who claims that an asset should be excluded from the pool of family property is responsible for proving that the asset is *excluded property*.

For some property this is easy to do, for example when someone owns their own home before the relationship even started. But for more ambiguous scenarios, like when one spouse says that the large amount of money they received from their parent is a gift to them personally, and was not intended for the couple, evidence of everything that happened around a transaction can be critical. Consider the case of *Zhao v. Fang* [3], 2022 BCCA 227, which involved a gift that the husband claimed to be excluded under section 85(1)(b.1), but which the wife disagreed was a gift. The Court of Appeal talked about the role that evidence plays in proving property deserves to be excluded:

> "[25] Excluded property, defined in s. 85(1), includes “gifts to a spouse from a third party”. Under s. 85(2) the spouse making this claim has the burden of demonstrating that property is excluded property. The standard of proof is on a balance of probabilities (as in any civil case), but the evidence must be clear and cogent. If documentary evidence is not available, a party's testimony on this issue is to be scrutinized for credibility. However, the judge is permitted to draw reasonable inferences from evidence that is less certain or precise in order to do justice between the parties [...]"

Amendments to the *Family Law Act* that reinforce excluded property

Where a married person transfers their excluded property into the name of the other spouse, there used to be a risk that this excluded property would become family property. This risk came from a contentious old legal doctrine called the *presumption of advancement*. The presumption applied when gratuitous transfers were traditionally made by a husband to his wife. Before May 2023, the *Family Law Act* did not explicitly address this old doctrine. It did not say if it applied or not, and a rift emerged between one line of court judgments that imposed the doctrine, and another line of court judgments that rejected it. In May 2023, the Act was amended to try and resolve this inconsistency. Subsection 85(3) was added to the Act, which says:

> If property is excluded from family property under subsection (1), the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse.

This amendment also added a number of sections to the Act, including section 81.1(1), which does away with the *presumption of advancement*, and section 81.1(2) which does away with the *presumption of resulting trusts*:

> Certain presumptions not be applied
>
> 81.1 (1) The rule of law applying a presumption of advancement must not be applied in question respecting the ownership of property as between spouses.
>
> (2) The rule of law applying a presumption of resulting trust must not be applied in question respecting the ownership of property as between spouses.

Let's consider an example that illustrates the impact of this amendment dealing with the presumption of advancement. Here is a fictional scenario:

- Jacob owned his own house prior to marrying Carmen.
- The house is excluded property.
- Once married, he adds Carmen on title to the house as a joint tenant.
- He does this because it is a common estate planning strategy to avoid unnecessary probate fees, but he doesn't keep evidence to show this intention.

Prior to the May 2023 *Family Law Act* amendments, unless Jacob somehow had the foresight to get Carmen's explicit acknowledgement that adding her to title was not intended to be a gift, Jacob risked losing his excluded property under the presumption of advancement. The court might have felt bound to presume that a gift was intended. Because the presumption of advancement is now abolished by section 81.1(1), and because section 85(3) now makes it clear that the exclusion of excluded property applies despite any transfer of legal or beneficial ownership to the other spouse, Jacob will not lose the value of his excluded property if Carmen and he separate.

Section 81.1(2) does away with the *presumption of resulting trust* which is also an equitable law doctrine (more or less the opposite of the presumption of advancement), which states that the gratuitous transfer of property from a parent to an adult child, is *not* presumed to be a gift. The presumption is that an obligation is imposed on the adult child to hold that property in trust, meaning the parent would maintain beneficial ownership even if the legal ownership was in the adult child's name.

Both forms of common law presumptions were intended to provide a convenient default presumption in cases where the evidence didn't lean either way. Whether the transfer of property was intended as a gift or not could be presumed just based on the specific relationship of the people involved. With the amendments, the *Family Law Act* now does not presume anything about the intention of a transfer. That's what sections 81.1(1) and (2) now say. And section 85(3) reinforces that excluded property keeps its excluded nature, even when legal or beneficial ownership is transferred to the other spouse.

Note for family law proceedings started before May 11, 2023: If you are involved in a family law proceeding that was commenced before May 11, 2023, the amendments do not apply, and you may still argue about the presumptions of advancement and resulting trust in your case.

Taking stock at the beginning of a relationship

As you can see, it's rather important to know what you owned when you and your spouse began to live together. If you are just starting a relationship, here's what you do.

First, gather the documents listed below for the period that spans the date on which you and your spouse began to live together or got married, whichever is earlier:

- statements for all financial accounts, including savings accounts, investment accounts, RRSP accounts, and other retirement savings accounts,
- statements for any workplace pension plans,
- statements for all credit accounts, including credit cards, loans, mortgages, and lines of credit,
- your personal income tax return, complete with all of the schedules and attachments,
- your BC Assessments for all real property, or, if you want to be more accurate than that, proper appraisals,
- black book values or dealer quotes for any vehicles you own,
- appraisals for works of art and collections, and
- anything else that helps to establish the value of something you brought into the relationship in a credible way.

Next, once you've gathered these documents, staple them together and keep them together in some place that you're not likely to lose them, like a safety deposit box.

You should still be able to gather much the same collection of documents even if you've already been married or living together for some time. Banks and other financial institutions will give you copies of old statements, but there will be a charge; pension plan administrators should be able to provide old values; and, BC Assessments for past years are available online. You may, however, have a problem valuing old vehicles.

Keeping track during a relationship

It's also important that you keep track of new excluded property acquired during your relationship, and what's going on with the excluded property you brought into the relationship. It may be easiest to keep a journal that:

- shows the dates and amounts of any inheritances, gifts, court awards, and insurance proceeds received during the relationship,
- tracks money received from the sale of excluded property, and what you did with the money, particularly if the money was pooled with your spouse's money to buy something,
- with respect to gifts, keep documents evidencing the intention of the donor (i.e. a letter or card from the donor parent confirming that the gift of $100,000 was to you and not to you and your spouse),
- tracks property bought in exchange for excluded property,
- shows the intent of any gift or transfer of property, and
- records any changes in the value of excluded property during the relationship.

Remember, under section 85(2) it's up to the person claiming that the property is excluded property to prove it.

Who got what under the *Family Relations Act*

Because of the transition provisions of section 252 of the *Family Law Act*, the old *Family Relations Act*, even though it's been cancelled, will still apply to determine the division of property between married spouses if:

- they started a court proceeding to divide property before 18 March 2013, the date when the *Family Law Act* came into effect,
- a spouse wants to start a court proceeding to enforce or set aside an agreement about property that was signed before 18 March 2013.

As a result, for some cases it's still important to know how family property is divided under the *Family Relations Act*.

The division and distribution of property between married spouses was governed by Parts 5 (*matrimonial property*} and 6 (*division of pension entitlement*) of the *Family Relations Act*. Part 5 of the act dealt with the division of property, including personal property, financial assets, and real estate. Part 6 dealt with the division of pensions. Unmarried couples, including couples who qualify as unmarried spouses, were expressly excluded from the parts of the act that deal with property.

The presumption of equal sharing

Under this old law, when a marriage broke down, each spouse was presumed to have a one-half interest in all assets that qualified as *family assets*. Section 56 of the *Family Relations Act* said that:

> (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset ...
>
> (2) ... as a tenant in common.

As long as an asset qualified under the act as a *family asset*, each spouse was presumed to have a one-half interest in that asset. Family assets were defined in section 58(2) of the act, and the focus under the act was on how an asset was *used during the relationship* rather than on who bought it, when it was bought, or how it was bought:

> Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family

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asset.
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This section cast a very broad net: as long as an asset was owned by a spouse and was ordinarily used for a family purpose, the asset would be a "family asset" for the purposes of the *Family Relations Act*, and it didn't matter whether the asset was brought into the marriage by one spouse, or bought during the marriage.

To summarize, when the marriage broke down, the spouses were presumed to own all family assets equally, no matter whose name the asset was in or whether the asset was brought into the marriage by one spouse or bought during the marriage. This presumption under the old law, however, only applied between spouses. As far as the rest of the world was concerned, the only owner of an asset was the person with legal title to the asset, which might be:

- one of the spouses,
- both spouses as joint tenants,
- both spouses as tenants in common, or
- one or both spouses, along one or more other people, either as joint tenants or as tenants in common.

The triggering events

Under the old *Family Relations Act*, when a *triggering event* happened, all of the property owned by either or both spouses became equally owned by both spouses as *tenants in common*. Even if only one spouse owned an asset, both of the spouses became equal owners of that asset as tenants in common. If both spouses owned an asset as *joint tenants*, the joint tenancy was severed and both of the spouses became equal owners of the asset as tenants in common.

Family law lawyers described the effect of a triggering event as "crystallizing" the interests of the spouses in the family assets because the triggering event made each spouse a legal owner of one-half of the family assets in a way that was also binding on people outside the marriage, like creditors, trustees in bankruptcy, potential purchasers, and so forth. After a triggering event happened under the old *Family Relations Act*, all a creditor could put a lien on or seize was the debtor's half-share of an asset, regardless of whether the debtor was the sole owner or the joint owner of the asset before the triggering event.

Section 56(1) of the *Family Relations Act* described four triggering events:

1. when the parties made and signed a separation agreement,
2. when the court made a declaration that the spouses had no reasonable prospect of getting back together and resuming married life,
3. when the court made an order for divorce, and
4. when the marriage was annulled.

Once any one of these triggering events happened, each spouse took a one-half legal interest in all of the family assets as a tenant in common, regardless of who bought the asset, who used to own the asset, or when the asset was bought. This new situation (created at the point of the triggering event) lasted until the division of the assets was finally determined by a court order or the parties' agreement.

The equal and unequal division of family assets

Under section 56 of the *Family Relations Act*, each spouse was presumed to have a one-half interest in all family assets. This was, however, only a presumption, a presumption that could be challenged. When assets were divided more in one spouse's favour than the other, the assets were said to have been *reapportioned*.

The court could order, or the spouses could agree, that all of the family assets would be reapportioned or that just a few assets would be reapportioned. This might have happened to allow one party to keep more of a pension or more of an inheritance, for example, even though all the other family assets might have been divided equally.

Section 65(1) of the *Family Relations Act* described the factors the court could take into account in deciding whether an equal division of the family assets would have been unfair:

> (a) the duration of the marriage,
>
> (b) the duration of the period during which the spouses have lived separate and apart,
>
> (c) the date when property was acquired or disposed of,
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift,
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

Family assets were most commonly reapportioned when:

- the marriage was short, say less than six or seven years, and one of the spouses brought the majority of the assets into the relationship,
- one of the spouses was responsible for racking up a lot of debts not related to spending for family purposes,
- some of the assets were located outside of British Columbia,
- one of the spouses required more than half of the family assets to become financially independent,
- one of the spouses had wrongfully disposed of family assets or negligently allowed them to decrease in value, especially if this happened after separation, or
- some of the assets had been bought with a spouse's inheritance.

Defining "family assets"

Not all assets were shareable family assets. The sections of the *Family Relations Act* quoted above only provided for the division of assets that qualified as *family assets*; other sorts of assets might have been exempt from division, so that the spouse who owned the asset would be allowed to keep that asset, without necessarily having to compensate the other spouse for its value.

Family assets were defined in section 58 of the *Family Relations Act* as:

> (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
>
> (3) Without restricting subsection (2), the definition of family asset includes the following:
>
> (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
>
> (i) a share in the corporation, or
>
> (ii) an interest in the trust
>
> owned by the spouse;
>
> (b) if property would be a family asset if owned by a spouse, property
>
> (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or
>
> (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

> (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
>
> (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
>
> (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

If an asset did not fall into these categories, it may not have been something that the spouses were both entitled to share. The basic rule of thumb under the old law was this: an asset was a family asset if it was ordinarily used or was intended to be ordinarily used for a family purpose.

Cohabitation agreements and marriage agreements

You can read more about *cohabitation agreements* under the chapter on Family Law Agreements. In short, they are agreements between people who will be or are living together, and who may or may not wind up getting married later on down the road.

That chapter also talks about *marriage agreements*, which are between people who will be getting, or are, married. (Although there's no reason why these agreements can't be entered into well after a relationship begins, they're usually signed on or shortly after the date the parties begin to live together or marry.)

These agreements are often used to say how property and debt will be handled during a relationship and how it will be allocated if the couple separates.

The *Family Law Act* specifically addresses agreements respecting property division at section 92:

> 92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:
>
> (a) divide family property or family debt, or both, and do so equally or unequally;
>
> (b) include as family property or family debt items of property or debt that would not otherwise be included;
>
> (c) exclude as family property or family debt items of property or debt that would otherwise be included;
>
> (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

Many people are content with the basic plan for the division of property set out in the *Family Law Act*, so the question is often about what a cohabitation agreement or a marriage agreement can do that would be better than the default plan that the Act expects. Here are some things that an agreement could do, that alter the default property division rules under the Act:

- clarify which property is excluded property and what its value was when the relationship began,
- allow a spouse to keep not just their excluded property but the growth in value of their excluded property,
- say that there will be no shared family property, except for property that is registered in both spouses' names or that the parties agree in writing will be shared family property,
- give a share of a spouse's excluded property to the other spouse, including a share which increases over time,
- make all excluded property shareable family property,

- say how property bought during the relationship will be owned if it's bought with both spouse's excluded property, or
- say what will happen if a spouse's excluded property decreases in value during the relationship.

Do you have *standing* to enter agreements under the *Family Law Act*?

If you are over the age of majority, the answer is yes.

Because many agreements look ahead in time to what could happen in a relationship, you don't need existing rights claim property division under the *Family Law Act* before making an agreement that deals with what would happen once you and another person become married or unmarried spouses. Section 6 of the Act says:

> (1) Subject to this Act, 2 or more persons may make an agreement
>
> [...]
>
> (b) respecting
>
> (i) a matter that may be the subject of a family law dispute in the future,
>
> (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
>
> (iii) the implementation of an agreement or order.

Agreements between any two people, even those who are not married and are not living together, can be used to change how property and debt will be divided later on when they are spouses under the Part 5 property division sections of the Act.

Resources and links

Legislation

- *Family Law Act*
- *Family Relations Act*

Links

- Dial-A-Law Script "Dividing Property and Debts" [4]
- Justice Education Society's handbook *Parenting After Separation: Finances* [7]
- Legal Aid BC's Family Law website's information page "Property & debt" [5]
  - See "Dividing property and debts"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman and Kenneth Craig, October 19, 2023.

References

[1] https://canlii.ca/t/hwm44
[2] https://canlii.ca/t/8rdx#Part_3_Family_Dispute_Resolution_Professionals_14035
[3] https://canlii.ca/t/jq0tt
[4] https://www.clicklaw.bc.ca/resource/1240
[5] https://www.clicklaw.bc.ca/resource/4656

Protecting Property and Debt in Family Law Matters

It's sometimes necessary to take steps to protect family property, family debt, and excluded property until a final agreement or order dividing assets is made. Failing to take these steps can sometimes result in property being sold, diminished in value, used as collateral for a loan, moved out of province, or being seized by a trustee in bankruptcy or by a creditor. Most of the time it only becomes important to protect property after a couple has separated.

This section reviews some important initial steps that you can take to secure family property and family debt. It also looks at the restraining orders that can stop family property from being disposed of, the problems posed by third-party claims such as debts and bankruptcy, and how assets located outside British Columbia can be protected.

Initial steps

It may seem a bit neurotic to be worrying about assets when your relationship is falling apart, but this is precisely the time to be concerned. It certainly isn't the case that every spouse is busy squirrelling money away in Switzerland or Antigua, or hatching plans to transfer the title of the family home to a loan shark from Las Vegas, but there are certain steps you should take regardless of how well you think you know your spouse.

There is, as they say, no sense in bolting the barn door after the horses have gone. It's fairly reasonable to take steps to protect your own interests, and in most cases you probably should.

Take stock of property and debt

Firstly, you might want to take a careful, but not too obvious, tally of what each of you owns and owes. This might be difficult if you and your spouse keep separate bank accounts and maintain your own investments, but make your best efforts. A list of the bank accounts, RRSP and investment accounts, cars, properties, loans, lines of credit and credit cards you have may prove to be extremely useful. Even if you can't get all the account details, a record of the names of the financial institutions that are sending your spouse mail can be extremely useful. However, the best evidence is to obtain copies of documentary evidence (i.e. copy of a bank statement) to evidence the assets and property in the name of your spouse.

Make it clear that you've separated

Once you've decided that your relationship can't continue, and you're sure that it can't continue, you need to separate. This doesn't mean that you and your spouse need to move into separate homes, but you need to announce your decision and you should probably do it in writing so that you have a record of the date of separation. If you continue to live in the same home after you have separated, you must ensure that you live separate lives (i.e. you close joint accounts, you do not do laundry or cook dinner for your spouse, you do not go out as a couple or hold yourself out as a couple at social events) or your spouse may allege that you reconciled or you changed your mind after announcing the separation.

If you own your home in joint tenancy with your former spouse, there is no reason to sever the joint tenancy in order to protect your interest in the home. The reason for that is because under section 81(b) of the provincial *Family Law Act*, when separation happens each spouse takes a one-half interest in all family property as tenants in common, regardless of how the property was owned before separation, and becomes responsible for one-half of all family debt.

It can be critical to protect your share of the family property from creditors, your spouse's bankruptcy, or court orders made in other court proceedings. While it's always a good idea to consult with a lawyer if you have a family law problem, be especially sure to do so if you're not certain whether separating would be helpful or harmful.

There are only a few times when a separation is a bad idea, usually when the effect of separation will limit a claim to one-half of the family property when there's a good chance that it might be more. Say, for example, that a spouse is in poor health and dying when the parties separate. The effect of separation may mean that a surviving spouse will get no more than half of the deceased spouse's estate when the spouse might have received more than half as a surviving spouse or a surviving joint tenant.

It is also good idea that upon separation, you take steps to revise your will to ensure that your former spouse is not the recipient of a gift from your estate that you no longer want them to receive. You should also change your life insurance beneficiary for the same reason, unless your former spouse is an irrevocable beneficiary under the terms of the policy. Lastly, you may want to consider opening a new Registered Retirement Savings Plan (RRSP) account for any contributions you want to make post separation. However, be sure not to cash in any existing RRSPs without at least informing your former spouse in advance, or upon obtaining the advice of a lawyer, as your former spouse may have a claim to the funds contained in those RRSPs. Otherwise, your former spouse may accuse you of dissipating family assets and the last thing you need at this stage of your separation is a court order freezing your financial assets.

Register your interest in property

Registering an interest in real property will stop the property from being sold and may prevent the property from being borrowed against. The two most common ways to do this are by filing an entry under the *Land (Spouse Protection) Act* [23] with the Land Title and Survey Authority, or by filing a Certificate of Pending Litigation under the *Land Title Act* [3] with the Land Title and Survey Authority.

Entries under the *Land (Spouse Protection) Act*

Married spouses and unmarried spouses may file an *entry* on the title of the family home under the provincial *Land (Spouse Protection) Act*. This only applies to the family home and not to rental property. The entry will prevent a spouse from transferring, selling, leasing, or making a gift of the family home without the knowledge and approval of the spouse filing the entry. A spouse is not given notice of an entry filed against the family home under the *Land (Spouse Protection) Act.*

The great thing about these entries is that you can get one whether court proceedings have started or not. This is an ideal way to protect yourself if you only have a slight concern about your relationship or the trustworthiness of your spouse, but don't have the need to begin a proceeding just yet. The downside, of course, is that entries under this act only protect the single property that is or was used as the family home.

Certificates of pending litigation under the *Land Title Act*

Where a court proceeding has started in the Supreme Court, a *Certificate of Pending Litigation* (CPL), formerly called a *lis pendens*, can be registered against the title of any property owned by you and your spouse or your spouse and a third party (such as a parent) at the Land Title and Survey Authority. As long as you have asked for a CPL in your Notice of Family Claim or Counterclaim and made a claim for the division of family property, you will be entitled to register a CPL. If title to the property is registered in the name of your spouse and a third party, you must

name the third party as a party in the Notice of Family Claim or Counterclaim if you wish to seek relief against the third party vis-à-vis the property.

The effect of a CPL is to announce to anyone interested in the property, such as a mortgagee or a creditor or a potential buyer, that ownership of the property may change as a result of the litigation. This discourages and usually prevents the sale of the property or its use as collateral.

You can file your CPL at the same time as you file your Notice of Family Claim or Counterclaim. The registry will stamp your CPL, and you must take the stamped CPL and file it with the Land Title and Survey Authority together with a copy of your Notice of Family Claim or Counterclaim. The owner or owners of the property on which a CPL has been registered against title are given notice of the CPL by mail.

Notices and financing statements under the *Family Law Act*

Spouses who have made a cohabitation agreement, a marriage agreement, or a separation agreement dealing with real property can file a *notice* of the agreement against the title of the property with the Land Title and Survey Authority under section 99 of the *Family Law Act*. A notice can be filed whether court proceedings have started or not, and will prevent the other spouse from transferring, selling, leasing, or otherwise dealing with the property without the voluntary cancellation of the notice or a court order.

A *financing statement* can be filed in the Personal Property Registry [1] against a manufactured home under section 100. A manufactured home is a structure like a mobile home or trailer home that is designed to be lived in but also towed or carried from one place to another. A filed financing statement will stop the manufactured home from being transferred, and any new debts registered against it will come in second in priority to the spouse's interest under the financing statement.

Make sure the rent gets paid and the lights stay on

Section 226 of the *Family Law Act* allows the Provincial Court and the Supreme Court to make a conduct order that can require a party to keep paying the household bills and prevent a party from terminating services to the family home:

> A court may make an order to do one or more of the following:
>
> (a) require a party to make payments respecting rent, mortgage, specified utilities, taxes, insurance and other expenses related to a residence;
>
> (b) prohibit a party from terminating specified utilities for a residence;

Most of the time, people don't stop paying the mortgage or cut off the electricity to the former family home when they move out. However, it can be very tempting to do this when emotions are running high, when there's not enough money to pay rent at the new place plus rent for the old place, or when the BC Hydro account at the former family home is in the name of the person who needs to arrange for the electricity to be hooked up at their new place. The court is not likely to make orders under section 226 when there's not enough money to pay for everything, but it will step in where someone is acting out of spite or malice.

Financial restraining orders

A *restraining order* is an order of the Supreme Court requiring someone to do something or to not do something. A typical restraining order relating to family assets reads something like this:

> The Respondent shall be and is hereby restrained from disposing or encumbering, or attempting to dispose of or encumber, the family property and other property at issue without the express written agreement of the Claimant or the further order of this Honourable Court.

In other words, unless the respondent comes to an agreement with the claimant or the court makes another order, under a restraining order like this the respondent is not allowed to sell any real property or personal property, or use that property as collateral for a loan or a mortgage. An order on terms like these is usually all that will be necessary for most couples in most circumstances and will cover real and personal property in British Columbia and personal property outside of British Columbia.

Remember that the Provincial Court does not have the power to make orders affecting property, including restraining orders about property.

The *Family Law Act*

The easiest way for married and unmarried spouses to obtain a financial restraining order is to apply for an order under section 91(1) of the *Family Law Act*. This section says that:

> (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

A couple of important points about this section deserve mention:

- The order *must* be granted on a party's application, unless the other party can show that there are enough assets that the applicant's claim to the property won't be frustrated if they happen to sell some of the assets.
- The order can be made without the other party being given notice of the application.
- The order includes not just family property but all "property at issue," which might include excluded property.

This is an important order and should probably be applied for whenever a claim is being made for the division of property. Again, this is a matter of simply being prudent. You may have no cause to believe that your spouse would do something that would jeopardize your interests, but better safe than sorry.

The Rules of Court

Rule 12-4 of the Supreme Court Family Rules [3] gives the court the authority to make a general restraining order, also called an *injunction*, to make someone to do something or not do something. The potential scope of these restraining orders is very broad, and can include, for example, a restraining order identical to that provided for in section 91 of the *Family Law Act* as well as an order stopping someone from racking up debt by drawing on credit cards and lines of credit.

Rule 12-4 says little more, that "the court can issue an injunction." A 1986 case of the British Columbia Court of Appeal, *British Columbia v. Wale* [2], 1986 CanLII 171 (BCCA), offers some guidance. In that case, the court held that someone applying for an injunction had to prove three things. In a family law context involving unmarried parties, these are that:

- you have a reasonable claim against assets owned by your spouse,

- your spouse has disposed of or encumbered their assets or is likely to do so, and
- the inconvenience that will be suffered by your spouse as a result of the injunction is less severe than the inconvenience you will suffer if the injunction isn't granted.

The *Law and Equity Act*

Section 39 of the provincial *Law and Equity Act* [3] does pretty much the same thing as Rule 12-4 of the Supreme Court Family Rules. Section 39 says this:

> (1) An injunction ... may be granted ... in all cases in which it appears to the court to be just or convenient that the order should be made.
>
> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.
>
> (3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

This section gives the court a fairly broad authority to make an injunction where the injunction is justified. Much like injunctions under Rule 12-4, you will have to show that:

- you have a reasonable claim against assets owned by your spouse,
- your spouse has disposed of or encumbered their assets or is likely to do so, and
- the inconvenience that will be suffered by your spouse as a result of the injunction is less severe than the inconvenience you will suffer if the injunction isn't granted.

Applying for restraining orders without notice

The court can only make orders, including restraining orders, when a court proceeding has been started. When there is an urgent problem, as might be the case if a spouse is threatening to sell or move an asset, applications for injunctions and restraining orders can be made with little or no notice to the spouse and sometimes before the spouse has even been notified of the court proceeding.

It's important to know that if you are applying for an injunction or restraining order without notice to the other spouse, the court will require that you make full and complete disclosure of *all* of the relevant facts, even of those facts that aren't in your favour. If it is discovered that you haven't made full disclosure, the court can set aside the injunction, make an award of *special costs* against you (if your conduct was reprehensible), or make an award of damages to compensate the other party for any inconvenience caused by the injunction.

Debts, bankruptcies and third-party claims

Apart from the possibility that your spouse will be less than forthright in dealing with the family property and family debt, you may also need to protect your interest in those assets from claims made by creditors and third parties. If your spouse is heading towards bankruptcy and racking up further debt, this is extra important. These issues can be dealt with, for the most part, by ensuring that you:

1. separate from your spouse, to convert the ownership of all property to a shared ownership between you and your spouse as tenants in common,
2. register a CPL against all real property in which your spouse has an interest, and
3. obtain a financial restraining order under one or more of section 91 of the *Family Law Act*, section 39 of the *Law and Equity Act*, or Rule 12-4 of the Supreme Court Family Rules.

The problem here is that property that is owned only by your spouse, or by both of you as joint tenants, may be vulnerable to your spouse's creditors and in the event of their bankruptcy. Say, for example, your spouse has put up their car as collateral for a loan. You would normally be entitled to one-half the car's value as a family property, assuming the car was bought during your relationship. If your spouse defaults on the loan, the car can be seized and you could find, especially where there are few other assets, that you get no compensation for your interest in the car's value once the lender's default fees and legal fees are added on.

For assets that are held only in your name, your spouse's creditors or trustee in bankruptcy will not usually be able to seize them. The same goes for your interest in property as a *tenant in common* (which the law would call a *divided interest*), unless you are responsible for your spouse's debts for some reason (such as if you co-signed or guaranteed a loan, or used a secondary credit card on your spouse's account).

When it comes to the *Family Law Act*, both spouses are responsible to *one another* for debts incurred during the relationship, but the act itself doesn't give any extra rights to creditors to go after a spouse of the debtor.

Creditors

Creditors have a wide range of remedies available to them when a debtor fails to live up to the conditions of a loan, a line of credit, or a credit card. Among other things, a creditor can:

- seize any asset put up as collateral on the loan,
- sue the debtor for the amount owing,
- put a lien on property owned by the debtor,
- garnish the debtor's wages,
- force the sale of the debtor's property to meet the debt, or
- register a judgment against the debtor's property.

Any one of these remedies can harm the interest the other spouse has in what would otherwise be family property, even if the other spouse had nothing to do with how or why the debt was incurred. The effect of separation can help to shield the other spouse's presumptive one-half interest in the family property from creditors and limit their ability to recover to the half of the property owed by the debtor spouse.

Third-party claims

Your spouse might be liable for damages or debt to someone in a court proceeding unrelated to your relationship. Your spouse may also have made a deal with someone outside the family that concerns the family property. These people may have a legitimate claim against the family property. The problem is that even though their claim or entitlement may be restricted to property owned by your spouse in their name alone, your interest in that property may be lost if a third party gets there first.

As we've discussed, both spouses have a presumptive interest in the family property, including property owned only by the other spouse, as long as it qualifies as family property. A third-party claim or entitlement can result in the loss

of an asset or in the loss of the value of the property. By the time the family property is divided, without separation or a restraining order, the assets might very well be in the hands of someone else and no longer be available for division.

Bankruptcy

When someone declares bankruptcy, the ownership of their property is transferred to a trustee in bankruptcy. The trustee's job is to tally up the list of the bankrupt's debts and then sell as much of the bankrupt's property as is necessary to satisfy their creditors. This may include almost all property registered in the bankrupt's name, but will exclude a few specific assets like pensions, clothing, and work tools.

If an asset is family property, the transfer of the asset to the trustee may deprive the other spouse of any interest they might have in that asset and, since the owning spouse is bankrupt, they may not have any other financial resources from which to compensate the non-bankrupt spouse for the lost interest.

A trustee in bankruptcy cannot take property that doesn't belong to the bankrupt. If the spouses separate before the bankruptcy, only the bankrupt's one-half interest in the family property as a tenant in common will go to the trustee.

Protecting property outside British Columbia

This is a little complicated, so please be patient. The law that deals with the division of property between spouses in this province is the *Family Law Act*. Because the jurisdiction of the government of British Columbia is generally limited to the province of British Columbia, the government cannot usually make laws that affect people and things located outside of British Columbia. For the same reason, the courts of British Columbia usually only have the jurisdiction to deal with things located inside the province of British Columbia.

There are some exceptions to these general rules.

- The Supreme Court of British Columbia can make an order requiring a person to do or not do something when that person accepts the authority of the court, even where that person lives outside the province.
- A person is considered to have accepted the authority of the court by responding to a court proceeding. Once an out-of-province respondent files a Response to Family Claim in reply to the claimant's Notice of Family Claim, they has accepted the jurisdiction of the court to deal with the litigation. This is called *attorning to the jurisdiction*.
- When someone attorns to the jurisdiction of the courts of British Columbia, they submit to the court's authority. The court still may not have the authority to make orders about things located outside the province, but it does have the authority to make orders about the person located outside the province. This is called "*in personam* jurisdiction."
- A court with *in personam* jurisdiction over a person can make orders requiring the person to do or not do things involving certain kinds of things located outside the province, such as assets like bank accounts, stocks, investment accounts, and similar assets that aren't real estate. These assets are called *movable assets*.
- Whether a court has *in personam* jurisdiction or not, it usually won't have jurisdiction over real property located outside the province. This kind of jurisdiction is called "*in rem* jurisdiction." Real property and things attached to real property like buildings are called *immovable assets*.

The upshot of all of this is the following general rules:

- the courts of British Columbia generally cannot deal with real property located in other provinces or outside of Canada,
- the Supreme Court of British Columbia can deal with out-of-province assets that are movable, like RRSPs, stocks, bank accounts, chattel (i.e. items of tangible property such as cars, boats, artwork, etc.), and what not, as long as the owner agrees that the court has jurisdiction, and
- the Provincial Court cannot deal with out-of-province issues at all.

However, the *Family Law Act* contains some provisions that are meant to give the court *in rem* jurisdiction out of province under certain circumstances and, if those circumstances are met, to allow the court to make an order restraining a person from disposing of property located outside the province. Although it remains to be seen how effective this legislation will be in imposing on the authority of another jurisdiction, the Act's out-of-province restraining orders are discussed below.

This area of the law is extremely complex, and you really should consider hiring a lawyer to help you whenever you have an interest in assets located outside the province.

Immovable assets

Real property and things attached to real property, like buildings, are called immovable assets. The courts of British Columbia generally do not have jurisdiction over immovable assets located outside of the province.

The general rule

Generally speaking, subject to the exception in the *Family Law Act* discussed below, there is nothing that can be done to stop someone from selling or otherwise dealing with real property located outside of British Columbia, even property that would normally qualify as family property. Usually, the only way to effectively protect such assets from sale or being used as collateral is to start a court proceeding in the jurisdiction in which the property is located.

The courts of this province will, however, usually compensate a spouse for an interest in out-of-province property by reapportioning the property that the court can deal with, property located inside British Columbia, to compensate for the property that it can't deal with. Here's an example:

> Zygmunt has a farm in Flin Flon, Manitoba worth $50,000. Zygmunt and Ivan both own the family home in Vernon, British Columbia worth $100,000. Assuming both properties were bought after the relationship began and that both are family property, under an equal division, each of the spouses would be entitled to $25,000 for the farm in Manitoba and $50,000 for the family home in British Columbia.
>
> Since the court can't normally make an order requiring the sale or transfer of the property in Flin Flon, an equal division of the assets in this jurisdiction would give each spouse $50,000, half the value of the family home, but this would short Ivan of his interest in the farm. To avoid this unfairness, the court could simply divide the family home in Vernon in favour of Ivan, and give him a $75,000 share rather than an equal share.
>
> This would reapportion the value of the property the court can deal with (the family home) to compensate Ivan for the interest he ought to have in the property the court can't deal with (the farm). Zygmunt is still left with half of the family property, as he remains the sole owner of the farm, $50,000, and gets a $25,000 share of the family home, for a total property interest of $75,000.

In truly exceptional circumstances, it is possible to get an order stopping someone from disposing of real property located outside the province with something called a "*Mareva* injunction." A *Mareva* injunction will stop someone from selling or encumbering assets outside of British Columbia, providing that certain conditions are met. (The name of this order comes from an old English case in which the relief was first granted, *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [4], [1980] 1 All E.R. 213). To qualify for this order, you must:

1. show a strong case for your entitlement to a share of those assets,
2. show that there is a real risk that the other party will dispose of those assets before a final order is made, and
3. guarantee that you will make good any harm the other party might suffer if the order is made.

The *Family Law Act*

Under Division 6 of Part 5 of the *Family Law Act*, the Supreme Court of British Columbia may, in certain circumstances, make orders about the ownership and division of property located outside British Columbia. If the court has the ability to make orders dividing property located outside the province, it may also make an order to preserve the property from being disposed of. Section 109(2)(b) says the Supreme Court may make an order that will:

> (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
>
> (i) preserve the extraprovincial property,
>
> [...]
>
> (iv) provide for any other matter in connection with the extraprovincial property

The first stumbling block is to figure out whether the court can divide the out-of-province property, and that requires a difficult analysis under sections 106, 107, and 108 of the Act. Assuming the court can make such orders, the next step is to find out whether the order would be "enforceable against a spouse" in the place where the property is located. If the answer to both questions is yes, then the court may make an order for the preservation of the foreign property.

This part of the Act is extremely complicated and you should get advice from a lawyer whenever you may need to deal with movable and immovable property located outside of British Columbia.

Movable assets

Bank accounts, stocks, investment accounts, and similar assets that aren't real estate are called movable assets. The BC Supreme Court usually has jurisdiction over movable assets located outside of the province where the owner has attorned to the jurisdiction and accepted the court's authority.

Where a spouse has attorned, the court can make a restraining order stopping the spouse from disposing of movable property located outside of British Columbia under section 91 of the *Family Law Act*. Inside British Columbia, a section 91 order will stop a spouse from dealing with everything that is family property or other *property at issue*, including real property. Outside British Columbia, a section 91 restraining order will only stop a spouse from dealing with movable assets.

The court can be reluctant to issue a section 91 order that is intended to deal with assets located outside the province, since in most cases the courts of British Columbia cannot make orders about things located outside the province. In a 2002 case called *Boyd v. Boyd* [5], 2001 BCCA 535, the Court of Appeal confirmed that the court can make *in personam* restraining orders that are effective against movable assets located outside the province.

It is important to remember that a section 91 order is an *in personam order*, which means that it is only effective against the person to whom the order is being made. Accordingly, if your spouse has a significant amount of money in a bank account, investment account, or similar type of savings vehicle, and you are concerned that your spouse will transfer the monies somewhere else even if there is an order in place, then you should ensure that the financial institution where the accounts are being held are named in the notice of application, the financial institution is served with your application, and that you seek specific relief vis-à-vis the financial institution. Otherwise, the financial institution does not have any legal obligation to prevent your spouse from transferring assets out of the financial institution.

If a section 91 order is not available for some reason, a *Mareva* injunction will have the same effect. However, *Mareva* injunctions are not granted automatically and you must satisfy the test described just above.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Constitution Acts, 1867 to 1982* [7]
- *Land (Spouse Protection) Act* [23]

Links

- BC Personal Property Registry website [1]
- Dial-A-Law Script "Dividing Property and Debts" [9]
- Justice Education Society's handbook *Parenting After Separation: Finances* [10]
- Legal Aid BC's Family Law website's information page "Property & debt" [11]
  - See "Dividing property and debts"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, October 19, 2023.

References

[1] http://www.bcregistryservices.gov.bc.ca/bcreg/pprpg/ppinfo.page
[2] http://canlii.ca/t/1q5c1
[3] http://canlii.ca/t/8459
[4] https://perma.cc/WK3R-48XF
[5] http://canlii.ca/t/50dw

Dividing Property and Debt in Family Law Matters

If a couple is able to agree on how their property and debts will be divided, they can make a separation agreement summarizing the terms of their settlement. However, if they can't agree, one or either of them will likely start court proceedings and the court will make an order dividing their property and debt for them.

This section talks about how property and debt are divided between spouses by the court through court orders made under the *Family Law Act*, and by spouses through separation agreements. It also discusses when excluded property can be shared between spouses, when family property can be divided unequally, and when the court can make orders about property located outside British Columbia.

Introduction

Whether you're able to settle how property and debt are going to be shared by agreement, or if you're going to need a court order, it's important to understand how the *Family Law Act* works. If you're going to start a court proceeding, the court will be required to divide property using the rules set out in the Act; if you're going to be able to settle your property issues, the Act will be used to measure the fairness of your agreement if either of you ever tries to get out of the agreement in the future.

How the *Family Law Act* divides property and debt

Part 5 of the *Family Law Act* talks about the division of family property and family debt between spouses. It says what counts as shared family property and shared family debt, and which property is excluded from family property and is supposed to remain the separate property of the owner. It talks about when family property and family debt can be divided unequally, and the circumstances in which excluded property may be shared between spouses. It also talks about how ownership of pets, or *companion animals*, should be determined, as the normal presumptions about family property and excluded property no longer apply to these animals starting 15 January 2024. Part 6 talks about how pensions, which count as family property under Part 5, get divided between spouses.

This is how Part 5 works:

- **Section 97(2)(a):** says that the court can make declarations concerning the ownership, right of possession or division of property (including companion animals) and family debt, and can make orders that may be necessary to give effect to such declarations.
- **Section 106:** says when the courts of British Columbia have the authority to divide property and debt if there is another court that can also make orders dividing property and debt between the same spouses.
- **Section 81:** states the basic principle that when spouses separate, each spouse takes a one-half interest in family property as a tenant in common, and each becomes responsible for one-half of the family debt.
- **Sections 84 and 85:** tell you how to figure out which property is family property and which property is excluded property.
- **Section 92**: gives spouses the right to make agreements about property division should they separate, determine what items of property will or won't be included or excluded, divide property equally or unequally, make their own determinations on value of property, and agree about ownership or possession of companion animals, including shared ownership or possession.
- **Section 94(1):** gives the court the authority to make orders for the division of property and debt between spouses.
- **Sections 95 and 96:** say when the court may divide family property and family debt unequally, and when division of excluded property is permitted.
- **Section 97(4)**: says that excluded property can only be divided as permitted under section 96, or if the excluded property is a companion animal.

- **Sections 97(4.1)-(4.3)**: say what the court must consider when declaring ownership of a companion animal, prohibits declarations of shared ownership or possession of one, and says sections 95 and 96 do not apply to such orders.
- **Section 109(1):** allows the court to make orders for the ownership and division of property outside of British Columbia.

Interestingly, there isn't a section that explicitly says "the court should make orders dividing family property and family debt equally"; you have to figure this out from section 81, which says that each spouse should have half of the family property and family debt, and from section 94, which says that the court can make orders dividing family property and family debt.

Dividing property and debt under the *Family Law Act*

Here's a step-by-step guide to Part 5. The discussions that follow will go into things in more detail.

Step One

To divide property and debt under the *Family Law Act*, you first have to figure out whether you're a "spouse" as defined by section 3(1)(a) or 3(1)(b)(i). You must either be married or have lived with your partner in a marriage-like relationship for at least two years.

If you're not a spouse, *stop* and read the discussion in the introductory section of this chapter, Property and Debt in Family Law Matters, about the property rights of people who aren't spouses. People who don't qualify as spouses are entitled to share in property that they both own, and may have an interest in property only one of them owns under the common law relating to trusts and equity.

Step Two

Next you need to look at any *cohabitation agreement* or *marriage agreement* that you may have signed earlier in your relationship to see whether it talks about property or debt. Oral agreements are harder to prove, but you should consider the special circumstances of your relationship and question if an oral agreement about property or debt might be argued (either by you or the other spouse).

If you have a written agreement about property, *stop*. Section 94(2) says that you cannot apply for a division of property if there's a written agreement about property or debt until that agreement is set aside. Accordingly, if you have a written agreement about property that you want to vary or set aside, you must seek an order from the court. If an oral agreement exists or might exist, this will not interrupt the steps you take next, but it may be a reason for the court to make an order for unequal division of property under section 95(2)(b) that adjusts for what the oral agreement provided for.

Step Three

Next you have to check that you're making your claim within the *time limits* set out in section 198(2). Married spouses must bring their claims for the division of property and debt within two years of the date of their divorce or a declaration that their marriage is a nullity; unmarried spouses must bring their claims within two years of the date of their separation.

If you're outside the time limits, *stop*. Talk to a lawyer to confirm that you're out of time and ask about whether you're within the limitation period to ask for an interest in property under the common law relating to trusts and equity.

Step Four

Now you have to figure out whether there's *another court* somewhere outside of British Columbia that has the authority to make an order affecting you, your spouse, and your property. Most of the time the answer to this question will be no.

However, there may be a problem if:

- you and your spouse lived somewhere else for a long time,
- there is a court action commenced in another jurisdiction seeking the same or similar relief,
- you have property outside of the province, or
- you have a cohabitation agreement or a marriage agreement that requires the laws and courts of another place to be used.

The problem is this. If another court can make an order, you then have to figure out under section 106 whether the courts of British Columbia should be dealing with your proceeding at all.

If your case is better dealt with by another court, *stop*, because you'll need to start a court proceeding there. If not, you can continue here.

Step Five

Now you have to start sorting what you have into *family property* and *family debt*, and *excluded property* and excluded debt (i.e. personal debt). Start from the assumption that everything you have is family property and family debt and then work backwards.

Property and debt that you got *after you separated* is generally the separate property or separate obligation of each spouse, with two main exceptions:

- property bought after separation with family property is also family property (i.e. if the source of the funds used to buy the property can be traced back to family property), and
- debt incurred after separation to maintain family property is family debt.

Property you got *during your relationship* is generally family property, except for certain kinds of property that are excluded from family property. These include:

- inheritances,
- gifts from a third party, unless they are gifts to both spouses,
- certain court awards,
- certain insurance payments,
- certain trust property, and
- excluded property which is then gifted by one spouse to the other.

Property that you got *before your relationship* is generally excluded property that only you will keep. If you have gifted excluded property to your spouse, section 85(3) should maintain that exclusion for your benefit (but not if your family law case was started prior to May 11, 2023). The increase in the value of the property you brought into the relationship is *family property* even where the original amount remains excluded. You will likely remain responsible for debt you brought into the relationship.

Step Six

Next you need to figure out what everything is worth and where it is. This will be the hard part.

For *excluded property* and excluded debt, what you need to know is:

- What was the value of each asset on the date immediately before you began to live together or got married, whichever came first?
- For property acquired during the relationship, when did you acquire each asset and what was it worth when you received it?
- If it was a gift from a third party, was this gift to you only, or you and your spouse together? And can you prove this?
- What did you do with your property during your relationship? Is it still around? Did you sell it and buy something else?
- Did you gift it to your spouse? (Again, this should not matter anymore, and you should be able to keep this exclusion unless your family law case was started before May 11, 2023.)

- Do you still have any debts from before your relationship started? If so, how much did you owe on the date you began to live together or got married, whichever was first?
- Have you incurred any new debt after the date of your separation? Did you add to any debts incurred during your relationship after separation? If so, how much new debt have you racked up?

For *family property* and *family debt*, you need to know:

- What is the value of each asset now?
- Did you buy any family property using the proceeds of sale of excluded property? If so, how much did you put toward the purchase of the family property?
- Is there any property that was bought after separation with family property? If so, what is the value of those assets?
- What are the debts owed by you, by your spouse, or by both of you, and how much is owing now?
- If new debt was incurred after the date of separation, was any of it incurred to pay for family property? If so, how much new debt was incurred paying for family property?

Step Seven

Now that you've got the numbers worked out, you may want to think about whether an *equal division* of family property and family debt would be "significantly unfair," bearing in mind the factors listed in section 95(2), which includes, but is not limited to, the duration of the relationship and whether a spouse, after the date of separation, caused a significant decrease or increase in the value of the family property or family debt beyond market forces. If it wouldn't be significantly unfair, then split the family property and family debt equally and go on with your life. If it would be significantly unfair, then you've got to figure out what a fair split looks like and I wish you the best of luck sorting this out in a speedy manner.

Finally, you may also want to think about whether there's a reason to share in some or all of the *excluded property*. Excluded property can be divided if there's property outside of British Columbia that ought to be family property but can't easily be divided, or if it would be "significantly unfair" not to share excluded property, bearing in mind the factors listed in section 96(b). These factors include:

- a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property,
- the terms of any oral or written agreement about the excluded property (a written agreement that met the requirements of section 93 would need to be handled at step two, however if there is an agreement that's in writing but is unwitnessed then this kind of written agreement could be a factor the court will consider), or
- if an unequal division of family property is not enough to address the significant unfairness, excluded property can be divided.

If there's no reason to share excluded property, carry on. If there is a reason to share that property, then you've got to figure out what a fair division looks like.

Orders for the division of property and debt

Under the *Family Law Act*, a person who is a "spouse" under section 3 may apply, within the two-year time limit in section 198, for a division of property under section 94(1). Where another court may also make an order for the division of property, the court here must first determine whether it should go ahead under section 106 and, if so, it must next determine what law it should apply under section 108. However, where no other court may make an order respecting property, the court here may make orders dividing property and debt under Part 5 of the act without any more complications.

The usual order under Part 5 is an order that decides which property is family property and which debt is family debt, and then divides them both equally. However, in some circumstances the court can divide family property and family debt unequally; in others the court can even divide excluded property between spouses.

Determining jurisdiction

A person who qualifies as a spouse under section 3 of the *Family Law Act* can start a court proceeding in British Columbia and ask for orders about the division of property and debt. There's no rule that says that a person who starts a court proceeding in British Columbia must live in British Columbia, but there must be some sort of connection with this province and the court proceeding. Maybe the other spouse lives here. Maybe the property or debt is here. Maybe British Columbia is where the spouses lived for most of their relationship. Either way, there must be some connection between the court proceeding and British Columbia.

However, where another court might be able to make orders about the same people and the same property, the court here must decide:

- if it should make orders dividing property and debt or leave those issues for the other court, and
- if it should make orders, the law it should apply in dividing the property and debt.

Determining whether the court should make orders

(You should skip this part if no court other than the Supreme Court of British Columbia can make orders about you, your spouse, and your property.)

When another court might be able to make orders about the same people and the same property, section 106(2) provides the rules to help the court here determine when it may make orders dividing that property between those people under Part 5:

> (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
>
> (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
>
> (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
>
> (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
>
> (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

In other words, the court here can make an order if:

- the claim about property was made by a counterclaim in the BC Supreme Court proceeding,
- both spouses agree that the court should make orders about property and debt,
- either spouse normally lived here when the proceeding started, or
- there is a "real and substantial connection" between this province and the proceeding.

Section 106(3) helps to explain what "real and substantial connection" means:

> (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
>
> (a) property that is the subject of the proceeding is located in British Columbia;
>
> (b) the most recent common habitual residence of the spouses was in British Columbia;

> (c) a notice of family claim with respect to the spouses has been issued under the *Divorce Act* (Canada) in British Columbia.

In other words, there is a "real and substantial connection" between this province and a court proceeding, which may let the court here make orders about the division of property and debt, if:

1. the property is here,
2. the spouses last lived together here, or
3. the court proceeding includes a claim under the *Divorce Act* (the reason for this factor is that the *Divorce Act* requires a spouse to have lived in the province where they make a claim under the act for at least one year before the court proceeding is started).

As if this wasn't complicated enough, even if the court can make an order because one of the section 106(2) conditions are met, under section 106(4) the court can refuse to make orders for the division of property and debt. Section 106(5) says what the court must take into account in deciding to refuse to make orders:

> (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
>
> (b) the relative convenience and expense for the spouses and their witnesses;
>
> (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
>
> (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
>
> (e) the extent to which an order respecting property or debt
>
> (i) made in another jurisdiction would be enforceable in British Columbia, and
>
> (ii) made in British Columbia would be enforceable in another jurisdiction;
>
> (f) the fair and efficient working of the Canadian legal system as a whole;
>
> (g) any other circumstances the court considers relevant.

This is a little harder to boil down, but these factors essentially ask the court to think about what is cheapest, fastest, and fairest for the spouses and will require the least number of court proceedings.

Determining the law to apply when the court may make orders

(You should skip this part if no court other than the Supreme Court of British Columbia can make orders about you, your spouse, and your property.)

Assuming, then, that the court here has decided that it has the authority to make orders for the division of property and debt because one of the section 106(2) factors is met, and that it hasn't decided to refuse to make orders anyway under section 106(4), the next thing to figure out is the law that the court should use in deciding how the property and debt should be divided under sections 107 and 108. That law could be the law of British Columbia, namely Part 5 of the *Family Law Act*, or it could be the law of another place.

Section 108 is just as complicated as section 106, but what it all comes down to is this:

1. under section 108(3), if the spouses have an agreement that says the law of a particular place must be used, the law the court must use is the law of that particular place,
2. under section 108(4), if the spouses first together lived in a place that divides property like the *Family Law Act* divides property, the law the court must use is the law of the place where the spouses first lived together,

3. under section 108(5), if neither of the first two circumstances apply, the law the court must use is the "applicable internal law."

Section 107 says how you figure out what the "applicable internal law" is:

> The applicable internal law for the purposes of section 108 [choice of law rules] is
>
> (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
>
> (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or
>
> (c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

In other words, the "applicable internal law" that should be used to divide property and debt between spouses is:

- the law of the place where the spouses most recently lived together,
- the law of the place where the spouses lived together the longest, or
- if the spouses never lived together, the law of the place where the spouse making the claim for the division of property and debt normally lives.

In the right circumstances, the "applicable internal law" could be the *Family Law Act*!

Property and debt inside British Columbia

Section 97 is the key to Part 5 of the *Family Law Act* and gives the court its general power to make orders that give effect to the other sections relating to the division of property and debt. Under this section, the court may:

- make decisions about any issue concerning the ownership, possession, or division of property or debt,
- make any order necessary to divide property or debt,
- declare who should own or possess property, including companion animals,
- make a spouse pay compensation if they have sold or transferred property that should have been shared,
- require the sale of a property and payment to the spouses from the proceeds of the sale,
- make one spouse be responsible for debt,
- require the sale of property to pay debt, and
- make orders transferring property to a spouse.

Under section 97, the court can make:

- whatever orders are needed to equally divide family property and family debt between spouses,
- whatever extra orders are needed to divide family property and family debt unequally under section 95 (except with respect to companion animals), and
- whatever extra orders are needed to divide excluded property under section 96 (except with respect to companion animals).

One thing to note about section 97 is that on 15 January 2024 it expanded to include the rules for how ownership of companion animals is decided by the courts. Section 97(4.1) contains the special factors that a court must consider when making an order about a companion animal, as explained in the section below.

Interim orders

An *interim order* is a temporary order made after a court proceeding has started and before it has wrapped up with a trial or a settlement. Under section 88, a spouse can apply to court for an interim order about property at any time until a final order or a final agreement has been made about the division of property and debt.

Paying for dispute resolution processes

Under section 89, the court can make an order for the interim distribution of some of the family property to a party to pay for:

- the cost (i.e. legal fees) of the court proceeding,
- the cost of another dispute resolution process, like mediation, arbitration, and collaborative settlement processes, and
- the cost of expert's reports, like needs of the child assessments under section 211, property appraisals, or business valuation.

In practice, the court will usually make an order for an interim distribution for legal fees if the court feels it is necessary to "level the playing field" between spouses. By making such an order, the court tries to ensure that the spouse who has all the money and can afford a lawyer does not have an advantage over the spouse who does not have as much money and may not be able to afford to pay for a lawyer without an interim distribution for legal fees.

Use of property

Under section 90, the court can make an interim order that one spouse have the exclusive right to live in the family home and use the property (i.e. household contents and furnishings) kept at the family home. The court will make these orders if it's no longer possible for the spouses to share the home and if the convenience to the spouse who's staying in the home outweighs the inconvenience to the spouse who's being made to leave. Usually, if there are children (especially young children), the spouse who has primary care of the children will be the spouse who remains in the family home because the children require the stability and security of remaining in the family home.

Under section 91(2)(a), the court can make other interim orders "for the possession, delivery, safekeeping and preservation of property." This might include orders that a spouse must return personal property to the other spouse or that a spouse will have the sole use of personal property, like a car that's necessary to go to work or take the kids to school.

Financial restraining orders

Under section 91(1) and (2), the court can make some really important interim orders that are intended to freeze any property that is at issue in the court proceeding, including family property and property that might be excluded property, until the property is finally divided by an order or an agreement.

> (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.
>
> (2) The Supreme Court may make one or more of the following orders:
>
> [...]
>
> (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,

> (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
>
> (ii) vesting all or a portion of property in, or in trust for, the applicant.

A couple of important points about this section deserve mention:

- the order *must* be made when a spouse asks for it, unless the other spouse can show that there are sufficient assets so that the claim to the property won't be frustrated if they happen to sell some of the assets,
- the order can be made without giving the other spouse notice of the application, and
- the order includes not just "family property" but all property in dispute, including property that might be excluded property.

This is a powerful interim order and you should probably think about asking for this order if you are asking for a share of property. This is just a matter of being prudent. You may have no cause to believe that your spouse would do something that would jeopardize your interests, but it almost always pays to be cautious.

Rule 12-4 of the Supreme Court Family Rules gives the court the authority to make a general restraining order, called an *injunction*, to require someone to do something or not do something. The same authority is given to the court by section 39 of the provincial *Law and Equity Act* [3]. See this chapter's section on Protecting Propery and Debt for more information.

Dividing property and debt equally

Under section 81(a) of the *Family Law Act*, "spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution." Under section 81(b), each spouse's share of the family property is presumed to be an "undivided half interest" and each spouse is "equally responsible for family debt." Section 97 gives the court the ability to make whatever orders are necessary to divide family property and family debt between spouses.

Section 84 says what family property is:

> (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:
>
> (a) on the date the spouses separate,
>
> (i) property that is owned by at least one spouse, or
>
> (ii) a beneficial interest of at least one spouse in property;
>
> (b) after separation,
>
> (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
>
> (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.
>
> (2) Without limiting subsection (1), family property includes the following:
>
> (a) a share or an interest in a corporation;

> (b) an interest in a partnership, an association, an organization, a business or a venture;
>
> (c) property owing to a spouse
>
> (i) as a refund, including an income tax refund, or
>
> (ii) in return for the provision of a good or service;
>
> (d) money of a spouse in an account with a financial institution;
>
> (e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;
>
> (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
>
> (g) the amount by which the value of excluded property has increased since the later of the date
>
> (i) the relationship between the spouses began, or
>
> (ii) the excluded property was acquired.

Section 86 says what family debt is:

> Family debt includes all financial obligations incurred by a spouse
>
> (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
>
> (b) after the date of separation, if incurred for the purpose of maintaining family property.

Dividing property and debt unequally

Under section 95(1) of the *Family Law Act*, the court may divide family property or family debt unequally, but only if equal division would be "significantly unfair" in the context of the factors mentioned in section 95(2). Recent court decisions explain that the unfairness must be "weighty, meaningful or compelling." A judge can only order an unequal division of family property where the result of equal division would be so unfair as to be unjust or unreasonable. It is highly unlikely that a court would find the circumstances to be "significantly unfair" merely because one spouse worked during the marriage and the other spouse did not.

Section 95(2) provides a list of factors considered when deciding if equal division of property and debt is significantly unfair:

> (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
>
> (a) the duration of the relationship between the spouses;
>
> (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
>
> (c) a spouse's contribution to the career or career potential of the other spouse;
>
> (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.

In some cases, judges find that the *unequal contribution* of one person, along with other factors, warrants unequal division. In other cases, *unequal contribution* is not enough to establish "significant unfairness."

Under section 95(3), the court can also take into account issues relating to spousal support in deciding whether to divide family property and family debt unequally:

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

This provision will apply when there is an obvious need for spousal support to be paid, but the potential payor doesn't have the surplus income from which to pay. In this situation, the spouse in need of support might get more of the family property to make up for the support that can't be paid. See the chapter on Spousal Support for more information about when spousal support might be payable.

Dividing excluded property

Under section 96 of the *Family Law Act*, the court may not make an order dividing excluded property between spouses except in two situations: if there's property outside the province that can't be divided under section 109, discussed below; or, if it would be "significantly unfair" not to divide the excluded property in light of the length of the spouses' relationship or one spouse's contributions to the excluded property owned by the other spouse. Section 96 says this:

> The Supreme Court must not order a division of excluded property unless
>
> (a) family property or family debt located outside British Columbia cannot practically be divided, or
>
> (b) it would be significantly unfair not to divide excluded property on consideration of

> (i) the duration of the relationship between the spouses, and
>
> (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

As we saw in the discussion about section 95, it's hard to say what "significantly unfair" means. I expect that something that is "significantly unfair" is more unfair than something which is just "unfair," yet is less unfair than something that is "grossly unfair."

Ownership and possession of pets

As mentioned earlier, companion animals have special treatment under the *Family Law Act* as of 15 January 2024. As of that date, these animals are also unique in that they are the only type of property that the BC Provincial Court has jurisdiction to decide ownership about. The Provincial Court has no jurisdiction to make orders about any other type of property under Part 5 of the Act.

Under section 97(4.2) a court cannot make an order that the parties share ownership of a pet. If a judge is to make an order, they must specify which spouse is the owner. Parties acting on their own initiative can make a family law agreement agreeing to shared ownership of their pet, if that's what they want, but a court is restricted and can only make an order that one or the other party is the owner. This idea that companion animals should not be "divided up" the same way as other kinds of property that are primarily about monetary value, is consistent with the other amendments in section 97 that relate to companion animals:

- Section 97(4.2) says what factors the judge must consider when making an order about a pet, and the needs of the animal, the relationship it has with a child, and the threats of family violence or animal cruelty are all important factors in addition to which spouse cared for and how it was acquired.
- Section 97(4.3) says that sections 95 and 96 do not apply to orders about pets, which means the court isn't concerned about finding *significant unfairness*, and instead:
  - The judge can make an order that a spouse owns 100% of the dog rather than just 50%, even though section 95 would normally only allow an unequal division of family property where there would otherwise be *significant unfairness*.
  - The judge can make an order that one spouse owns the cat, even though the other brought it into the relationship, and even though *exclusive property* would normally be divided according to the very specific circumstances in section 96.

In other words, the court doesn't have to make any findings of significant unfairness to divide the pet "unequally" as family property. And a court is not restricted from declaring that a pet that would otherwise be one spouse's *excluded property* will now be exclusively owned by the other spouse.

What the judge must do instead, when deciding ownership of a companion animal, is work through section 97(4.1) to consider:

> (a) the circumstances in which the companion animal was acquired;
>
> (b) the extent to which each spouse cared for the companion animal;
>
> (c) any history of family violence;
>
> (d) the risk of family violence;
>
> (e) a spouse's cruelty, or threat of cruelty, toward an animal;
>
> (f) the relationship that a child has with the companion animal;
>
> (g) the willingness and ability of each spouse to care for the basic needs of the companion animal;
>
> (h) any other circumstances the court considers relevant.

Property and debt outside British Columbia

Division 6 of Part 5 of the *Family Law Act* has a complicated test that the court must apply to determine whether it can and should make orders dividing property and debt between spouses when another court could also make orders about the same people and the same property and debt. This was discussed earlier in this section under the heading "Determining jurisdiction."

If the court decides that it can make orders, it can, in certain circumstances, also make orders about property located outside the province under s 109(2):

> (2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:
>
> (a) instead of dividing the extraprovincial property,
>
> (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
>
> (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
>
> (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
>
> (i) preserve the extraprovincial property,
>
> (ii) provide for the possession of the extraprovincial property,
>
> (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or
>
> (iv) provide for any other matter in connection with the extraprovincial property;
>
> (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

To put this another way:

1. under section 109(2)(a), the court can divide family property here unequally to compensate for property outside the province, just like how the court can divide excluded property for the same reason under section 96(a),
2. under section 109(2)(b)(i), the court can make a kind of restraining order to stop the property outside the province from being sold, just like how the court can make restraining orders about property inside the province under section 91(1), and
3. under section 109(2)(b)(ii) and (iii) and section 109(3), the court can make orders about which spouse should be able to possess or own property outside the province and orders transferring property outside the province between spouses.

Separation agreements for the division of property and debt

A separation agreement is a contract that records a settlement of the issues that arise when a relationship ends. Separation agreements can be an effective and inexpensive way of settling things. However, the terms of the agreement must be reasonable, and the parties must be able to get along well enough to negotiate the deal and then put it into action when it's done.

The ways that a separation agreement can deal with the division of family property and family debt are virtually unlimited. Under the *Family Law Act*, each spouse is presumed to keep the property they brought into the relationship and share in the property bought during the relationship as well as the increase in the value of any property brought in. Although spouses are presumed to be each half responsible for any debt incurred during the relationship, you can make whatever other arrangements you want, as long as both spouses agree to those arrangements and they're reasonably fair. In fact, section 92 says this:

> Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more the following:
>
> (a) divide family property or family debt, or both, and do so equally or unequally;
>
> (b) include as family property or family debt items of property or debt that would not otherwise be included;
>
> (c) exclude as family property or family debt items of property or debt that would otherwise be included;
>
> (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

In other words, in making an agreement about the division of property and debt, spouses can divide unequally the things they're supposed to divide equally, divide things they're not supposed to divide, and not divide things that are supposed to be divided. As long as you both agree, you can do pretty much whatever you want in a separation agreement.

The effect of a valid agreement

When spouses have written, signed, and had witnessed their agreement about the division of property and debt, section 94(2) of the *Family Law Act* says that the court cannot make an order about the division of family property, excluded property, or family debt, unless the parts of the agreement that deal with property and debt are set aside by a court order. This gives agreements on the division of property and debt a lot more protection against later court challenges than was provided to agreements under the old *Family Relations Act*.

Making a valid agreement

An agreement about the division of property and debt is almost always in writing, signed by both parties, and signed by a witness, even though oral agreements or less formal agreements in writing are possible. There are good reasons for this based on how the *Family Law Act* treats properly written agreements versus oral or informal written agreements, and because the terms of oral agreements are notoriously hard to prove.

Benefits of written versus oral agreements about property

As mentioned, if there is a written, signed, and witnessed agreement (which is the criteria in section 93(1)), then a judge cannot make a property division order unless a party has made a successful application to have all or some of the written agreement set aside. This means that a written agreement cannot simply be ignored or sidestepped. By contrast, the *Family Law Act* does not prevent a judge from making a property division order in the face of an oral agreement, or an agreement that is written but doesn't meet the criteria in section 93(1).

A written agreement is also much clearer and easier to prove. Proving the terms of an oral agreement is usually a difficult and risky process for the person trying to do that in the face of a spouse who disputes the fact there even was an agreement, or disagrees about what the agreement included.

It is highly recommended that any family law agreement be in writing.

Requirements of a valid written agreement

Requirements about the validity of agreements comes from the common law of contracts. These are discussed in a little more detail further on in this section, but for a more thorough discussion you should look at the Family Law Agreements chapter.

Getting legal advice

You can be on totally good terms with the other person, and still get a lawyer to look at your family law agreement. This is standard practice, and strongly advised for every agreement. Each spouse should get their own lawyer. Family lawyers are often approached by individuals to provide independent legal advice, or *ILA*, about family law agreements. It's not a big deal, and it shouldn't be interpreted as a sign of trouble or dysfunction. The lawyer will explain and give advice about the terms of the agreement before the parties sign it. This step ensures that each spouse understands the nature, circumstances, terms, and the effect of the agreement. An ILA is especially important if one spouse has a limited understanding of the English language or has limited education.

Fully disclosing all property and debts

Each spouse must properly and fully disclosed all assets and debts in the spouse's name in the agreement. A written agreement that merely says "what's mine is mine and yours is yours" without first disclosing what that is, may not be upheld by the court if one spouse seeks to set it aside or vary it.

Asking the court to set aside an agreement

Section 94(2) says that the court cannot make an order dividing property or debt in the face of a written and witnessed agreement on property and debt until it has set aside those parts of the agreement. If a spouse is unhappy with the terms any agreement that deals with property or debt, the spouse must:

1. ask the court to set aside those parts, and
2. ask for an order about the division of property and debt.

Applications to set aside written family law agreements are made under section 93, and to succeed the applicant must typically take a two stage approach. The onus of proof is on the applicant. Can the spouse who wishes to set aside the agreement show that one of the situations at section 93(3) existed when the parties entered the agreement? If so, then the written agreement was unfairly reached and can be set aside. If the spouse can't pass the first stage, then can

they show that the written agreement was significantly unfair in light of the factors in section 93(5)? That section gives the court discretion to set aside an agreement as *significantly unfair*, but requires some factors to also be considered.

Stage one: circumstances around formation of the agreement

A typical challenge to a written agreement is successful because it meets the requirements of this first stage, and the situations listed in section 93(3) apply, which means there is proof that:

- a spouse failed to disclose significant property or debts,
- a spouse took improper advantage of the other spouse's vulnerability,
- one of the spouses did not understand the nature or consequences of the written agreement, or
- the written agreement would be voidable under the common law rules around contracts.

Stage two: significant unfairness factors

If none of the situations in section 93(3) apply, the written agreement might still be challenged at the second stage. It might be set aside under section 93(5) if a spouse can show it is *significantly unfair*. Significant unfairness represents a high threshold for setting aside an agreement, however. Furthermore, a court could agree that a written agreement is significantly unfair, but still decline to set it aside after considering the factors under section 93(5), which are:

- the length of time that has passed since the written agreement was made,
- the intention of the spouses to achieve certainty when they entered the written agreement, or
- the degree to which the spouses relied on the terms of the written agreement.

These three factors — passage of time, intention to achieve certainty through the agreement, and degree of reliance on the terms of the agreement — could themselves show that an agreement is *significantly unfair*, but the court can also consider these factors in deciding whether or not a significantly unfair agreement should be set aside or left in place. As the BC Court of Appeal said in *Azanchi v. Mobrhan-Shafiee* [3], 2021 BCCA 55 "a court may determine that, despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty."

It's important to remember that section 92 of the *Family Law Act* anticipates that people might make agreements to exclude assets from family property, divide assets unequally, or otherwise deviate from the default property division rules in the Act. So long as a written agreement was fairly reached (taking into account the situations listed in section 93(3)) a court will not likely find a written agreement to be significantly unfair just because it deviates significantly from what a party is entitled to under the *Family Law Act*.

Family law agreements and contract law

Family law agreements are private contracts reached between two people. While family law agreements can be attacked and enforced under the common law principles of contract, the court will usually give considerable weight to family law agreements that are in writing. Without proof of some serious problem like duress or coercion, or some other issue, the court will treat the agreement as representing the honest and informed intentions of the parties to settle their dispute.

Because of the importance the court will usually give to a written agreement, it can sometimes be necessary to attack the agreement itself under the common law that applies to contracts. An agreement might be found to be invalid (or voidable) for one or more of the following reasons:

- one of the parties was forced to enter into the agreement,
- one party was too much under the influence or control of the other party in consenting to the terms of the agreement,
- the agreement is fundamentally unfair, or

- one party lied to the other party or hid information from that party, and these misleading representations were the basis on which the other party signed the agreement.

All of these arguments for why an agreement is voidable are based on the common law of contracts, and 93(3)(d) lets you make them in an application to set aside an agreement.

Agreements on property and debt and the *Family Law Act*

The *Family Law Act* provides two tests to help the court decide when an agreement on property and debt should be set aside. Under the first test, at section 93(3), the court must look at the situation of the parties when they were negotiating and executing the agreement. The court is required to consider whether the following circumstances existed when the parties were making their 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 party'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.

The last part of this test, subsection (d), is about whether there is a defect under the law of contracts that might make the agreement void or voidable. The other parts of the test are all about the fairness of the parties' negotiations.

Now, even if there are problems with an agreement under section 93(3), the court can still decide not to set aside the agreement if "it would not replace the agreement with an order that is substantially different from the terms set out in the agreement" under section 93(4). In other words, if the court wouldn't make a different order than the arrangements the parties agreed to, it might just leave the agreement alone.

If there are no problems under section 93(3), the second test, at section 93(5), allows the court to set aside agreements that are "significantly unfair", taking into account:

> (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

If the court sets aside an agreement under section 93(3) or (5), the court will then make an order dividing property and debt between the spouses in place of the agreement.

Resources and links

Legislation

- *Family Law Act*
- *Law and Equity Act* [3]
- *Family Relations Act*

Links

- Dial-A-Law Script "Dividing Property and Debts" [9]
- Justice Education Society's handbook *Parenting After Separation: Finances* [10]
- Legal Aid BC's Family Law website's information page "Property & debt" [11]
  - See "Dividing property and debts"

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, November 22, 2023.

Family Violence

Family Violence Overview

If you are in danger

If your physical safety is in immediate danger, start here first:

- **If you are in immediate danger, call 911.**
- **For crisis support, dial VictimLINK** [1] **at 1-800-563-0808** for confidential and multilingual service.
- For more information, visit the Clicklaw website [2] (www.clicklaw.bc.ca) for a list of websites and other assistance under the heading "Your safety."

Overview of the various laws around family violence

This chapter talks about the laws and legal mechanisms for dealing with family violence. (Other terms, such as *gender-based violence*, *domestic violence*, and *intimate partner violence*, are more commonly used by anti-violence organizations and have meanings that are similar to family violence.) It covers:

- the provincial *Family Law Act*, its definition of family violence, and mechanisms for keeping family members safe and able to work on resolving their family matters,
- the federal *Divorce Act* and its definition of family violence, and mechanisms for keeping spouses and children safe and able to work on resolving their family matters,
- the provincial *Child, Family and Community Service Act* [17], and how family violence intersects with child protection issues,
- family violence in the context of the federal *Criminal Code*, with information for those who have experienced family violence and those accused of crimes, and
- the law of torts, another area of the civil law, that lets people ask for compensation when they have been harmed as a result of the actions of other people.

The *Family Law Act*

Under the *Family Law Act*, the term *family violence* includes physical, emotional, sexual, and financial abuse. This includes harmful behaviour such as threats, harassment, emotional abuse, and even acts that harm someone's financial independence and autonomy. Women, gender-diverse people, and children continue to be disproportionately impacted by family violence, in particular Indigenous women, women with disabilities, racialized women, and members of the 2SLGBTQIA+ community.

The legal system's concept of family violence has expanded beyond physical violence, reflecting how abuse and violence impact family members, including children. Fear, intimidation, and coercive control, can have a similar if not greater impact on the safety of family members than physical violence, and can have a significant impact on the outcome of a family law dispute. In many cases, more than one of these types of family violence may be present, and different types of family violence may be used at different times during the relationship. However, the presence of even one type of violent behaviour will meet the definition of family violence and may need to be taken into account when resolving the legal issues that come up when a relationship ends.

The *Family Law Act* offers a few ways for dealing with family violence, including *protection orders*, *conduct orders*, and rules that require the court to consider family violence when deciding what is in the best interests of children.

The act also requires that all "family dispute resolution professionals," a term which includes lawyers, family justice counselors and mediators, assess the potential for family violence in their cases. Where warning signs of family violence are present, lawyers must first determine if there are any safety risks to their client and their client's family members. They must also assess the degree to which family violence might be impairing the ability of their client to speak for themselves, advocate for their interests, and negotiate a fair agreement.

The *Family Law Act* and the *Divorce Act* both require the court to consider the impact of coercive and controlling behaviour and family violence when making decisions about children.

The *Divorce Act*

The *Divorce Act* also has a definition of family violence. Like the definition in the *Family Law Act*, the *Divorce Act* definition includes more than physical violence. It includes sexual abuse, threats to kill or harm someone, harassment, psychological abuse, financial abuse, and threats to harm an animal or damage property.

Like the definition in the *Family Law Act*, the *Divorce Act* also requires judges to consider family violence when making decisions about the parenting arrangements that are in the best interests of children.

Child protection

The law that deals with child protection issues is the provincial *Child, Family and Community Service Act* [17]. Each province has its own law about child protection, and these laws can be very different from province to province.

In British Columbia, the Ministry of Children and Family Development can get involved if children are being harmed or at risk of being harmed. In the case of Indigenous children, an Indigenous authority may step in instead of the MCFD, and offer support or protection. This chapter takes a brief look at some child protection issues, what happens when a report of a protection concern is made, and discusses when children may be placed in the care of MCFD or an Indigenous authority.

Family violence and the criminal law

Where a family member has committed family violence, they may have also committed a criminal offence and may be charged with an offence by the police. Criminal cases are handled differently than family law and other kinds of civil case. This chapter provides an introduction to the ways that criminal law can affect family law cases involving family violence.

If charges are laid under the *Criminal Code*, the accused person may be ordered to have no contact with the complainant, often called a *no contact order*. Other orders that could be made include not being allowed to have weapons, or not being allowed to go to the complainant’s home, school or workplace, often called a *no go order*. If a person charged with a criminal offence is convicted of the offence, their sentence could include further court orders or even time in jail.

The *Criminal Code* also provides for *peace bonds*. Peace bonds are not criminal convictions or sentences, but can be used to order an accused person not have to contact with the complainant. Peace bonds can be obtained against abusers of all kinds, including people in a dating relationship, even if they do not meet the requirements for a protection order under the *Family Law Act*.

Family violence and the civil law

Where a family member suffered family violence, they may have a "cause of action" under the civil law. A *cause of action* is the right to sue for something, usually compensation. Being wrongfully fired or hit by a car in a crosswalk can give you a cause of action. If you were assaulted by someone, including in a family relationship, you might have a "cause of action" for assault or battery.

Civil law is a broad area of law, and it includes the *law of torts*, sometimes known as personal injury law. The law of torts can address not just physical assaults, but a wide range of other harmful actions including violating someone's property or damaging someone's property. The result of a successful tort claim is typically financial compensation, called *damages*.

This chapter takes a brief look at how tort claims related to family violence can be brought with or alongside a regular family law case, and reviews some of the common difficulties people experience bringing tort cases.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Criminal Code* [3]
- *Child, Family and Community Service Act* [17]
- Provincial Court (Child, Family and Community Service Act) Rules [3]
- Provincial Court Family Rules [2]
- Supreme Court Family Rules [9]
- *Limitation Act* [12]

Resources

- E-book by Dr. Linda C. Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* [4] (CanLII February 2017, updated March 2020)
- Legal Aid BC & YWCA, *Mothers Leaving Abusive Partners: Family Law Information* [5]
- Rise Women's Legal Centre, *Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System* [6]
- Rise Women's Legal Centre, *Decolonizing Family Law Through Trauma-Informed Practices* [7]
- Rise Women's Legal Centre, *Creating Safety in BC Courts: Key Challenges and Recommendations* [8]
- West Coast LEAF, *Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare* [9]
- VictimLINK crisis support line: 1-800-563-0808
- Battered Women's Support Services website [10] and crisis support line: 1-855-687-1868
- Rise Women's Legal Centre: 1-236-317-9000 or complete an appointment request at https://womenslegalcentre.ca/
- More legal advice, representation and advocacy services related to abuse and family violence on Clicklaw's HelpMap website [11]
- Rise Women's Legal Centre, *Seeking a Peace Bond: A Guide* [12] (available in 12 languages)
- Dial-A-Law Script "Peace Bonds and Assault Charges" [13]
- Ministry of Attorney General's Community Safety and Crime Prevention Branch and Legal Aid BC's booklet *For Your Protection: Peace Bonds and Family Law Protection Orders* [14]
- Clicklaw resources on abuse and family violence [2]
- Clicklaw resources on child protection [15]
- Legal Aid BC's publications on abuse and family violence [16]

- Legal Aid BC's Family Law website's information page "Child protection" [17]
- Rise Women's Legal Centre, *Why Can't Everyone Just Get Along?* [18]
- Justice Canada's *HELP Toolkit: Identifying and Responding to Family Violence* [19]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Kim Hawkins, Vandana Sood, Elizabeth Cameron, and Rosanna Adams, 16 June 2023.

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[4] http://commentary.canlii.org/w/canlii/2017CanLIIDocs2
[5] https://www.clicklaw.bc.ca/resource/2231
[6] https://perma.cc/5ADM-E22W
[7] https://perma.cc/UJN7-UJA8
[8] https://perma.cc/8VWS-7QFU
[9] https://perma.cc/84US-8G5L
[10] https://www.bwss.org/
[11] https://www.clicklaw.bc.ca/helpmap/search?so=r&f=Abuse+%26+family+violence
[12] https://www.clicklaw.bc.ca/resource/5032
[13] https://www.clicklaw.bc.ca/resource/1317
[14] https://www.clicklaw.bc.ca/resource/1319
[15] https://www.clicklaw.bc.ca/global/search?k=child%20protection
[16] https://legalaid.bc.ca/publications/subject/4
[17] https://clicklaw.bc.ca/resource/4642
[18] https://www.clicklaw.bc.ca/resource/4886
[19] https://www.justice.gc.ca/eng/fl-df/help-aide/index.html

Family Violence in the Family Law Act and the Divorce Act

Family violence under the *Family Law Act*

The *Family Law Act* addresses family violence in the context of:

- protecting an at-risk family member from another family member, and
- parenting arrangements and deciding what is in the best interests of a child.

Sections 182 to 191 of the *Family Law Act* deal with *protection orders*. These are special orders that restrict a family member from communicating with or going near another family member. They can restrict the possession of weapons, or direct police officers to help in removing people or belongings from residences. If someone who is subject to a protection order breaks the terms of the order, they may be criminally charged for breaking a court order. Protection orders are sent to a special Protection Order Registry by court services and enforced under the *Criminal Code* in criminal court.

Sections 222 to 228 of the act deal with *conduct orders*, a category of orders used to manage behaviours that might frustrate the resolution of a family law dispute. Conduct orders can also restrain a family member from communicating with, following, or going near another family member, but are enforced in family court rather than criminal court.

Sections 37 and 38 of the act talk about children's parenting arrangements and how family violence *must* be considered by parents and judges when what is in the best interests of a child and when making orders and agreements about parental responsibilities, parenting time and contact.

"Family members"

Protection orders are available when a *family member* is at risk, or is likely at risk, of family violence. Section 1 of the *act* says who qualifies as a "family member":

> "family member", with respect to a person, means
>
> (a) the person's spouse or former spouse,
>
> (b) a person with whom the person is living, or has lived, in a marriage-like relationship,
>
> (c) a parent or guardian of the person's child,
>
> (d) a person who lives with, and is related to,
>
> (i) the person, or
>
> (ii) a person referred to in any of paragraphs (a) to (c), or
>
> (e) the person's child,
>
> and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e)

This definition includes spouses, parents, children and other people in the definition of "family member." However, if you read the definition carefully, you will notice that people who are

- dating,
- in another kind intimate relationship but aren't living together, and
- roommates and not in an intimate relationship,

aren't included in the definition. As a result, people in these relationships cannot apply for protection orders under the *Family Law Act*. People in these relationships should read the *Criminal Code* section of this chapter for the

options that may be available to them.

"Family violence"

The *Family Law Act* defines family violence broadly and, in addition to physical and sexual abuse, as including a variety of other forms of abuse such as psychological abuse, harassment, coercion, threats and restricting a family member's financial independence and autonomy. The definition extends to situations where children may be harmed through exposure to family violence, and to situations someone threatens to harm or harms pets or property. There is no requirement that the violent family member have an intention to follow through on threats in order for those threats to be considered family violence. There is also no requirement for the violent family member to actually intend to cause harm for their actions to be considered family violence.

"Family violence" is defined in section 1 of the act:

> "family violence" includes, with or without an intent to harm a family member,
>
> (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

It's important to know that a child's exposure to family violence, directly or indirectly, is considered family violence under the definition in section 1. *Direct exposure* would include situations where a child is the target of family violence; *indirect exposure* includes situations where the child is impacted by family violence, for example by witnessing it.

The courts have found that a wide range of actions can fit into the definition of family violence. Here are just a few examples of situations that have been found to qualify as "family violence":

- *Barendregt v Grebliunas* [1], 2022 SCC 22: In this case the mother had suffered due to the father's controlling nature and overbearing personality. The father continued his hostile behavior during the trial, adding a nude selfie of the mother in an affidavit purely to humiliate her. The Supreme Court of Canada agreed with the trial judge's findings and allowed the mother to relocate, emphasizing that domestic abuse and family violence impacts the children and it is appropriate to negatively judge the perpetrator's parenting ability based on their behaviour.
- *K.S.P. v. B.R.J.* [2], 2023 BCSC 886: The court ruled that throwing an object at a person during an argument constitutes family violence.
- *K.L. v. A.P.* [3], 2022 BCPC 214: The court declared that the father's pattern of harassing, degrading and aggressive messages, secret video recording, and conflicts requiring police intervention was family violence.
- *M.S.R. v. D.M.R.* [4], 2022 BCSC 1398: By alienating the child from the mother, the father had engaged in family violence. The court noted that "the harm [was] ongoing and [did] represent a pattern of controlling behaviour

directed at the child."

- *K.S.P. v. J.T.P.* [5], 2022 BCSC 1727: The court determined it would be abusive to allow the husband to challenge findings of domestic violence already made in three separate hearing, even though there were pending appeals on two orders.
- *K.R.L. v. N.P.* [6], 2021 BCPC 324: The father's "hateful, cruel and vulgar" text messages to the mother were "staggeringly voluminous and unrelenting" and found to be psychologically and emotionally abusive.
- *T.M.H. v. P.J.H.* [7], 2020 BCSC 804: The father committed family violence when used parenting time as a means to bully and harass the mother. He violated the boundaries of communication and sent messages to the children that were "manipulative, emotionally abusive and a breach of trust".
- *C.M.C. v. J.C.P.* [8], 2020 BCSC 2005: The father's text messages, including statements that the mother "could not get 'any dumber'" and was a liar" and suggesting that the mother's parenting was putting his and the child's life in danger, were emotionally abusive. The father's communications caused stress to the child and emotional harm.
- *D.A.B. v. C.A.S.* [9], 2020 BCSC 807: Disparaging and inappropriate comments, including comment made in front of the children, constituted family violence.
- *T.C. v. K.C.* [10], 2019 BCSC 1299: The court held that it was a "significant violation" of "personal autonomy" for the father to lift up and remove the mother from their bedroom when she refused to leave on her own. It amounted to family violence.
- *C.A.L. v. D.E.L.* [11], 2018 BCSC 772: In an acrimonious separation, the past conduct and the current circumstances are all relevant. When analyzing the risk of family violence and the factors in s. 184 of the *Family Law Act*, judges must take a "broad and contextual perspective" by looking at the parties' history, communication patterns, and surrounding circumstances.
- *Primeau v. L'Heureux* [12], 2018 BCSC 740: The court found a pattern of coercive and controlling behaviour by the father. He deliberately jeopardized the mother's livelihood by speaking ill of her to clients, caused her a loss of income (while at the same time not paying court-ordered child support reliably), made baseless complaints against her to the RCMP, failed to communicate reasonably, and used the child as a "pawn" in order to get back at the mother.
- *S.A.H. v. J.J.G.V.* [13], 2018 BCSC 2278: The father's constant assertion that the mother's and the children's actions were sinful and evil amounted to "spiritual abuse", which fits into the broad definition of family violence in the *Family Law Act*. By "painting himself with truth and goodness and the claimant with lies and evil" he unintentionally tormented the children by forcing them to side with the "alleged evil in order to be with the mother they love".
- *N.M.A. v. K.D.L.* [14], 2018 BCSC 1879: Derogatory and abusive language in emails can go beyond mere argument, and turn into emotional abuse and family violence. The father went beyond mere bickering and unpleasantness, and his repetitive, unrestrained and vulgar language, especially over an extended period of time, became emotional abuse and family violence.
- *S.A.W. v. P.J.W.* [15], 2018 BCPC 376: The court found a distinction between "mere arguments and insulting discourse", or even "nasty or spiteful arguments", and behaviour that is so "belittling, demeaning, and insulting" (and repeated frequently in front of a child), that it was at a different level and fit the broad definition of family violence, although likely at the lower end of the scale.
- *J.S.R. v. P.K.R.* [16], 2017 BCSC 928: The father's threats to kill himself, which were delivered in such a manner that they became known to the children, were found to be a form of psychological abuse and family violence.
- *K.D.R. v. J.N.D.* [17], 2017 BCSC 182: A parent's derogatory and demeaning comments about the other parent, on occasion and in the child's presence, "clearly amount to family violence" since they disturbed the child and caused the child emotional harm.
- *C.L.M. v. M.J.S.* [18], 2017 BCSC 799: The mother's litigation conduct was a form of emotional abuse and harassment that constituted family violence. This included persistent failure to cooperate with litigation, a lack of cooperation with sale of the family home, failure to follow court orders, failure to attend court, failure to respond

to correspondence or provide full financial disclosure, and general obstructive behaviour.

- *M.W.B. v. A.R.B.* [19], 2013 BCSC 885: The mother was found to have committed family violence for repeatedly interfering with the father's access to the children and refusing to settle orders drafted by lawyers. These actions prolonged and intensified the litigation.
- *Hokhold v. Gerbrandt* [20], 2014 BCSC 1875: The father's emotionally abusive conduct, which included sending excessive and demanding emails, failing to pay support, and threatening to close his dental practice, constituted family violence.
- *C.R. v. A.M.* [21], 2015 BCPC 76: The father's threats to use his stronger financial position to fight the mother "[until] she lives in a box" was family violence.
- *L.A.R. v. E.J.R.* [22], 2014 BCSC 966: The court found that disparaging remarks made to the children about their mother, as well as disparaging comments made to the mother in the children's presence, constituted emotional abuse.
- *F.(C.) v. V. (D)* [23], 2015 BCPC 309: Family violence includes breaking the mother's cellphone and smashing a picture on the wall while holding the child, then kicking through the door to the bathroom where the mother was trying to escape and call police.
- *J.C.P. v. J.B.* [24], 2013 BCPC 297: A deliberate failure to pay child support, where it was a "calculated and deliberate act designed to inflict psychological and emotional harm and to control [the other party's] behaviour", is family violence.

A lot depends on the specific facts of the case, however, and evidence is very important. In *J.R.E. v. 07-----8 B.C. Ltd.* [25], 2013 BCSC 2038, the court held that taking an insistent and even inflexible position in post-separation negotiations did not in that case equate to emotional or psychological abuse. And courts take a dim view of family violence claims if they are brought with other motivations. In *L.S. v. G.S.* [26], 2014 BCSC 187, the court said:

> "More important, there is no evidence that the children have suffered any physical or emotional harm as a result of the claimant's conduct. The provisions in the *FLA* relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger. Their meaning and application should not be stretched to the point they become just another weapon in a largely financial war between the parties."

Using the *Family Law Act* for protection

The *Family Law Act* offers a number of different remedies that may be helpful in protecting family members from family violence. In September 2021, the BC Government announced an online service to help people fill out and file the forms needed to get *Family Law Act* orders. The Apply for a Family Law Act (FLA) Order [25] service includes a pathway specifically for getting protection orders. It could save you time and make applying for a protection order much easier.

Protection orders

Protection orders are the most useful type of order that family members can apply for under the *Family Law Act* to protect themselves from another family member. Under section 183(1), the *at-risk family member*, someone on their behalf, or the court itself can ask for a protection order. A claim for a protection order can be asked for on its own, and doesn't need to be made with any other claims under the act.

To find out more about protection orders, you may want to read the booklet "For Your Protection: Peace Bonds and Family Law Protection Orders [14]", or read Legal Aid BC's Family Law website's information page on "Protecting yourself & your family [27]", under the section "Family law protection orders".

To grant a protection order, the court must find that:

1. the person asking for protection is an *at-risk family member*, and
2. that family violence is likely to occur by a family member against the at-risk family member.

The term "at-risk family member" is defined at section 182 of the *Family Law Act*:

> "at-risk family member" means a person whose safety and security is or is likely at risk from family violence carried out by a family member

Applying for protection orders

When the court is asked to make a protection order, it must consider certain risk factors set out at section 184(1) of the *Family Law Act*:

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

Essentially, the court is must consider the family violence in the overall context of the family members' relationship, and the historic and present circumstances of their relationship. When asking for a protection order, a family member experiencing violence will need to prepare evidence of the history of violence in the relationship that address the section 184(1) factors.

Under section 184(4), the court may still make a protection order even though:

- the at-risk family member had a previous protection order, whether or not the other family member had followed that order,
- the family member against whom the order is to be made is temporarily absent from the residence,
- the at-risk family member is temporarily residing in an emergency shelter, transition house, or other safe place,
- criminal charges have or may be laid against the family member,
- the at-risk family member has a history of going back to the other family member after other incidents of family violence incidents, or
- a conduct order has been made agains the family member.

In deciding whether to make a protection order where the at-risk family member is a child, section 185 says the court must also consider whether:

- the child might be exposed to family violence if a protection order isn't made, and
- a separate protection order should also be made for the protection of the child.

Here are some circumstances where courts have ordered protection orders:

- *Raj v. Raj* [28], 2022 BCSC 110: The court found considerable evidence that the father had ongoing alcohol abuse and anger issues that led to mental, emotional and physical abuse, and of recent actions that showed a risk to the mother. The protection order was granted to protect the mother and the youngest child who had been exposed to direct and indirect violence and was not in a position to protect herself given her age and vulnerability.
- *K.R.L. v. N.P.* [6], 2021 BCPC 324: The father was prohibited from communicating with the mother after repeated threats and abusive communications. The court also prohibited the father, for a shorter period of time, from communicating with the child. Even if the child was not an at-risk family member, the order needed to name the child as a "specified person" in order to protect the mother.
- *M.C.C. v. M.C.R.C.* [29], 2019 BCSC 380: The claimant showed a pattern of coercive and controlling behaviour directed against her and to some extent the children. She was successful in getting a without-notice protection order. She had not been allowed to go the mall or hotels, was not permitted to attend important family events, and was not allowed to have her own credit card, email account, or Facebook account. The respondent had ensured that all family electronics were connected to his Apple ID and iCloud account and he tracked her movements using an iPad. The court ordered that the claimant should have exclusive occupancy of the family home and issued a *conduct order* restricting the respondent's communications with the children.
- *N.M.A. v. K.D.L.* [30], 2018 BCSC 1879: Protection order based on derogatory and abusive communications over an extended period of time, which constituted emotional abuse. The court declined to make the protection order reciprocal, and made the order against the respondent only.
- *Prasad v. Prasad* [31], 2015 BCSC 207: Given the likelihood that the husband would react violently if he was not favoured in the division of assets, and that he would not agree to stay away from her, the court issued a permanent, non-expiring protection order. The husband was prohibited from applying to vary or amend the protection order for three years. There was a history of physical, verbal, and emotional abuse. Note that in *Williams v. Williams* [32], 2022 BCSC 517 the court said permanent protection orders are a very rare remedy "usually made to address an ongoing threat".
- *S.M. v. R.M.* [33], 2015 BCSC 1344: The court stated "judges hearing applications of this kind must approach the issue from a broad and contextual perspective, taking into account a variety of factors that frame the risk analysis in determining whether family violence is likely to occur. The inquiry is future oriented but it takes its shape from past conduct and present circumstances that inform the assessment of risk."
- *Dawson v. Dawson* [34], 2014 BCSC 44: The judge considered the severe nature of an earlier assault and the husband's ongoing anger and hostility. These two factors convinced the judge that there was a likelihood of further family violence. This case shows that further family violence may still be *likely* even if only one incident occurred in the past. When deciding if family violence is "likely" under section 183(2)(a), the court must weigh the potential severity of the harm from future violence.

It's important to know that it usually will not be enough for the person seeking a protection order to just say that they are afraid or at risk of violence. Evidence of one of the section 184 risk factors must be presented to allow the court to decide if a protection order is suitable, as the court decided in *Whitelock v. Whitelock* [35], 2014 BCSC 1184.

The court may also consider how much time has passed since the family violence occurred. If the circumstances that led to family violence are no longer present, a past act of violence, despite ongoing fear from the victim, may not be sufficient grounds for making a protection order. The court will usually focus on current risk and the likelihood of future violence when determining whether a protection order is needed. In *Yusufi v Yusufi* [36], 2022 BCSC 900, the parties were in a 17-year marriage with no children. The claimant recounted a history of both physical and psychological abuse. The court found that the violence was dated, with the last incident occurring two years prior to separation, and there had been no incidents since separation despite litigation. The parties regularly attended the same place of worship without incident. A protection order was not ordered.

Even though the court won't make protection orders automatically, without proof of the risk factors, remember that:

1. A single incident of family violence may be enough to get a protection order.
2. A protection order can be granted even if some time has passed since the last incident of family violence, but the court will consider if the risk of family violence is still present. Delaying can make it more difficult to get a protection order.
3. A family member's own, subjective perception that they are at risk of harm is a factor that the court will consider.

Potential terms of protection orders

The different kinds of protection orders are listed at section 183(3) of the *Family Law Act*. These include orders:

- restraining a person from communicating with or contacting the at-risk family member, going to the at-risk family member's home, workplace, or school, or stalking the at-risk family member,
- limiting how the person communicates with the at-risk family member,
- directing the police to remove the person against whom the order is sought from the family home or accompany them to remove personal property, and
- requiring the person to report to the court or to another person.

Under section 183(3)(e), an at-risk family member can ask for any other terms that may be necessary to protect them or implement the protection order. (Judges have made orders requiring the family member to carry a copy of the order on their person when outside their place of residence, or requiring them to go to a police station to surrender any weapons that they're banned from possessing.) Protection orders remain in place for one year, unless the order specifies a different length of time. In some very serious cases, protection orders are ordered indefinitely. These are sometimes called *non-expiring protection orders* or *permanent protection orders*.

If there is an *Family Law Act* order that allows a family member to have contact with the children, but a protection order is made that prohibits communication with the children, the conflicting terms of the older order are suspended while the protection order is in effect. This temporary suspension of specific, conflicting terms of a *Family Law Act* order even applies in the situation where the other court order was made by a court in a different province, as long as the other court order from another jurisdiction is "similar in nature" to a protection order under the *Family Law Act*. It also applies to orders under the *Criminal Code*. Keep in mind that the suspension of the *Family Law Act* order is limited only to inconsistencies between it and the protection order, and lasts only while the protection order is in effect.

Getting protection orders without giving notice

Under section 186 of the *Family Law Act*, an at-risk family member can ask the judge for a protection order without the other person being told in advance. This is called a *without notice* application. Without notice applications are suitable when there is a risk of further or escalating violence, either because the current situation is urgent, or because an event like serving someone with court documents could trigger further risk of violence and harm.

After a protection order has been made without notice, the family member who got the order must serve it on the other family member, along with all of the application materials, including any affidavit evidence, and the order made by the court.

When the court grants protection orders without notice, it will often limit the time they are in effect. The court may also require that both parties return to court so that the person against whom the order was made can explain why the protection order isn't necessary and should be cancelled. When a protection order has been made without notice, the opposing party can always ask the court to cancel or change the order.

Changing protection orders

When a protection order has been made and hasn't yet expired, either party can apply to vary the order to:

- extend or shorten the period of time that the protection order is in effect,
- vary the terms of the order, or
- end the order.

When a protection order is changed, the existing protection order will be terminated and replaced, so it is important to make sure that the court is aware of any terms in the original order that need to be carried over to the new order.

Enforcing protection orders

It is a criminal offence for the family member against whom a protection order has been made to breach that order. This makes protection orders special, as they are enforced by the criminal court rather than the civil courts that usually enforce orders under the *Family Law Act*.

Enforcement in criminal court will occur if the police charge the family member with the offense of disobeying a court order under section 127 of the *Criminal Code*. Once a charge is laid under section 127, it will proceed through the regular criminal process, with the accused person having the opportunity to plead guilty or not guilty to the charge, and in the case of a not guilty plea, go to trial.

Family violence and the best interests of children

The only thing that matters when making decisions about guardianship, parenting arrangements, or contact with a child is the *best interests of the child*. While all of a child's needs and circumstances must be considered when determining their best interests, section 37(2) of the *Family Law Act* lists a number of specific factors. Sections 37(2)(g) and (h) deal with family violence:

> 37(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (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;

When family violence is a factor under section 37(2)(g) or (h), section 38 lists a number of additional factors that must be considered:

> 38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:
>
> (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.

It is important to present evidence regarding family violence to the court when asking for an order about guardianship, children's parenting arrangements, or contact with a child. When family violence is present, the orders that can be asked for include that the person responsible for family violence have no parenting time or that their parenting time is supervised, or occur in a public place or by video. It is also possible to ask for an order that they have parenting responsibilities, in order to limit the parents' need to communicate with each other.

Conduct orders

Conduct orders under sections 222 to 228 the *Family Law Act* give the court additional tools to help parties manage the kinds of conflict and problematic behaviours that can prevent them from resolving their family law issues. In some cases, conduct orders are used when family violence is not so severe as to require a protection order.

Conduct orders are different from protection orders, and not as well tailored to addressing family violence. A conduct order could, for example, stop a party from filing repetitive applications that misuse the court process, require a party to attend a counselling program, or say how and when parties should communicate with each other.

While conduct orders can be seen as less extreme ways of reducing bad behaviour and hostility compared to a protection order, the court must consider whether conduct orders are enough. Under section 225, a court will not issue a conduct order restricting communication if a protection order would be more appropriate. Likewise, a court will not decline to impose a protection order just because a conduct order was previously in place.

A court can make conduct orders for one of four purposes set out at section 222:

> At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:
>
> (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
>
> (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
>
> (c) to prevent misuse of the court process;
>
> (d) to facilitate arrangements pending final determination of a family law dispute.

Conduct orders can be used to address a wider range of issues than protection orders, which are specific to family violence. A conduct order could, for example, stop a party from filing repetitive applications that misuse the court process, or compel a party to attend a counselling program. Conduct orders may:

- require a person to attend counselling, or a specified service or a program like an anti-violence or anger management course,
- restrict communication between the parties,
- require a person to participate in family dispute resolution process,
- require a person to pay the costs associated with the family home, like mortgage or rent payments, property taxes, and utilities,
- restrict a person from terminating the utilities serving the family home,
- require a person to supervise the removal of personal property from the family home,

- require a person to post security to guarantee their good behaviour,
- require a person to report to the court or to another person, like a counsellor or therapist, and
- include any other term the court believes necessary to fulfill one or more of the purposes listed at section 222.

Conduct orders restricting communications

Section 225 of the *[Family Law Act]* allows the court to make orders restricting or setting conditions on the parties' communications with each other, including when or how communication should take place.

If the family violence does not warrant a protection order, a section 225 conduct order can be made instead. Like a protection order, a conduct order can prevent a family member from communicating with or contacting another family member. Breaching a conduct order is not a criminal office, however; breaching a protection order is a criminal offence. Conduct orders are enforced in family court, not criminal court.

It is also worth considering that while protection orders are usually time-limited, conduct orders normally continue until a different court order is made. In some cases conduct orders, can last for a longer period of time.

Enforcing conduct orders

Conduct orders are enforced in family court, not criminal court.

Conduct orders can be enforced in a number of ways under section 228, including by requiring the person breaching the order to pay up to $5,000, either to the court or to the opposing party. Under section 231, a court may even order that a person be jailed for no more than 30 days. Jail time is an extremely rare remedy and will only be ordered if nothing else will secure the person's compliance with the conduct order.

Other orders

Other orders are available under the *Family Law Act* that could be used to address issues relating to family violence.

- **Supervised parenting time and contact:** Under sections 45 and 59, a person's parenting time or contact can be subject to a requirement that it be supervised by a third party, like a relative or a professional supervisor.
- **Conditions of parenting time and contact:** Under section 218, the court may impose terms and conditions on any order it makes. Where family violence is an issue, appropriate terms and conditions might include exchanging the children in a public place, placing restrictions on how the parties are allowed to interact when the children are exchanged, restricting a family member to video or telephone parenting time or contact only, requiring that parenting time or contact only happen in a general or specific public place, or they might say that a party's parenting time or contact will not happen if the party is impaired by drugs or alcohol.
- **Denial of parenting time:** Sections 61 and 62 address what happens if one person or guardian denies parenting time or contact set out in a legal agreement or court order to another person or guardian.
  - Under section 61, the person denied parenting time or contact can apply to the court within 12 months for various remedies such as make-up time, requiring a party or the child to attend counselling or other programs, requiring attendance at family dispute resolution, requiring a fine be paid, or other remedies.
  - Under section 62, the court may decide that the denial was not wrongful if the guardian reasonably believed that the child might suffer family violence if the parenting time or contact with the child were exercised, or the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised. Objective evidence should be provided to the court that supports the reasonableness of the guardian's belief in these circumstances. There are also other circumstances set out in section 62 under which a court may decide that the denial was not wrongful.
- **Non-removal orders:** Under section 64 of the Act, if there is a concern that a person may remove a child from British Columbia and is unlikely to return, a court may make an order that a person not remove a child from a specified geographical area. This can range from a city to the province of British Columbia, for example. This type of order does not apply when a guardian wishes to relocate with a child with notice to the other guardian.

- **Exclusive occupation of the family residence:** Under section 90, the court may make temporary orders, and grant one spouse exclusive occupancy of the family residence. This isn't a restraining order, and it does not prohibit the other party from entering the home, but the person with the exclusive occupation order is allowed to live there and the other person is not.

The *Divorce Act*

A number of important changes to the federal *Divorce Act* took effect on 1 March 2021, some of which talk about family violence. The new legislation includes a broad definition of family violence that is a lot like the definition of family violence in the *Family Law Act*. Family violence is defined at section 2(1) of the *Divorce Act* as follows:

> *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; (violence familiale)

The court also has a new list of factors to consider when making decisions about children under the *Divorce Act*, which include factors about family violence. The best-interests factors appear at section 16 and include, at section 16(3):

> (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.

If family violence is present, the court must consider the impact of the family violence by looking at a number of additional factors listed at section 16(4);

> (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

> (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.

In *Barendregt v Grebliunas* [1], 2022 SCC 22, at paras 143 and 146, the Supreme Court of Canada emphasized that findings of family violence are a critical consideration under section 16(3) and 16(4) of the *Divorce Act*, and said that "domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable".

The court is required by section 7.8(1) of the *Divorce Act* to consider the existence of any family or civil protection orders, any child protection orders, and ant orders, proceedings, undertakings, or recognizances relating to criminal matters, when making orders dealing with children or support under the *Divorce Act*. This means a judge can review the court files for those orders, if they're available, or ask questions to make sure that their own orders are made in coordination with any existing civil, child protection, or criminal matters. Under Rule 15-2.2 of the *Supreme Court Family Rules*, parties to a matter in which orders about children or support are being sought under the *Divorce Act* must file a statement of information for corollary relief proceedings in Form F102 in order to provide the court with this information before a parenting or support order is made.

Family violence and moving away after separation

When determining whether a guardian may relocate to a new place with a child, the parties and the court must consider the best interests of the child. As set out in sections 37 and 38 of the *Family Law Act* and sections 6(3) and 16(4) of the *Divorce Act*, one of the factors that must be considered in determining a child's best interests is the impact of family violence.

In *Barendregt v Grebliunas* [1], 2022 SCC 22, the trial judge allowed a mother to relocate with the children in order to be closer to family support and away from family violence. The move was within British Columbia, but over 800 kilometers away. The matter was appealed up to the Supreme Court of Canada, which confirmed the order allowing relocation and said that "[b]ecause family violence may be a reason for the relocation and given the grave implications that any form of family violence poses for the positive development of children, this is an important factor in mobility cases".

Additionally, section 66(2)(a) of the *Family Law Act* and section 16.9(3) of the *Divorce Act* allow a court to modify or waive the required period of notice with respect to an application to relocate with children in certain circumstances, including when there is a risk of family violence. In practice, relocation is not often allowed without notice to a child's other guardians, so when bringing an application to relocate without notice it may be helpful to consider also seeking additional or alternative protective measures, such as protection orders, conduct orders, or

restrictions on parenting, to be applied if the court does not allow relocation to occur without notice.

Family violence and spousal support

Misconduct by a spouse, which may include family violence, is not generally considered to be relevant to the issue of spousal support. However, there are exceptions to this general rule.

Section 15.2(5) of the *Divorce Act* says that the court "shall not take into consideration any misconduct of a spouse in relation to the marriage" when making an order for spousal support. However, there is a difference between misconduct itself and the consequences of misconduct. The Supreme Court of Canada confirmed this distinction in the case of *Leskun v Leskun* [37]*]*, 2006 SCC 25, when it said a court may not order spousal support to be paid solely because family violence has occurred, but the court may order spousal support to be paid if that family violence has negatively impacted a spouse's ability to become self-sufficient.

Similarly, section 166 of the Family Law Act provides that in making an order for spousal support the court must not consider any misconduct of a spouse, except if the misconduct unreasonably causes, prolongs, or aggravates a spouse's need for spousal support, or affects the ability of a spouse to pay spousal support.

Family violence and the division of property

The court may make an order under section 90(2) of the *Family Law Act* that one party have the sole and exclusive right to live in the family home. To make this order, the court must be satisfied that shared use of the family home by the spouses is a "practical impossibility" and that the spouse who is seeking to exclusively occupy the family residence is the preferred spouse on the "balance of convenience", as set out in *Bateman v. Bateman* [38], 2013 BCSC 2026. In considering whether it is a practical impossibility for the spouses to share the residence, the court may consider evidence showing that there is significant conflict between the spouses, which may include evidence of family violence. In considering which spouse should be allowed to remain in the home, the court may consider factors such as the conduct of the parties, which may include family violence as well as the economic circumstances of the parties, whether the spouses have other accommodation options available to them, and the needs of any children involved.

Family violence is not typically considered in determining how family property and family debt should be divided between spouses on a final basis, but there are some relevant issues that family violence may impact.

The starting point for determining how family property and family debt will be divided under the *Family Law Act* is the presumption that the division should be equal. However, section 95 allows the court to divide family property or family debt unequally, by giving a larger share of property or debt to one of the spouses, when it would be "significantly unfair" to divide the property or debt equally. When considering whether it would be significantly unfair to divide family property and family debt equally, the court may consider factors including:

- under section 95(3), whether the objectives of spousal support have not been met through an order or agreement for spousal support to be paid, and
- under section 95(2)(i), "any other factor," as long as the other factor relates in some way to the economic characteristics of the spousal relationship, as set out in *Singh v. Singh* [39], 2020 BCCA 21.

In circumstances where financial abuse has been present and has extended to a failure to provide full and frank disclosure of a spouse's assets and debts, the court may make an adverse inference against the party who has failed to make appropriate financial disclosure under section 213 of the *Family Law Act*. For example, in *N.K. v. M.H.* [40], 2020 BCCA 121, the British Columbia Court of Appeal addressed property division between a husband and wife. At trial, the husband was found to have been abusive to the wife throughout the marriage, including threats, physical abuse, limiting her financial independence, and refusing her opportunities to educate herself. The wife was given 60% of the family property based on a failure of the husband to make appropriate financial disclosure, the children having a heightened need for stability in housing due to family violence, as well as the impact of family violence on

the wife's economic self-sufficiency, although that impact was largely addressed by an order for spousal support to be paid to the wife. The Court of Appeal found there was no error in dividing family property unequally based on factors including lack of financial disclosure and the effects of family violence on the children.

In *He v. Guo* [41], 2022 BCCA 355, the British Columbia Supreme Court clarified that family violence is not a relevant consideration in unequal division of family property or debt unless the violence is demonstrated to have had an economic impact on the parties.

Resources and links

Legislation

- *Family Law Act*
- *Divorce Act*
- *Criminal Code* [42]

Resources

- The BC Government's Apply for a Family Law Act Order (Online FLA Assistant) [25] service
- Legal Aid BC's Family Law website's information page "Protecting yourself & your family" [27]:
  - See "Family law protection orders"
- Rise Women's Legal Centre's booklet *Seeking a Peace Bond: A Guide* [12] (available in 12 languages)
- Provincial Court of British Columbia's website's information page "How can I get an urgent protection order or have one set aside?" [43]
- Ministry of Attorney General's Family Justice website information page "What is a protection order?" [44]
- Ministry of Attorney General's Community Safety and Crime Prevention Branch and Legal Aid BC's booklet *For Your Protection: Peace Bonds and Family Law Protection Orders* [14]
- Justice Canada's *HELP Toolkit: Identifying and Responding to Family Violence* [19]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Kim Hawkins, Vandana Sood, Elizabeth Cameron, and Rosanna Adams, 16 June 2023.

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Family Violence and the Criminal Code

The *Criminal Code*

The federal *Criminal Code* [3] is the main legislation on criminal law. There is no specific crime of family violence in the *Criminal Code*, but there are many criminal offences that could apply in the context of family violence, including:

- assault, including common assault, assault with a weapon or causing bodily harm, and aggravated assault,
- sexual assault, including common sexual assault, sexual assault with a weapon or causing bodily harm, and aggravated sexual assault,
- murder and attempted murder,
- criminal harassment, including stalking,
- uttering threats,
- offences related to firearms,
- trespassing, including trespassing at night,
- unlawful confinement (restraining someone against their will),
- kidnapping,
- distribution of intimate images,
- conveying false information with intent to injure,
- mischief (destroying or damaging property),
- cruelty to animals,
- arson, and
- financial offences including theft, misappropriation of money held under direction, extortion, forgery, or fraud,

Offences against property like arson and mischief can occur even where a person is damaging their own property, for example when a home that both people live in is damaged because of arson.

Family violence committed against the children of a relationship may also result in criminal charges. Some charges more commonly involving harm to children are:

- failure to provide necessities of life,
- kidnapping,
- abandoning a child, and
- criminal negligence.

If your ex commits a crime against someone other than you or your children, that crime may not constitute *family violence* under the proivincial *Family Law Act* or the federal *Divorce Act*, but it could still impact your family law dispute. Your ex's criminal conviction, for example, could have an impact on orders about parental responsibilities, parenting time, and contact with children.

Criminal cases and the criminal court process

The criminal court process starts with a report being made to police. A report can be made by a victim of a crime, or a witness to a crime. The police will assess the report and may open a police file and investigate. Investigations typically involve interviewing the complainant, interviewing witnesses, and examining the crime scene.

It's important to note that a victim of a crime in a criminal proceeding has much less control over the process than a survivor of family violence does in a family court. A survivor of family violence in a family law case decides whether or not to ask for a protection order in family court. In a criminal process, decisions are made by *crown counsel*, lawyers who work for and represent the state, and are responsible for prosecuting criminal offences. While some police or crown counsel may ask a complainant for their opinion about things, the ultimate decision about how the case is managed will be made by crown counsel.

In some circumstances, the police may come to the crime scene immediately and arrest the suspected offender. In other cases, where the crime has already happened or there is no immediate danger, the police may take longer to investigate or make an arrest. If there are children present or involved in the alleged offence, the police will typically notify child protection services, who may also intervene.

After the police have conducted their investigation, they may prepare a document called a *Report to Crown Counsel*. Among other things, this report describes witnesses' statements and recommends whether criminal charges should be laid. Crown counsel decides whether there is enough evidence to lay charges. If they think there is enough evidence, the charges will be approved, beginning the criminal court process.

Depending on how the processes of investigation, arrest and charging unfold, an accused person may be arrested and held in custody while the criminal matter is being decided, or they may be arrested and then released into the community on conditions, usually called an *undertaking* or *recognizance*, until the criminal matter is finished.

The criminal court process takes time, just like the civil court process. Typically the first court date is several months from the initial incident. The first court date is typically used to ensure that the accused person has information about the charges and evidence, to determine if they have a lawyer, and to schedule further court dates. There are often several “scheduling” dates before either a guilty plea is entered or a trial date is set.

Conditions of release until trial

If an accused person is released into the community until trial, their release will normally be on conditions to not contact or communicate with the complainant and other witnesses until the trial is completed. Crown counsel may ask for other release conditions, such as conditions that the accused person:

- surrender, or not possess, firearms or weapons,
- not go to the complainant's home, school, or workplace,
- not go to the complainant's children's school or daycare,
- not come within a certain distance of the complainant's home, or
- not contact the complainant or the children, directly or indirectly.

The judge may impose any other conditions that are reasonably necessary for the safety of the complainant and any children.

Outcomes of criminal cases

There are three general paths that criminal cases can take. The first are when the charges are *withdrawn* (permanently dropped) or *stayed* (put on hold, sometimes indefinitely) by crown counsel. Charges may be withdrawn when the crown counsel no longer thinks they can prove the offence or they have decided it is not in the public interest to prosecute the case. Charges may be stayed if the accused pleads guilty and admits they committed a crime. Guilty pleas often involve the accused making an agreement with crown counsel to proceed on fewer or less serious charges, and may also include an agreement between crown counsel and the accused about the sentence they will ask the judge to impose..

The third path is going to trial, which happens when the accused person decides not to plead guilty. At a trial, crown counsel must prove to the court that the accused person committed the crimes with which they have been charged.

If the accused person is found guilty after a trial, or changes their mind and pleads guitly during the trial, a judge will determine what sentence should be imposed. The decision about sentencing is often made at a hearing that is scheduled after the trial. The sentence the judge chooses will depend on the circumstances of the offence, the range of sentences required by the *Criminal Code* for each charge, and any past record related to the offence. Because offences related to family violence cover a wide range of circumstances, the sentences imposed for family violence vary from case to case.

Some sentences that a person may face after a finding of guilt are:

- an *discharge*, which can be absolute or be accompanied by certain conditions, and as long as any conditions are successfully completed no conviction will be recorded,
- a *suspended sentence*, which means a period of probation with conditions imposed on the person's behaviour as well as a criminal conviction,
- a *conditional sentence*, which generally means house arrest with conditions imposed on the person's behaviour as well as a criminal conviction,
- a *jail sentence*, and
- a *fine*, which may also be combined with a jail sentence.

A finding of guilt normally results in the person having a criminal record that will impact them even after their sentence is complete. Criminal records can restrict employment, prevent someone from volunteering with community groups and charitable organizations, and limit a person's ability to travel outside of Canada.

In addition to the sentences outlined above, if crown counsel decides not to seek a criminal conviction and sentence, they may still ask the court to order a peace bond either under section 810 of the *Criminal Code* or the common law. A peace bond is a preventive order. It does not require proof that a crime has taken place, does not result in a criminal conviction, and it is not intended as a punishment. Instead, the crown must show that the complainant has a reasonable basis for fearing the accused person. The court will then order conditions to protect the complainant,

often including orders prohibiting contact. If the person breaches the peace bond, they may be criminally charged for breaking a court order.

Information for those who have experienced violence

Victim services

As part of our criminal justice system the provincial government runs victim services programs. Victim services are available throughout the province to anyone who has been a victim of a crime, and can also provide support to family members and witnesses. You may feel that you need to leave the family home, or you may want to develop a safety plan in case your partner becomes violent again. A victim support worker can help you develop a safety plan or find a place to stay.

To get connected with a local victim services organization, call VictimLink BC at 1-800-563-0808 for assistance. VictimLink BC [1] is a province-wide telephone help available free to people across British Columbia and Yukon 24 hours a day, seven days a week.

A support worker at VictimLink can either help you by providing:

- help understanding and dealing with the effects of a crime,
- safety planning,
- emotional support,
- referrals to other community agencies that can help,
- help understanding what happens in court and providing support and guidance through the court process, and
- help accessing information about and applying for financial benefits, if you are eligible.

Victim services are either run by the police, called *police-based victim services*, or by community organizations, called *community-based victim services*. You do not need to make a report to the police to access community-based victim services. You can access both police- and community-based victim services if you have made a report to police.

Making a report

If you choose to start the criminal process, the first step is to make a report to the police. Many people are hesitant to report family violence. People can be afraid they won't be believed or that it will make things worse. Connecting with community-based victim services through VictimLink can be a good way to help you understand the criminal process and feel supported when choosing whether to make a report to police.

In cases where you or your children are in immediate danger, it is important to phone 911 right away.

Though you do not need to immediately make a report to police after an incident of family violence, there are some good reasons to make reports as soon as possible:

- some criminal offences must be charged within 6 months of the incident,
- if you are in danger, making a police report may result in the police taking steps to protect you,
- evidence is often easier to gather close to an incident, and
- myths and stereotypes still exist in our system, and a late report may cause the police, crown counsel, or a judge to believe the reported violence is less serious or that you are being untruthful.

The criminal process will not begin until a report has been made to the police, whether by you or by another person.

Changing no-contact release conditions

It is important to remember that the release conditions set out in *undertakings* or *recognizances* are legally binding conditions that an accused person must follow. That means if they break their release conditions they can be arrested for breaching the terms of their release, which is a serious criminal offence. If the accused person doesn't follow the terms of their recognizance or undertaking, you can call the police or ask community-based victim services to help you report the breach.

Many people still want to be able to communicate with each other even though criminal charges have been laid. Sometimes people have to talk to each other to organize child care or parenting time. Sometimes the person who made a criminal report never wanted to end their relationship. It's important to know that you cannot change the terms of the accused person's recognizance or drop the charges yourself; only a judge can do that. If you want to change the conditions of the accused person's release, talk to crown counsel first. If you contact the accused person without getting their conditions changed first, you could be complicating the situation by inviting them to break the terms of their release. This can result in further criminal charges. It may also lead police to believe that you don't really need protection and can lead to difficulty with enforcement of the conditions in the future.

If you are considering changing no-contact release conditions, talk with a community-based victim services worker to help ensure you and your children's safety are protected.

Keeping updated on the criminal process

You can ask that the police and crown counsel keep you up to speed on the progress of the criminal case. Police and crown counsel are limited in the information they can give you, usually because of privacy considerations and because you are a witness. Police and crown counsel may direct you to victim services instead of communicating with you directly.

You should also ask for a copy of your statement and the recognizance that sets out the conditions of the accused person's release. If you have a lawyer helping you with a family law problem, be sure to give them copies of these documents.

Depending on the type of charges, you can also use the Court Services Online website [1] to monitor the accused person's upcoming court dates.

You can go to the accused person's court dates, but in cases where there are no-contact conditions or a protection order, it may be better to not attend. Many courthouses are small and not set up to keep complainants and accused persons separate. There may only be one waiting room and a limited number of sheriffs. Another consideration is that many court appearances are often not scheduled for a specific time, so you could be waiting all day to watch a quick adjournment with no new information being provided.

When charges are not pursued

There is a good chance that crown counsel or the police will decide not to prosecute the charges against the acccused person. There are many reasons that criminal charges are not pursued, and many of them don't have anything to do with whether the events giving rise to the charges actually happened.

If you have concerns for your safety, or the safety of your children, it can be a good idea to go to civil court and ask for a protection order under the *Family Law Act*, even if the accused person is subject to conditions from the criminal court. Crown counsel may decide not to pursue the charges against the accused person, and if the charges are withdrawn or stayed, any conditions that the accused person was required to follow will also come to an end.

It is important to remember that you can apply for a family law protection order even if police do not investigate, or if crown counsel does not lay charges.

Information for accused persons

British Columbia's *Crown Counsel Policy Manual* [2] states that incidents of intimate partner violence are a "very serious, prevalent, and complex problem" that require a special response by prosecutors. As a result, if your partner or another person makes a report to the police about family violence, you may be arrested and you could be taken to jail overnight.

If this happens, you will appear before a justice of the peace or a judge for a bail hearing. If you are arrested on a Friday, this may mean that you will spend the weekend in custody, although provincial court judges are usually available by telephone or video link. At the bail hearing, the judge will normally require that you promise to follow certain conditions if you want to be released from custody. If you do not agree to abide by the terms the judge wants, you will not be released and will stay in jail until the hearing of the charges against you.

Bail conditions typically required you to:

- not contact the person you are charged with harming, either directly or indirectly,
- not to go to the person's home, school, or workplace, and
- keep the peace and be of good behaviour

Other conditions might include restrictions on your use of alcohol and drugs, a curfew, a requirement that you report to a bail supervisor or the police, a requirement that you not go within a certain number of blocks of the complainant's home, or a requirement that you not possess firearms or other weapons.

The judge's conditions will be written down in a document called a *recognizance* or an *undertaking*. It is critical that you follow the terms set out in your recognizance. If you don't, you can be arrested for breaching a court order, and face a criminal trial on that charge as well. The terms of your recognizance will remain in effect until the trial or until they are changed at a court appearance before trial.

Lawyers and your bail hearing

You have a right to contact a lawyer when you are arrested. Most importantly, you have a right to have a lawyer represent you at your bail hearing. Call one.

If there are family law proceedings in civil court, make sure that your family law lawyer is aware of your arrest and the criminal proceedings, especially if you have children.

Whether or not you have a criminal lawyer representing you, make sure you speak to duty counsel before your bail hearing. Duty counsel are lawyers paid by Legal Aid BC to give advice and provide limited help to people who have been arrested and do not have a lawyer. Duty counsel will usually try to speak to everyone who has been arrested before their bail hearing. However, if the number of people waiting in court cells for a bail hearing is high, you may not have very much time with them.

You will want to ensure that the terms of your recognizance are fair, not too restrictive, and don't interfere with your ability to see your children or go to school or work.

Under certain circumstances, you may not be released from custody, regardless of the conditions you're prepared to agree to. This will depend on factors such as the gravity of the alleged offence, any history you have of related criminal convictions, and the opinion of crown counsel given the circumstances of the alleged offence.

Getting back together

People sometimes want to back together, or even just talk about things, after an arrest has been made. Sometimes the complainant will decide that they want to "drop the charges." A couple of points need to be mentioned.

- **Dropping the charges**: Criminal charges are laid by crown counsel, not by the complainant. The complainant cannot drop the charges. Only crown counsel can do that.
- **Communicating with the complainant**: Do not talk to the complainant if your recognizance does not allow you to communicate with them, even if they contact you. No matter who initiates the contact, communicating with the complainant is still a breach of the terms of your recognizance and you may face criminal charges for that breach, as well as the other charges.
- **Reconciling**: If the complainant really wants to get back together with you, they must talk to crown counsel and ask that the terms of your recognizance be changed to allow you to communicate with each other or to share the same residence. There must be a hearing to vary the terms of the recognizance before those terms will be officially changed.

Parenting and criminal court orders

Criminal charges often make any previous parenting arrangements impossible to follow. Where criminal court and civil court orders conflict, parents typically follow the most recent order.

Even if the criminal charges don't result in conditions that force a change in parenting arrangements, the complainant may still seek legal advice about how to withhold parenting time or make changes to the parenting arrangement to reduce or stop the accused person's time with the children. The complainant may have safety concerns and not want parenting arrangements to stay the same, or the accused person might be living in a space where children cannot easily stay overnight.

Interruptions to children's parenting schedules resulting from criminal charges are often temporary. How people return to their usual parenting schedule can vary. For many people, the first step back to a schedule involves adjusting the conditions of the accused person's release to allow communications about parenting. Sometimes, the conditions of the accused person's release have a built-in plan for communications about parenting. It's important to talk to a lawyer about your specific situation.

Think about what's best for your family. You can think about talking directly, like in person, by telephone, by email or by text, or indirectly through a friend or relative. Maybe you have a friend who can help by passing messages or by transferring the kids between you and the other parent. Sometimes, there is no safe way to communicate or coordinate parenting.

Once you have an idea of what might work, remember that if there's any court order stopping you from talking to each other, the order needs to be changed first.

When communication is possible, the next step is to figure out whether your parenting plan needs to be changed because of safety or other practical issues. Here are some things to think about:

- Should the accused person's time with the kids be supervised?
- Should their parenting time be limited to daytime, with no overnights?
- If the accused person has had to leave the family home, do they have a good place to spend time with the kids?
- Can the kids be transferred between the parents without the parents meeting?

Sometimes criminal charges and restrictions are dropped all together, and parents can go back to how things were. Other times, there might be a finding of guilt, which changes how parents communicate with each other or care for their kids. Early in a criminal case, it's often hard to predict what parenting will look like in the future.

Resources and links

Legislation

- *Criminal Code* [42]

Resources

- BC Prosecution Service's *Crown Counsel Policy Manual* [3]

Links

- Clicklaw Common Question "What are my rights after arrest, and what might happen after?" [4]
- Ministry of Attorney General's Community Safety and Crime Prevention Branch and Legal Aid BC's booklet *For Your Protection: Peace Bonds and Family Law Protection Orders* [14]
- Rise Women's Legal Centre, *Seeking a Peace Bond: A Guide* [12] (available in 12 languages)

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Kim Hawkins, Vandana Sood, Elizabeth Cameron, and Rosanna Adams, 16 June 2023.

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[2] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual
[3] https://bit.ly/47UR8SH
[4] https://www.clicklaw.bc.ca/question/commonquestion/1030

Civil Claims and Family Violence

Civil claims for family violence

In British Columbia, "family law" typically refers to the law about divorce, spousal support, children's parenting arrangements, child support, and property division. If these issues are addressed in court, they are addressed through claims brought under the *Divorce Act* or the *Family Law Act*.

Family law is a kind of *civil law*. "Civil law" refers to every kind of law other than criminal law. Other branches of the civil law include the law about contracts, the law about property, and the law about something called *torts*. Tort law is the law that applies when someone does something, or doesn't do something, that causes harm to someone else. Tort law includes claims about a wide range of misbehaviour, such as negligence, defamation and invasion of privacy. Tort law also includes claims about things that are more directly relating to family violence, such as assault, battery, and infliction of emotional harm. Claims like these aren't covered by the *Divorce Act* or the *Family Law Act*.

Tort claims for family violence can overlap with family law issues. They can be the subject of a lawsuit on their own, or they can be combined with a lawsuit brought under the *Divorce Act* or the *Family Law Act*. While the *Divorce Act* or the *Family Law Act* do talk about family violence, in the context of children's parenting arrangements, protection orders and conduct orders, neither act provides financial compensation for the effects family violence. That is what tort claims are for.

Introduction to the law of torts

The word "tort" comes from the Latin word for "wrong" or "injustice." *Tort law* covers things like personal injuries, motor vehicle accidents, negligence, assault and battery, trespass, and more. A tort is a breach of a duty someone owes to someone else, such as a duty not to hit someone, a duty to drive carefully, or a duty not to dig a hole someone might fall into. However, not all actions that cause harm are torts. It's crucial to talk with a lawyer to see if harm done to you is a tort.

Most tort claims come from the *common law*, which means the vast majority of them developed over the course of decades, and even centuries, as courts have recognized the need for new kinds of legal claims to address different problems in society. As a result, tort claims are not governed by legislation the way family law claims are governed by the *Family Law Act*, *Divorce Act* and the Child Support Guidelines, or the way criminal law is governed by the *Criminal Code*. That said, some torts are "statutory torts" that are written into legislation. One example is claims for violation of privacy under the provincial *Privacy Act*, which defines specifically what the tort of violation of privacy is.

Damages

When a tort claim is proven, the result will be an order for the payment of financial compensation, or *damages*, to the victim. The precise dollar value of these damages is based on the concept that every injury or harm, and every consequence suffered by the victim, has a dollar value. Some damages are easier for a court to calculate if it has evidence of direct financial loss to the victim, like lost wages or the cost of medical expenses. These direct financial losses are called *pecuniary damages*. Other damages, such as pain and suffering, are more difficult to measure because they are more subjective. Damages for pain and suffering are called *general damages*, or *non-pecuniary damages*, and the courts tend to look to past cases with similar facts in order to calculate a dollar value.

General damages can be awarded for:

- pain and suffering from the family violence,
- emotional trauma,
- impairment to family or social relationships, and

- loss of life enjoyment due to the lasting impacts of the violence.

Pecuniary damages can be calculated for:

- past wages lost due to the family violence,
- future wages lost from an inability, illness, or other impairment from the violence (sometimes referred to as lost earning capacity),
- rehabilitation and job retraining costs, and
- past and future medical care expenses tied to injuries caused by the violence.

General and pecuniary damages are both forms of *compensatory damages*, as they are awarded to compensate the victim for their harm and losses.

Aggravated damages are awarded by a judge where the circumstances of the harm are especially humiliating or undignified. The court may separately identify aggravated damage amounts, or award them as part of general damages. The purpose of aggravated damages is to compensate the victim when the circumstances of the harm are humiliating, oppressive, or malicious. In the context of family violence, the circumstances of the harm often qualify for aggravated damages. The unique power dynamics in many intimate relationships, the fact that there is often a significant size and strength difference between the parties, and the wide-ranging negative consequences that arise when family violence is part of someone's daily life, increase the likelihood that aggravated damages will be awarded.

Punitive damages are another form of damages. They are different from other kinds of damages and punitive damages are not about compensating the victim, they're about:

- punishing the defendant, and
- send a strong message to the defendant and to other people, to discourage them from doing similar things.

Punitive damages are only awarded if the combined effect awards for general and aggravated damages is insufficient to achieve the goals of punishment and deterrence.

Specific tort claims

Canadian law students learn about tort law in their first year of study. Tort law is a big part of the Canadian legal system, and it's easiest to think about tort law as a collection of legal tools created by judges to provide compensation to individuals who have been hurt, or whose property has been negatively affected, by a wrongdoer. Tort claims are divided into distinct torts, each with its definition and requirements. The most frequent tort claims in family violence cases are the torts of *assault* and *battery*. In tort law, "assault" means wrongfully threatening someone, and "battery" means wrongfully hurting someone. Assault and battery can include sexual assault. (It's important to know that spouses can sue each other for sexual assault.)

Other possible torts in family violence cases include *intentional infliction of mental suffering*, *public disclosure of private fact*, and *false imprisonment*. Note that tort law uses specialized language, so your understanding of what "mental suffering" is might differ from how tort law defines it.

Torts are a developing area of law. It is important to be cautious and seek legal advice before using torts because of these changes. In the context of family violence, the Ontario Court of Appeal in *Ahluwalia v. Ahluwalia* [1], 2023 ONCA 476, clarified that existing torts like battery, assault, and intentional infliction of emotional distress are sufficient to address the harms resulting from family violence.

Starting a civil claim

A tort claim, such as for assault and battery, is a *civil claim* and must be made by the person who has suffered the harm from family violence. A tort claim about an incident that happened within a domestic relationship can either be made alongside a family law claim in a family law proceeding, or as a stand-alone tort claim in a general civil proceeding.

To make a tort claim part of a family law proceeding, you will start your claim in the Supreme Court of British Columbia by filing a Notice of Family Claim. (The family court division of the Provincial Court cannot hear tort claims.) Your tort claims will be described along with your family law claims. To bring the tort claim in a stand-alone civil proceeding, you will likely also start your claim in the Supreme Court by filing a Notice of Civil Claim. (While tort claims can be heard in the small claims division of the Provincial Court, that court is limited to making awards of $35,000 or less. You could also file with the Civil Resolution Tribunal, but it can only make awards of $5,000 or less.)

Because different courts have different rules, where you choose to bring your tort claim can have a significant impact on how the case proceeds. It is important to speak to a lawyer to fully understand which court is best for your case.

Another consideration when starting a tort claim is *timing*. It is crucial that you bring the claim within the proper limitation period. (We'll talk about limitation periods a bit later.) If you do not file your claim in time, you will miss your opportunity to bring your claim at all. Again, it is important to speak to a lawyer to understand the limitation period that applies to your case.

The challenges of tort claims

This discussion is not meant to discourage individuals who have suffered family violence from making tort claims. It is meant to raise some of the difficulties that can accompany tort claims relating to family violence. Despite these challenges, it can be empowering to hold an abusive personal accountable for their behaviour. If you have been sexually or physically assaulted, you should talk to a lawyer experienced in handling such claims and seek advice to determine whether your case is likely to succeed.

Costs

The first drawback of tort claims is that they are often expensive to bring to trial. You will likely need to hire a lawyer if you want to make a tort claim against your spouse. The law governing tort claims is rarely set out in a statute like the *Family Law Act*. Instead, it is mostly based on the common law, also known as the *case law*.

To succeed in your claim, you will have to prove that the tort occurred, the nature and extent of your injuries, and that your injuries resulted from the wrongful act. Proving injuries, especially when they are mainly psychological or emotional, can be complicated. You may even need to hire experts to assign a financial value to your injuries. For instance, if you are claiming the costs of future medical care, you will likely need a medical expert to tell the court about the type of treatment you will require and for how long.

Recoverability

Even if you're successful, your spouse must have some assets from which they can pay the damages you are awarded. It likely doesn't make sense to spend tens of thousands of dollars on legal fees and win, only to discover that your spouse cannot pay your award. This is called a *dry judgment*.

One potential benefit of bringing your tort claim with your family law claim is that courts have generally factored damages for assault and battery into the division of property. This can make recovering your damages award much easier. In *Megeval v. Megeval* [2], 1997 CanLII 3721 (BCSC), a tort claim was made in the same proceeding as a claim for the division of property. The court divided the family property equally between the parties but awarded the wife $139,150 in damages for injuries resulting from battery. This amount was paid from the husband's share of the family property.

Personal impact

You will need to testify about the family violence and its effect on you openly, honestly and personally. The opposing party or their lawyer will question you about the tort and its impact on you in open court. Before a trial, you will also need to disclose your medical and counselling records, if any, to the opposing party and their lawyer, and participate in a discovery process that requires sharing relevant information. You might also have to undergo medical and psychological evaluations. These are standard parts of the civil law process, but many individuals find them exceptionally invasive.

Limitation periods

A limitation period is a deadline by which a claim must be made and a court action started. If a limitation period applies to a claim, and that period has expired, you cannot make that claim anymore. For many torts, including assaults involving people who are strangers, the limitation period is generally two years after the incident. Where assault involves people in an intimate relationship, or where the victim was in a relationship of dependency with the attacker, there is no limitation period. There is also no limitation period for claims relating to sexual assault, regardless of the relationship between the attacker and the victim.

Under section 3(1) of the provincial *Limitation Act* [12], there is no limitation period for:

- claims relating to sexual assault,
- claims relating to assault, battery or misconduct of a sexual nature while the claimant was a minor, or
- claims relating to assault or battery while the claimant was an adult living in an intimate and personal relationship (or had a relationship of financial, emotional, physical, or other dependency) with a person who performed, contributed to, consented to, or acquiesced in the assault or battery.

Awards

The amount of damages a court may award for tort claims depends on the circumstances. If you can, get legal advice to help decide whether a claim is worthwhile in your particular circumstances. Outcomes vary widely, and many factors go into a judge's assessment of the appropriate award. Here are some examples of awards that the courts have made for tort claims in a family context:

- In *Schuetze v. Pyper* [3], 2021 BCSC 2209, the wife was awarded a total of $795,000 following a violent incident for which the husband faced criminal charges. The majority of damages were for past and future diminished earning capacity, but $100,000 were general damages for pain and suffering. The wife's tort claim of *battery* was made in a separate civil action, not a family law proceeding, and she had expert evidence to prove her physical and psychological injuries.
- In *Olds College v. Huxley* [4], 2019 BCSC 2111, the plaintiff received $2,500 in general damages $2,500 in aggravated damages, and $5,000 for punitive damages in a defamation case against his former wife. She made serious and defamatory statements by email, Facebook, and YouTube and tried to reach as many people as possible.
- In *T.K.L. v. T.M.P.* [5], 2016 BCSC 789, the step-daughter was awarded a total of $93,850 for breach of privacy and breach of fiduciary duty following her step-father spying on and video recording her in the shower. $85,000 was awarded for general damages, which included a $25,000 aggravated damages component. This case features the tort of breach of privacy under the *Privacy Act*.
- In *A.M. v. S.O.* [6], 2014 BCSC 4, physical assault in the form of an open-handed blow to the head resulted in $20,000 for general damages.
- In *Bird v. Kohl* [7], 2012 BCSC 1424, the serious shoulder fracture, concussion, lacerations, and scarring that resulted from repeated strikes with a shovel handle amounted to $75,000 for general damages, $15,000 for aggravated damages, $40,000 for lost wages, and $25,000 for lost earning capacity.

- In *Constantini v. Constantini,* [8] 2013 ONSC 1626, verbal abuse during the relationship and pre-meditated break-in and aggressive assault post-separation did not produce permanent disability, but it did result in post-traumatic stress disorder. $15,000 was awarded for general and aggravated damages.
- In *D.G. v. R.M.* [9], 2012 SKQB 296, the facts involved a single instance of "horrific" sexual assault including striking, kicking, and biting. $35,000 was awarded for general damages.
- In *Gould v. Sandau* [10] 2005 BCCA 190, the trial judge awarded $2,500 for an assault that broke a hand.
- In *Megeval v. Megeval* [11], 1997 CanLII 3721 (BCSC), assault causing permanent disability resulted in $45,000 for general damages, $20,150 for past wage loss, $66,500 for future wage loss, $2,500 for future care, and $5,000 for punitive damages.
- In *N.C. v. W.R.B.* [1999] O.J. No. 3633 (Ont. S.C.J.), multiple instances of sexual, physical, verbal, and emotional abuse that caused post-traumatic stress disorder resulted in an award of $65,000 for general damages and $25,000 for aggravated damages.
- In *Shaw v. Brunelle* [12], 2012 ONSC 590, a serious wrist fracture resulting from physical ejection from the home resulted in $65,000 for general and aggravated damages, $25,000 for lost earning capacity, and a figure for costs of future care (to be assessed by an actuary).

These cases have been included only to give you a general idea of how the courts have treated tort claims based on family violence in the past. Damage awards in family violence cases involving assault and battery have changed and appear to be increasing at a rate higher than inflation. You should not rely on these cases to fix a dollar amount to your claim — seek legal advice from a lawyer with experience in this area if possible.

Resources and links

Legislation

- *Limitation Act* [12]
- *Privacy Act* [13]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Kim Hawkins, Vandana Sood, Elizabeth Cameron, and Rosanna Adams, 16 June 2023.

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Family Violence and Child Protection

Child protection issues

British Columbia's laws about child protection laws are found in the *Child, Family and Community Service Act* [17] and its regulations. Child protection matters are heard in the Provincial Court, under the Provincial Court (Child, Family and Community Service Act) Rules, and may also be heard in the Supreme Court.

Unlike normal family law proceedings where two former spouses decide how to proceed with their case, it's the provincial Ministry of Children and Family Development [1], or an "Indigenous authority" under the CFCSA, that manages child protection proceedings. Once these authorities investigate a child protection concern, they have a legal duty to take steps, including possibly seeking court orders, to ensure the safety and well-being of children.

In *J.P. v. British Columbia (Children and Family Development)* [2], 2017 BCCA 308, the Court of Appeal made it clear that the Ministry of Children and Family Development, also called the "MCFD," can ask for child protection orders even if a family law orders about children's parenting arrangements already exist. The MCFD must make its decisions "regardless of the nature of the dispute between the parents in the family proceeding." This means that even if a family law order greatly restricts a parent's contact with a child, if the MCFD becomes involved and decides that parent should have broad access rights, the MCFD can seek that order in Provincial Court and that order will have priority over the other order. The CFCSA, and not the *Family Law Act* or the *Divorce Act*, directs how child protection matters are handled. (As a side note, the CFCSA still uses the terms *custody* and *access*, even though the *Family Law Act* and the *Divorce Act* have moved to talking about *guardianship*, *parenting time*, and *contact*.)

Section 2 of the CFCSA sets out the guiding principles for child protection matters:

> This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
>
> (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> (d) the child's views should be taken into account when decisions relating to a child are made;
>
> (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
>
> (f) Indigenous children are entitled to
>
> (i) learn about and practise their Indigenous traditions, customs and languages, and
>
> (ii) belong to their Indigenous communities;

> (g) decisions relating to children should be made and implemented in a timely manner.

Unlike the legislation in family law, the best interests of the children is *not* the most important consideration under the CFCSA. Instead, the most important considerations under are the "safety and well-being of the children."

The first principle under the CFCSA is that children are entitled to be protected from "abuse, neglect, harm, or the threat of harm." Most of the other principles center around keeping the child with or connected to their family if possible. These principles state that a child's family is the preferred environment for their care and upbringing, that the responsibility for protecting children rests primarily with the parents, and that kinship ties and a child's attachment to extended family members should be preserved if possible. The principles also say that if a family can provide a safe and nurturing environment for a child with the help of support services, then those support services should be provided.

Reporting a protection concern to MCFD or an Indigenous authority

Section 14 of the CFCSA says that any adult who has reason to believe that a child needs protection must report the situation to the MCFD. (Only lawyers in a solicitor-client relationship are exempt from this duty to report.) It is an offence *not* to report a protection concern to MCFD. In other words, anyone who thinks a child needs to be protected from abuse, neglect, harm, or the threat of harm, must report the problem to the MCFD.

In the case of Indigenous children, the CFCSA says that if a person has reported the protection concern to an Indigenous authority, then the person is not required to report the protection concern to MCFD, as long as the Indigenous authority confirms it will assess the report. An "Indigenous authority" is an organization that is authorized by an Indigenous governing body to provide child and family services according to Indigenous law.

Once they receive a report, the MCFD must assess the report and decide whether an investigation by a social worker is necessary. The CFCSA gives government social workers fairly broad authority to investigate reports and determine if a child is in need of protection.

Protection concerns

Section 13 of the CFCSA describes the situations that may cause the MCFD or an Indigenous authority to decide that a child needs protection. Under this part of the act, children require protection if they have been or may be:

- physically harmed by a parent,
- sexually abused or exploited by a parent,
- harmed, sexually abused, or exploited by another person, and the parent can't or won't protect the child, or
- physically harmed due to parental neglect.

Protection will also be required if:

- the child is emotionally harmed by a parent's conduct or by living in a situation with family violence,
- the child lacks necessary health care,
- the child's development may be seriously impaired by a treatable condition, and the parent refuses to allow treatment,
- the parent can't or won't care for the child and hasn't made adequate arrangements for care,
- the child has been in a situation that endangers their safety or well-being,
- the child's parent is dead and no adequate provision has been made for care,
- the child has been abandoned without adequate care, or
- the child is in the care of the MCFD director or someone else by agreement, and the parent won't or can't resume care when the agreement ends.

Section 13 of the CFCSA also says that:

- sexual abuse or exploitation includes being encouraged or coerced into prostitution,

- situations with family violence increase the likelihood of physical harm to the child,
- emotional harm means that a child shows severe anxiety, depression, withdrawal, self-destructive or aggressive behaviour, and
- a child does not need protection just because of socioeconomic conditions like poverty, lack of housing, or a parent's health condition.

Family violence as a protection concern

The CFCSA uses the term "domestic violence" instead of family violence. The MCFD has acknowledged, in its *Policy on Best Practice Approaches: Child Protection and Violence Against Women*, that women and children are disproportionately impacted by domestic violence. MCFD policies around the issue of violence against women are aimed at:

- keeping mothers safe by connecting the child's safety to the mother's safety whenever possible,
- keeping children with the non-abusive parent,
- providing the non-abusive parent with supportive services so they can safely care for the child,
- preventing further violence,
- offering an integrated approach for meeting a child's safety needs,
- providing supportive services to the non-abusive parent, and
- keeping their safety a parallel consideration through MCFD proceedings.

If a non-abusive parent, usually the mother, is concerned that the other parent may commit violence, they should prioritize their own safety and the safety of their children. If the non-abusive parent is in immediate danger they should call 911. The non-abusive parent can also contact VictimLINK at 1-800-563-0808 to access safety planning resources. The non-abusive parent also has an obligation to report the child protection concern to MCFD. In any of these cases, it is critical to obtain legal advice as soon as possible about the available options.

The child protection process

Legal Aid BC has helpful factsheets and other information about the child protection process. See the Resources and Links heading under this section.

What happens if you are reported to MCFD or an Indigenous authority

A parent may be reported to MCFD or an Indigenous authority because of a protection concern.

If the concern involves an Indigenous child, the local Indigenous authority may conduct its investigation under Indigenous law, customs, and traditions.

Legal help for reported parents

It is important that parents who are reported for a protection concern get legal advice as soon as possible. Getting legal advice about your rights with the MCFD early in the process is important, for sure, but getting legal advice in the later stages of an investigation is even more important!

You can contact Legal Aid BC to find out if you qualify for a free lawyer. Contact your local Parents Legal Centre at 1-888-522-2752, or find a lawyer who represents parents in child protection proceedings. If Legal Aid BC determines you are not eligible for a lawyer for your child protection matter, you may be able to apply to the courts and ask that a lawyer be appointed to represent you. This request for lawyer representation is called a *JG application*.

When a court considers a "JG application," it decides whether or not to appoint a lawyer for someone who was denied legal aid, but is facing a complicated child protection hearing and cannot afford to pay for a lawyer themself. You can find the necessary forms and application materials for a JG application on the Legal Aid BC website. The person applying must be found to be *indigent* in order to succeed in their application. Being found to be "indigent" is

not limited to rare or exceptional cases, but does depend on the financial and other circumstances of the person applying.

Child protection investigations

A social worker's first step when starting an investigation is usually to contact the person who is the subject of the report. They may decide to visit the child's home, interview one or both parents, and interview the child. They may also ask the parent for the names of other people they can talk to about the parent's parenting abilities, called *collaterals*. These collateral witnesses could be the child's family doctor, teachers, daycare provider, counsellor, or family members. The social worker may reach out and contact some or all of these collateral witnesses in the course of their investigation.

At the end of the investigation, the social worker will reach one of three conclusions.

1. **No concern:** the social worker may close the file due to a lack of protection concerns, and give you a letter outlining this conclusion, which you should keep in a safe place.
2. **Some concern:** the social worker may start with a lower level of intervention, including providing support services to the family in the home and making referrals to outside social agencies.
3. **High concern:** the social worker may be concerned enough to take more control by supervising the parent's care of the child, starting a court proceedings, or even removing the child.

If the social worker concludes that there is a protection concern, you should contact a lawyer immediately to learn more about your rights.

What happens if a protection concern is found

If the social worker investigating the report is sufficiently concerned about the child's living conditions, a risk of harm, or a parent's unwillingness to cooperate with their investigation, then they may take further actions such as:

- supervising the parent's care of the child with various terms and conditions that one or both parents must follow,
- beginning court proceedings, or
- removing the child temporarily or permanently from the parent's care and placing the child temporarily or permanently with relatives, a foster family, or a group home.

If the MCFD has taken a child out of a parent's care, they must start a child protection action in court and seek a court order approving the removal. They need to serve the parent with court documents. All child protection proceedings are held in the Provincial Court and follow special rules called the Provincial Court (Child, Family and Community Service Act) Rules [3].

Remember that:

- it can be critical to get legal advice about your legal rights in relation to the MCFD as early in the process as possible, and getting legal advice becomes more important as the investigation goes on,
- if your child is removed, the *Child Protection and Removal* [4] script from People's Law School's Dial-a-Law website talks about parents' legal rights and explains steps you can take, and
- Legal Aid BC's illustrated booklet *Parents' Rights, Kids' Rights: A Parent's Guide to Child Protection Law in BC* [5] outlines the child protection process.

Orders for supervision

The MCFD may ask the court to make a *protective intervention order* that:

- allows them to supervise the child's care on a continuing basis the on-going supervision of the child, imposes conditions like daycare, services for the parent, and allows the right of the MCFD to visit the child in the home,
- prohibits a person from contacting, interfering with, or living with a child, or entering the child's home,
- requires the police to enforce the order, and
- allows them to remove a child if the parent fails to comply with the terms of a supervision order.

Orders for child removal

Where protection concerns are more serious, the MCFD may immediately remove the child from the home and set a *presentation hearing* within seven days to have the court review that decision. At the presentation hearing, the court may order that:

- the MCFD have temporary custody of your child,
- the child be returned to you, under the supervision of the MCFD,
- the child be returned to you, or
- the child be placed in the care of someone other than yourself.

To learn about the rest of the child protection process and the other hearings involved when the MCFD intervenes to remove a child, read Legal Aid BC's booklet *Parents' Rights, Kids' Rights: A Parent's Guide to Child Protection Law in BC* [6]

The Indigenous child protection process

In 2022, the CFCSA was changed to better respect the rights of Indigenous communities to provide their own child and family services, and to help keep Indigenous children safely connected to their cultures and communities.

The guiding principles in section 2 of the CFCSA include two provisions that are specific to Indigenous families:

- section 2(b.1) recognizes that Indigenous families and their communities share responsibility for the upbringing and well-being of Indigenous children, and
- section 2(f) says that Indigenous children are entitled to learn about and practice their traditions, customs, and languages and belong to their Indigenous communities.

Reported protection concerns can be investigated by an Indigenous authority in accordance with that community's Indigenous law, customs, and traditions. In these cases, the MCFD is *not* the authority dealing with Indigenous children. (Note that in older versions of the CFCSA, Indigenous peoples were referred to using the term *Aboriginal*, and you may still see that term in some child protection publications in the province, as well as online.)

If you or your child is Indigenous, and you have been reported to MCFD or are otherwise involved with MCFD, you can get a lot more information from Legal Aid BC. See the materials listed under the Resources and Links under this section, or visit the Aboriginal Legal Aid in BC website pages on child protection [7].

If you are reported to MCFD or an Indigenous authority, they might conclude there's enough concern to supervise your care of the child, start court proceedings, or remove the child. If this happens, you should contact the Parents Legal Centre or a lawyer immediately to learn more about your rights.

Resources and links

Legislation

- Provincial Court (Child, Family and Community Service Act) Rules [3]

Resources

- Legal Aid BC's Family Law website's information pages on Child Protection [8]
- Legal Aid BC's Aboriginal Legal Aid in BC website [9]
- Legal Aid BC's forms and self-help guide *If You Can't Get Legal Aid for Your Child Protection Case* [10]
- Find a Parents Legal Centre on Clicklaw [11]
- Legal Aid BC's Family Law website's information page on *Child protection* [17]
- Legal Aid BC's booklet *Parents' Rights, Kids' Rights: A Parent's Guide to Child Protection Law in BC* [6]

Links

- Ministry of Children and Family Development [18]
- Clicklaw resources for child protection [15]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Kim Hawkins, Vandana Sood, Elizabeth Cameron, and Rosanna Adams, 16 June 2023.

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[4] https://www.clicklaw.bc.ca/resource/1245
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[10] https://www.clicklaw.bc.ca/resource/2745
[11] https://www.clicklaw.bc.ca/helpmap/service/1231

Definition of Common Legal Terms

Terminology

This section offers my own plain-language definitions of common legal words and phrases. For more complete, more detailed definitions you might want to have a look at *Black's Law Dictionary*, an American reference book published by Thomson West, or at Barron's *Canadian Law Dictionary*. Many public libraries will carry one or both of these dictionaries. The website of Legal Aid BC [1] also features a helpful glossary.

Many of the terms in this section have Latin roots. These terms also make appearances in *Black's Law Dictionary* and the *Canadian Law Dictionary*, and Wikipedia offers a helpful and fairly complete list of Latin terms [2].

A

ab initio

A Latin phrase meaning "from the beginning." A marriage that is unlawful is void *ab initio*, as if it never happened.

abduction

The taking of a person by force or fraud. In family law, also the taking of a child contrary to a court order or without the permission of a guardian. In certain circumstances, the abduction of a child by a parent may be a criminal offence.

access

Under the old *Divorce Act*, the schedule of a parent's time with their children under an order or agreement, replaced with "parenting time" and "contact" in the new *Divorce Act*. Access usually referred to the schedule of the parent with the least amount of time with the child. See "contact," "custody" and "parenting time."

account

In law, (1) a lawyer's bill to their client or a statement, or (2) a person's recollection of events.

act

(1) Intentionally doing a thing, or (2) a law passed by a government, also called "legislation" or a "statute." See "regulations."

action

A court proceeding in which one party sues another for a specific remedy or relief, also called a "lawsuit" or a "case." An action for divorce, for example, is a court proceeding in which the claimant sues the respondent for the relief of a divorce order.

address for service

The address at which a party to a court proceeding agrees to accept delivery of legal documents. An address for service must be a proper street address within British Columbia; additional addresses for service may include postal addresses, fax numbers, and email addresses.

adjournment

The suspension of a hearing or trial, usually when the hearing or trial cannot proceed on the date scheduled or because it cannot complete within the time scheduled, normally until a specific date. See "sine die."

adoption

In family law, the act or process of taking another person's child as one's own. The child becomes the adopting parent's legal child as if the child were the adopting parent's natural child, while the natural parent loses all rights and obligations with respect to the child. See "natural parent."

Adoption Act

A provincial law dealing with the adoption process and the ability to adopt.

adoptive parent

A person who has assumed the status of a legal parent to a child who is not their biological offspring. See "adoption," "assisted reproduction" and "natural parent."

adultery

A married person's voluntary sexual intercourse with a person other than their spouse, also known as cheating, playing the field and fishing out of season. Proof of adultery is grounds for an immediate divorce, providing that the spouse complaining of the adultery can prove that the adultery occurred and that they have not consented to or forgiven the adulterous act. See "collusion," "condonation," and "divorce, grounds of."

advance

In family law, this usually refers to one party obtaining a part of any property at issue before the property has been finally divided by court order or the parties' agreement, usually in order to help pay for that person's legal fees.

Advisory Guidelines

Short for the Spousal Support Advisory Guidelines, an academic paper released by the Department of Justice that describes a variety of mathematical formulas that can be applied to determine how much spousal support should be paid and how long it should be paid for, once a spouse is found to be entitled to receive support. The Advisory Guidelines are not a law, although they are pretty useful.

advocate

(1) A lawyer or a person other than a lawyer who helps clients with legal issues, or (2) to argue a position on behalf of someone.

affidavit

A legal document in which a person provides evidence of certain facts and events in writing. The person making the affidavit, the deponent, must confirm that the statements made in the affidavit are true by oath or affirmation. Affidavits must be signed in front of a lawyer, a notary public or a commissioner for taking oaths, who takes the oath or affirmation of the deponent. Affidavits are used as evidence, just as if the person making the affidavit had made the statements as a witness at trial. See "deponent", "affirm," "oath" and "witness."

affidavit of service

A legal document required by the rules of court in which a person who has personally served someone describes the circumstances in which that person was served. This may be essential to prove personal service, particularly if the serving party intends to seek a default judgment, as is usually the case in a desk order divorce. See "default judgment" and "personal service."

affirm

To promise that a statement is true. When someone "swears" to tell the truth, they are taking an oath on their faith in a god and their fear of retribution in the afterlife. Affirming is a substitute for taking an oath, and is most often employed where the person making the statement is an atheist or under a religious proscription from making oaths. See "affidavit," "oath," "perjury," and "witness."

age of majority

The age at which a child becomes a legal adult with the full capacity to act on their own, including the capacity to sue and be sued. In British Columbia, the age of majority is 19. The age of majority has nothing to do with being entitled to vote or buy alcohol, although federal and provincial laws sometimes link those privileges with the age at which one attains majority. See "disability" and "infant."

agent

In law, someone acting on behalf of someone else, with that person's express permission and normally at their express direction.

alias

A name by which people know you other than your legal name, such as Vanilla Ice if your legal name is Robert Matthew Van Winkle. Aliases are not illegal in British Columbia.

alienating

In family law, the actions or statements of one parent that tend to sever, damage, or harm a child's relationship with, or affections for, the other parent, either intentionally or unintentionally.

allegation

A claim that a certain set of facts is true, such as "on Monday, I had soup for lunch" or "Bob drives a blue Camaro." Also called an "allegation of fact" or a "statement of fact."

alternative

In law, a phrase used to indicate secondary relief or a secondary ground of relief in a claim or application, usually presented as an option to the primary relief or primary ground of relief sought. For example, "I'd like to have all of the house but, in the alternative, I'll take half." See “motion," “pleadings," and “relief."

alternative dispute resolution

A phrase referring to a number of processes intended to resolve people's disputes outside of the court system. This includes arbitration, mediation, negotiation, and collaborative settlement processes. In family law, the purpose of alternative dispute resolution is to offer a less adversarial and less expensive way to resolve a dispute than having to go to court so that a judge can resolve things.

amend

To change or alter a pleading or document that has already been filed in court or given to the other party. The resulting document is a separate document from the original and is called, for example, the "Amended Notice of Family Claim" or the "amended separation agreement."

amicus curiae

A Latin phrase meaning "friend of the court." Usually refers to a lawyer who does not act for any of the parties and assists the court by bringing relevant information to the attention of the judge. In specific and extraordinary circumstances, a court may appoint, and even order that public funds be used to pay for, an amicus. For example, the court may appoint amicus curiae in a case that involves children, so as to help the court in determining what is in the best interests of the children.

annulment

A declaration by a judge that a marriage is invalid. The effect of such a declaration is to cancel the marriage from the moment it took place, as if the marriage never occurred. See "ab initio," "declaration," and "marriage, validity of."

answer

In law, response to an allegation of fact or to a claim. Usually refers to documents that reply to the allegations or claims made by the other party, such as a "Response to Family Claim" or a "Reply."

appeal

An application to a higher court for a review of the correctness of a decision of a lower court. A decision of a judge of the Provincial Court of British Columbia can be appealed to the Supreme Court of British Columbia. A decision of a judge of the Supreme Court can be appealed to the Court of Appeal for British Columbia. See "appellant" and "respondent."

appellant

The party who brings an appeal of a lower court's decision. See also "appeal" and "respondent."

applicant

A party who brings an application to the court for a specific order or remedy. Usually refers to the party making an interim application, but in the Provincial Court applicant also means the person who starts a court proceeding. See also "court proceeding," "application respondent," and "interim application."

application

A request to the court that it make a specific order, usually on an interim or temporary basis, also called a "chambers application" or a "motion." See also "interim application" and "relief."

Application to Obtain an Order

A legal document required by the Provincial Court Family Rules to start a court proceeding which sets out the relief sought by the applicant against the person named as respondent. See "action," "applicant," "pleadings," "relief" and "respondent."

application respondent

A party against whom an interim application has been brought. See also "applicant" and "interim application."

Application Response

A legal document required by the Supreme Court Family Rules to reply to a Notice of Application, which sets out the relief agreed to and opposed by the application respondent and the facts in support of that position. See "interim application."

apportion

In family law, to divide equally, usually referring to the division of family property between spouses. See also "reapportion."

appraisal

A professional estimate of the worth of something, such as a company, a property, an investment, a book of business, a loan, or a debt. In family law, this is sometimes required for the court to determine the value of property such as an art collection or a house.

apprehend

In law, to take or to seize. In family law, this term usually refers to the taking of a child out of the care of their parents by the police or child welfare authorities.

arbitration

A dispute resolution process in which an arbitrator hears the evidence and arguments presented by the parties to a legal dispute and makes an award that resolves the dispute and is binding on the parties. The arbitration of family law disputes is governed by rules set out in Part 2, Division 4 of the *Family Law Act*. See "alternative dispute resolution" and "family law arbitrator."

argument

In law, an attempt to persuade by logical reasoning. Usually refers to oral or written argument presented to a judge or arbitrator following the presentation of evidence, or to a written summary of argument.

arrears

Child support or spousal support that is owing because of an order or agreement but is unpaid.

assent

Agreement, approval.

assess

To determine the proper value or worth of something. A lawyer's bill may be *assessed* by a registrar to determine the actual amount the client should pay. See "appraisal."

assign

In law, to transfer an interest or right in something to someone else. People who go on welfare, for example, are required to assign their rights to apply for child support and spousal support to the provincial government.

assisted reproduction

(1) A means of conceiving a child other than by sexual intercourse, usually with medical or technological intervention, or (2) when someone requires help operating the photocopier.

associate judge

A provincially-appointed judicial official of the BC Supreme Court with limited jurisdiction, usually charged with making interim decisions before final judgment in a court proceeding, and certain decisions after final judgment, including the assessment of lawyers' bills and the settling of bills of cost. Until January 2024, associate judges were referred to as *masters*. See "interim application," "judge" and "jurisdiction."

attest

To swear or affirm something to be true, usually in the context of giving oral evidence or providing affidavit evidence.

award

A mandatory direction of an arbitrator, binding and enforceable upon the parties to an arbitration proceeding, made following the hearing of the arbitration trial proceeding or the parties' settlement, following which the only recourse open to a dissatisfied party is to challenge or appeal the award in court. See "appeal," "arbitration," and "family law arbitrator."

B

bad faith

Intentionally misleading someone else, whether by doing or not doing something; acting in a manner contrary to one's actual intention; failing to act honestly and openly. Also known by the Latin phrase *male fides*. See *bona fides*.

bar

In law, (1) the physical railing separating the public gallery in a courtroom from the area where the judge and lawyers sit, (2) lawyers as a group, or (3) the place where lawyers go after work.

barrister and solicitor

A lawyer; a person licensed to practice law in a particular jurisdiction. In England, "barristers" do trial work and "solicitors" draft legal documents. In Canada, lawyers are both barristers and solicitors.

bastard

A child of unmarried parents; an illegitimate child. Bastards used to be at a profound legal disadvantage; however, the law has changed so that such children are treated no differently than children born of a marriage. The appearance of this definition below that of "barrister and solicitor" is purely coincidental.

bench

In law, (1) the court, (2) judges as a group, or (3) the place where a judge sits in a courtroom.

beneficial interest

In law, the rights or advantages a person has in a property, even if they are not the legal owner on paper. This term is often used in trusts and property law. In trusts, a person with a beneficial interest (beneficiary) has a right to benefit from the property held in the trust, though the legal title may be held by someone else (the trustee). In property law, it can refer to a person's rights to enjoy the benefits of a property, such as receiving rent or living in a property, without being the registered owner.

beneficiary

(1) A person for whom a trustee holds a trust, or (2) the recipient or intended recipient of property given in a will. See "heir" and "trust."

bigamy

The act of going through a form of marriage ceremony with one person while being already married to someone else, or with a person who is already married to someone else. This is a criminal offence in Canada, under section 290 of the *Criminal Code*, although one that is rarely, if ever, enforced. Bigamous marriages, marriages subsequent to the first, are void *ab initio*. See "ab initio," "marriage, validity of," and "polygamy."

bill

In law, (1) a piece of draft legislation presented to the legislature for its approval,or (2) a lawyer's statement of account for services rendered to their client. See "account," "act," and "lawyer's fees."

bill of costs

In British Columbia, an account prepared by the party who is awarded their costs of an action or application and which is presented to the other party for payment. A bill of costs is prepared according to a formula set out in the Supreme Court Family Rules.

binding

(1) In law, a requirement or obligation to honour and abide by something, such as a contract or order of the court. A judge's order is "binding" in the sense that it must be obeyed or a certain punishment will be imposed. (2) The principle that a higher court's decision on a point of law must be followed by a lower court. See "contempt of court" and "precedent."

bona fide

A Latin phrase meaning "in good faith." Doing something honestly and openly, without intending to mislead, deceive, or harm someone else. See "bad faith."

book of authorities

A binder containg the case law that a party will rely on in making a legal argument. Each case is usually separated by numbered tabs to make it as easy as possible to find a particular case.

book of documents

A binder containing documents that a party will introduce into evidence at a trial or arbitration hearing. Each document is usually separated by numbered tabs to make it as easy as possible to find a particular document; it's also helpful to number the pages of each document.

breach of contract

Acting or not acting in a manner that is contrary to the terms of a contract. In family law, the breach of one party usually gives rise to a cause of action for the other party, allowing that party to sue for breach of contract, but the breach is unlikely to allow that party to treat the agreement as if it were cancelled or had been voided.

brief

In law, (1) a written argument, or (2) a memorandum of law. A brief is usually presented to a judge as a summary of an argument or the law on a particular issue. Curiously, briefs are rarely brief.

BTW

A law student's mnemonic device, short for "Bigamy = Two Wives."

burden of proof

The obligation of a party to prove their case; the onus of proof. The burden of proof usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of a statute. In civil litigation, a party must prove their case on the balance of probabilities. See "onus."

business days

A method of calculating time under which the days for a legal deadline are counted according to the days when the court is open for business, excluding weekends and holidays. See "calendar days" and "clear days."

C

calendar days

A method of calculating time under which the days for a legal deadline are counted as they appear in the calendar, including weekends and holidays. See "business days" and "clear days."

case

(1) In law, a court proceeding; a lawsuit; an action; a cause of action; a claim. (2) A historic decision of the court; case law. See "action," "case law, " "court proceeding," and "precedent."

case at bar

The case presently before the court; the case being argued.

case law

The law as established and developed by the decisions made in each court proceeding. See "common law."

cause

In law, (2) a lawsuit, an action, or a cause of action, or (2) the wrongful act of another which gives rise to a claim for relief. See "action" and "cause of action."

cause of action

The behaviour of a person that gives rise to a claim for relief. For example, a spouse's adultery might give rise to the other spouse's right to claim a divorce. The adulterous act is the cause of action for the divorce claim.

Certificate of Costs or Expenses

Often referred to as simply a *Certificate of Costs*, this is a document endorsed by an associate judge or registrar stating the amount owed as "costs" by one party to the other after a trial, usually issued following a hearing to settle the amount of the costs justly owed. It is a judgment of the Supreme Court and enforced like a judgment debt.

Certificate of Fees

A document endorsed by an associate judge or registrar stating the amount a client owes to their lawyer, issued following a hearing to "assess" or "tax" a lawyer's bill and determine what portion of the lawyer's bill was reasonable and is properly owed to or refundable by that lawyer. See "account."

Certificate of Pending Litigation

Often referred to as a "CPL" for short, this is a document filed in the office of the Land Title and Survey Authority against the title of real property; formerly called a *lis pendens*. When a CPL is filed, it warns others that the property is the subject of a court proceeding and that ownership of the property may change as a result.

In family law, a CPL is used to protect the interest of a party in a piece of property by notifying potential purchasers or mortgagees about the court proceeding. See "clear title," "encumbrance," and "real property."

Charter of Rights and Freedoms

Also known as the *Charter*, the part of the *Constitution Act, 1982* that sets out the fundamental rights and freedoms enjoyed by all Canadians, including the freedoms of religion and expression and the rights to life and liberty. Neither the federal nor the provincial governments may pass laws or act in ways contrary to the *Charter*.

chambers

A type of hearing in the BC Supreme Court, where a judge or an associate judge hears applications. Unlike trials, evidence is presented through affidavits instead of live witnesses, the proceedings are less formal (no one wears robes), and the result is often an interim order instead of a final order. Chambers can address procedural issues, but also interim orders dealing with parenting or support concerns, or other issues that come up before a family law trial is held.

chattel

Personal property; an item of property other than real estate. See "real property."

child

A person who is younger than the legal age of majority, 19 in British Columbia. See "age of majority."

child of the marriage

A term under the *Divorce Act* describing a child who is under the provincial age of majority or older but unable to withdraw from the charge of the spouses by reason of illness, disability or other cause. "Other cause" is usually interpreted to mean an adult child who is pursuing post-secondary education. An adult child must qualify as a "child of the marriage" to be entitled to child support. See "age of majority," "child" and "child support."

child support

Money paid by one parent or guardian to another parent or guardian as a contribution toward the cost of a child's living and other expenses.

Child Support Guidelines

A regulation to the federal *Divorce Act*, adopted by every province and territory except Quebec, that sets the amount of child support a parent or guardian must pay, usually based on the person's income and the number of children involved.

circumstantial evidence

Evidence that doesn't prove a fact but allows a court to logically infer a fact; indirect proof of a fact. For example, a fixed amount of money deposited every two weeks into someone's bank account may allow the court to infer that the person has a job even though there is no direct evidence of that person's employment.

civil action

A court proceeding other than a criminal court proceeding. All family law court proceedings are civil actions.

Civil Marriage Act

Federal legislation that expands the common law definition of spouse to include persons of the same gender, thereby allowing persons of the same sex to marry one another.

claim

(1) The assertion of a legal right to an order or to a thing; (2) the remedy or relief sought by a party to a court proceeding.

claimant

The person who starts a court proceeding seeking an order for a specific remedy or relief against another person, the respondent. See "action" and "respondent."

clear days

A method of calculating time under which the days for a legal deadline are counted by excluding the first day and the last day in the period. For example, a court order obtained on Monday that says that someone can apply to vary the order on "two clear days' notice" means that the soonest the person could apply is Thursday. See "business days" and "calendar days."

clear title

Ownership of property without any debt, liens, or claims having been registered against the property. For example, owning a piece of land without a mortgage or a CPL on the property, or owning a car without a car loan. See "Certificate of Pending Litigation."

coercion

The use of force or intimidation, whether emotional or physical, to compel another person to do something; interference with another person's freedom of choice to obtain an outcome, action, or behaviour.

cohabitation

Living with another person, shacking up, living in sin, playing house. Cohabitation in a "marriage-like relationship" is necessary to qualify as a "spouse" under the *Family Law Act*. See "marriage-like relationship" and "spouse."

cohabitation agreement

An agreement signed by people who are or have begun to live together in a marriage-like relationship that is intended to govern their rights and obligations in the event of the breakdown of their relationship and, sometimes, their rights and obligations during their relationship. See "family law agreement."

collaborative negotiation

A dispute resolution process in which the parties to a legal dispute and their lawyers agree that they will make every effort to resolve the dispute through cooperative, transparent negotiations, sometimes with the assistance of counsellors and neutral experts in financial issues and children's issues as necessary, without going to court. Also known as collaborative law, even though it's not a type of law, and as collaborative settlement processes. See "alternative dispute resolution."

collusion

An agreement to do something with one or more other people towards an illegal or harmful goal. In family law, the court must satisfy itself that there has been no collusion between the spouses as to the ground of divorce before a divorce order will be made.

common law

(1) The legal principle under which courts are bound to follow the principles established by previous courts in similar cases dealing with similar facts, or (2) the system of justice used in non-criminal cases in all provinces and territories except Quebec.

common-law marriage

A form of marriage occurring without government or church licence, in which a couple acquired certain rights and obligations toward each other under the common law, banned as a result of the 1753 English *Marriage Act*. Common-law marriages have never been lawful in British Columbia. See "common-law spouse" and "unmarried spouse."

common-law spouse

(1) A popular misconception under which people believe they are married to each other simply because they have lived together, or (2) a popular misnomer describing the legal relationship between long-term cohabitants. Common-law marriages have never been lawful in British Columbia. See "common-law marriage," "married spouse," and "unmarried spouse."

competent

In law, having the capacity, ability, or authorization to do a thing. A person who is competent to give evidence is sane and able to understand the issues and results of their evidence. A court that is competent has the authority to deal with the issues in a case and authority over the parties to that case.

conclusion of fact

A judge's decision as to what the facts of a case are, based on the evidence they have heard and their evaluation of the credibility of the witnesses giving the evidence. See "conclusion of law," "evidence," "question of fact," and "witness."

conclusion of law

A judge's decision as to how the law, including any relevant legislation or principles of the common law, should be applied to the facts of a particular case. See "common law," "conclusion of fact," "question of law," and "legislation."

concur

To agree.

concurrent

Happening or existing at the same time. Two courts with concurrent jurisdiction each have the jurisdiction to hear the same case and deal with the same legal issues.

condonation

Forgiving the wrongful or harmful act of another. In family law, condonation usually refers to forgiving an act of adultery or cruelty and the continuation of the parties' relationship as it had been before, often inadvertently ending the innocent spouse's ability to apply for a divorce based on the adultery or cruelty. See "adultery," "cruelty, mental or physical," and "divorce, grounds of."

conjugal rights

A somewhat outdated term describing the rights resulting from marriage, including each spouse's entitlement to the comforts of living together, eating at the same table, sympathy, mutual confidence, sex, and so forth. See "consortium."

connivance

Intentionally causing or permitting a wrongful act to happen to achieve a certain goal. In family law, a married spouse conspiring towards the adultery of the other spouse for the purpose of claiming adultery as a ground of divorce would qualify as connivance. A divorce will not be granted where connivance as to the ground of divorce relied on is found. See "adultery," "collusion," "condonation," and "divorce, grounds of."

consanguinity

Being related to another person by blood. For a marriage to be valid, the parties must not be within the prohibited degrees of consanguinity or adoption. See "marriage," "*Marriage (Prohibited Degrees) Act*" and "marriage, validity of."

consent

(1) Agreement, or (2) the giving of permission for a thing to happen or not happen.

consent order

An order resolving all or part of a court proceeding, on an interim or final basis, that the parties agree the court should make.

consortium

The marital relationship between spouses, specifically the right of each spouse to the company and aid of the other. See "conjugal rights."

conspiracy

The agreement of two or more people to perform an unlawful act or to do a lawful act by unlawful means. A conspirator is a party to a conspiracy. See "lawful."

constitution

In law, the rules that set out the political and legal organization of a state. The power and authority of the governments, the legislative bodies, and the courts, as well as their limits, all stem from the constitution. In Canada, there are two primary constitutional documents, the *Constitution Act, 1867* and the *Constitution Act, 1982*. The *Charter of Rights and Freedoms* is part of the *Constitution Act, 1982*.

construction

In law, the interpretation of something, like a document or a set of circumstances, so as to give it meaning. For example, if a separation agreement stated that one guardian "will have the children on Monday, Tuesday, and Friday" but didn't say anything about the other guardian, the agreement would be *constructed* to mean that the other guardian would have the children on the days that weren't mentioned.

contact

Under the *Family Law Act*, a term that describes the time a person who is not a guardian of a child, including a parent who is not a guardian, has with that child. Under the *Divorce Act*, a term that describes the time a person who is not a married spouse has with a child. See "guardian" and "parental responsibilities."

constructive trust

In family law, the finding by a court that a person holds a portion of their assets for the benefit of the other party without an express agreement to that effect between the parties. See "resulting trust," "trust" and "unjust enrichment."

contempt of court

Doing something or failing to do something that impairs the administration of justice or respect for the court's authority, such as bribing a witness, disobeying a court order, or misleading the court. Contempt of court can be a civil offence as well as a criminal offence.

contingency fees

A fee arrangement whereby a lawyer is paid by taking a percentage of the money awarded to their client by the court or a settlement. Contingency fee agreements are not allowed in family matters, although sometimes a lawyer will agree to be paid from the assets held by a party following the final resolution of an action, such as the proceeds of the sale of a family asset. See "account," "lawyer's fees," and "retainer."

continuance

The continued hearing of an application or trial following a partial hearing at an earlier date. See "adjournment."

contract

An agreement between two or more people, giving them obligations towards each other that can be enforced in court. A valid contract must be offered by one person and accepted by the other, and some form of payment or other thing of value must generally be exchanged between the parties to the contract.

contract law

The branch of law dealing with the interpretation and enforcement of contracts. The principles of contract law are usually, but not always, applicable to family law agreements.

corollary relief

In a court proceeding for divorce, this term refers to all relief claimed under the *Divorce Act* apart from the divorce order itself, specifically claims for parenting orders, child support orders and spousal support orders. See "action" and "relief."

corollary relief proceeding

A court proceeding under the *Divorce Act* in which a spouse seeks parenting orders, a child support order or a spousal support order. See "action" and "relief."

corporal punishment

In family law, the physical punishment of a child by a parent, guardian, or another authorized person. Corporal punishment is permitted under the *Criminal Code*, but only to a limited extent and only by certain persons, including parents and teachers.

costs

In law, a calculation of the allowable legal expenses of a party to a court proceeding, as determined by the Supreme Court Family Rules. The party who is most successful in a court proceeding is usually awarded their "costs" of the proceeding. See "account," "bill of costs," "Certificate of Costs or Expenses" and "lawyer's fees."

counsel

(1) A lawyer, or (2) the advice given by a lawyer to their client.

counterclaim

The claims made by a respondent in a court proceeding against the person starting the court proceeding. The legal document required by the Supreme Court Family Rules in which a respondent sets out their counterclaims against a claimant, is a form called a Counterclaim. See "Notice of Family Claim" and "Response to Family Claim."

Court of Appeal

The highest level of court in the province, having the jurisdiction to review decisions of the Supreme Court, all provincial lower courts, and certain tribunals. See "appeal."

court proceeding

A legal proceeding in which one party sues another for a specific remedy or relief, also called an "action," a "lawsuit," or a "case." A court proceeding for divorce, for example, is a proceeding in which the claimant sues the respondent for the relief of a divorce order.

court registry

A central office, located in each judicial district, at which the court files for each court proceeding in that district are maintained, and at which legal documents can be filed, searched and reviewed.

covenant

A promise to do or not do a particular thing. See "contract," "family law agreements," and "separation agreements."

CPL

The short form for "Certificate of Pending Litigation." See "Certificate of Pending Litigation."

cross-examination

The portion of a trial where a party asks questions of a witness presented by the other party in order to challenge the witness's recollection and truthfulness. The questions asked of the witness must be relevant to the issues and may be leading, that is, the questions may suggest their answers, for example "You didn't get home until 2:00am, did you?" See "examination-in-chief," "evidence," and "leading question."

Crown

In law, (1) the federal and provincial governments and their departments and agencies, or (2) lawyers employed by the federal and provincial governments to prosecute criminal offences.

cruelty

In family law, the physical, verbal, emotional, or mental abuse of one married spouse by the other. Proof of cruelty is grounds for an immediate divorce, providing that the other spouse has not forgiven the cruelty. See "condonation" and "divorce, grounds of."

custody

In family law, an antiquated term used by the old *Divorce Act* to describe the right to possess a child and make parenting decisions concerning the child's health, welfare and upbringing. Replaced in the new *Divorce Act* with the term *decision-making responsibility." See "access," "decision-making responsibility" and "parenting time."*

D

damages

An award of money payable by one party to a court proceeding to another, usually as compensation for loss or harm suffered as a result of the other party's actions or omissions. In family law, damages are usually awarded to one party in compensation for breach of contract or spousal abuse. See "breach of contract" and "tort."

debt

A sum of money or an obligation owed by one person to another. A "debtor" is a person responsible for paying a debt; a "creditor" is the person to whom the debt is owed.

decision

In law, (1) a judge's conclusions after hearing argument and considering the evidence presented at a trial or an application, (2) a judgment, or (3) the judge's reasons. A judge's written or oral decision will include the judge's conclusions about the relief or remedies claimed as well as their findings of fact and conclusions of law. A written decision is called the judge's "reasons for judgment." See "common law," "conclusions of law" and "findings of fact."

decision-making responsibility

Under the new *Divorce Act*, a term referring to a spouse's responsibility for making significant decisions about a child, including about healthcare, education, culture, language, religion, spirituality and extracurricular activities. Decision-making responsibility may be shared by both spouses, divided between spouses such that each has responsibility for different decisions, or allocated wholly to one spouse.

declaration

In law, a pronouncement of the court about a fact or a state of affairs, such as a declaration that a marriage is void or that a person is the guardian of a child. Not to be confused with an order, which is a mandatory direction of the court requiring a party to do or not do something. See "order."

deem

(1) To make an assumption that one thing follows logically from another, (2) a presumption of a fact based on the existence of other facts, or, sometimes, (3) a presumption of a fact required by law, such as the

presumption that a respondent who files a Response to Family Claim has been served with the Notice of Family Claim.

de facto

A Latin phrase meaning "in fact."

default

In law, failing to do something which is either optional or mandatory, such as failing to respond to an application or to a claim within the time limits set out in the rules of court. See "default judgment."

default judgment

A judgment obtained by a claimant following the respondent's failure to reply to the claimant's claim within the proper time from service. In the Supreme Court, a respondent who has been properly served with a Notice of Family Claim has 30 days to file a Response to Family Claim. Once those 30 days have elapsed without the response being served on the claimant, the claimant may apply to the court for a judgment in default. This is the basis for divorce orders made under the desk order divorce process. See "desk order divorce" and "Response to Family Claim."

defence

(1) A reply, a rebuttal, an answer to a court proceeding or an application, or (2) a statement as to why a particular claim or application should not succeed.

de jure

A Latin phrase meaning "by law." By operation of law; as a matter of law; by legal right.

delivery

Sending legal documents to a party at that party's "address for service," usually by mail, fax, or email, called "ordinary service" in proceedings before the Supreme Court. Certain documents, like a Notice of Family Claim, must be served on the other party by personal service. Most other documents may be served by ordinary service. See also "address for service" and "personal service."

demand letter

A letter describing a legal claim sent to the person against whom the claim might be made, offering to settle the claim without the necessity of legal action on terms set out in the letter. Demand letters are usually issued before court proceedings are commenced to try to settle a potential claim without the need for litigation.

de minimus non curat lex

A Latin maxim meaning "the law does not concern itself with trifles," also known by its short form, *de minimus*. This maxim stands for the idea that some claims or arguments, even though legally correct or valid, are too small or too trivial to be dealt with by the court.

denial

In law, defending a claim by denying the truth of a fact supporting the claim; a rejection of the truth of facts alleged.

de novo

A Latin phrase meaning "anew." Renewed; from the beginning. An application or trial heard *de novo* is heard for a second time without the court considering or being bound by the result of or decisions made during the first hearing.

dependant

In law, a person who relies on someone else for their support and the necessities of life. See "child," "child support," and "spousal support."

deponent

A person giving information under affirmation or oath; a witness. Refers to both a person giving testimony at a trial and a person making an affidavit. See "affidavit," "evidence," "testimony" and "witness."

desertion

In family law, the abandonment of one married spouse by the other. This is an old ground of divorce that has been replaced in the modern *Divorce Act* with simple separation for a period of at least one year. See "divorce, grounds of" and "separation."

desk order divorce

A process in which a divorce order, with or without corollary relief, is obtained following the respondent's failure to defend the claim for divorce by filing a Response to Family Claim. A desk order divorce does not require a hearing in court and is the cheapest way to obtain a divorce order. See "corollary relief" and "divorce."

disability

In law, a legal incapacity to do certain things, like enter into a contract or start a court proceeding. Legal disabilities include insanity and being under the age of majority. See "age of majority."

disbar

To strip a lawyer of their right to practice law, usually after a formal inquiry by the Law Society.

disclosure

A step in a court proceeding in which each party advises the other of the documents in their possession which relate to the issues in the court proceeding and produces copies of any documents the other side requests before trial. This process is regulated by the rules of court, which put each party under an ongoing obligation to continue to advise the other of new documents coming into their possession or control. The purpose of this step is to encourage the settlement of court proceedings and to prevent a party from springing new evidence on the other party at trial.

discontinuance

The termination of a claim by the claimant or the termination of a counterclaim by a respondent. The discontinuance of a claim indicates the party's intention not to proceed with that claim. See "action" and "Counterclaim."

discovery

A step in a court proceeding in which a party may demand that the other party produce specific documents and submit to a cross-examination, on oath or affirmation, outside of court before trial. This process is regulated by the rules of court. The purpose of this step is to encourage the settlement of court proceedings and to make sure that each party knows what the other party's case will be at trial. See "examination for discovery."

dismiss

In law, a judge’s decision (1) not to grant a claim or (2) to reject a court proceeding with or without trial. An application that is *dismissed* has been rejected by the judge. See "application."

dispute resolution

Processes used to resolve legal disputes, including negotiation, collaborative settlement processes, mediation, arbitration and litigation.

dissent

(1) Disagreement, or (2) the decision of a judge of the Court of Appeal who disagrees with the decision reached by the majority of the judges hearing the same appeal. See "appeal" and "Court of Appeal."

divorce

The legal termination of a valid marriage by an order of a judge; the ending of a marital relationship and the conjugal obligations of each spouse to the other. See "conjugal rights," "marriage" and "marriage, validity of."

Divorce Act

Federal legislation that deals with divorce, custody and access, child support, spousal support, and the recognition of divorce orders made outside of Canada.

divorce, grounds of

The *Divorce Act* provides one ground upon which the court may make a divorce order, marriage breakdown. Marriage breakdown may be established on proof of the spouses' separation for at least one year, a spouse's adultery, or a spouse's cruelty toward the other spouse. See "adultery," "cruelty," "divorce," and "separation."

divorce proceeding

A court proceeding under the *Divorce Act* in which a spouse seeks a divorce order. See "divorce."

domestic contract

In family law, an agreement between two or more persons about legal issues that have arisen or may arise, dealing with their respective rights and obligations to one another, that the parties expect will be binding on them and will be enforceable in court. Typical domestic contracts include marriage agreements, cohabitation agreements, and separation agreements.

domicile

(1) The place where one has one's permanent home, where one lives most of the time, or, sometimes, (2) the place where one *intends* to have a permanent home. A party's domicile may have an impact on the jurisdiction of the court to hear a court proceeding, deal with certain claims made in a court proceeding, or determine the applicable law for dividing up property and debt. See "jurisdiction" and "residence."

donee

A person who receives a gift or bequest.

donor

A person who gives a gift or bequest to someone, freely and without expectation of payment in return.

dower

The entitlement of a wife to a portion of her husband's estate on his death under the common law. This right is extinguished in British Columbia and is replaced by the provisions of the *Wills, Estates and Succession Act* that give a surviving spouse certain rights to share in the estate of the deceased spouse.

dowry

In some legal systems, (1) the real property and personal property brought into a marriage by a wife, or (2) the property given to a wife by her husband in return for her marriage to him. There is no legal entitlement to dowry in Canada, agreements for the payment of dowry will not normally be enforceable. See "chattels" and "real property."

draft

(1) A preliminary version of a document, (2) an order prepared following judgment and submitted to the court for its approval, or (3) to prepare, or *draw,* a legal document.

duress

Forcing someone to do something through psychological or emotional pressure; a defence to the enforcement of a contract. If, for example, a separation agreement was entered into under duress, that may be a ground to dispute or apply to set aside that agreement.

Durex

A brand of condom. See "child support."

duty

In law, a legal obligation to do or not do something, whether under the common law or pursuant to legislation. See "act" and "common law."

duty counsel

A lawyer paid by legal aid or the government who provides limited legal assistance to people on the day that they are in court.

E

election

In law, the making of a choice between two or more options.

enactment

A government action or declaration intended to have a legal effect, usually in the form of legislation or regulation. See "act" and "regulations."

encumbrance

A legal right, usually to payment of a debt, that is secured by registration of the right on the title of property. For example, a mortgage is secured against the title of real property and is registered as an *encumbrance* on title. See "Certificate of Pending Litigation," "clear title" and "real property."

endorse

In law, to sign a document or otherwise formally signal one's approval or acceptance of a document, proposal, contract or draft order.

endowment

In family law, the giving of dower to a wife or of dowry by a wife. See "dower" and "dowry."

enjoin

To prohibit or restrain someone from doing something, normally by order of the court. See "restraining order."

enticement

In family law, the act of intentionally causing a wife to leave her husband or intentionally interfering with a married couple's consortium, formerly a common law cause of action. The *Family Law Act* expressly forbids legal actions based on enticement, which is too bad, really. See "cause of action," "conjugal rights" and "consortium."

ergo

A Latin word meaning "therefore."

error of fact

A ground of appeal based on a claim that a fact exists or a fact supposed to exist does not, making the judge's decision void or voidable. See "appeal."

error of law

A ground of appeal based on a claim that the trial judge did not apply the law correctly in reaching their decision. This is the most common ground of appeal. See "appeal" and "error of fact."

estate

In law, all of the personal property and real property that a person owns or in which they have an interest, usually in connection with the prospect or event of the person's death.

et al.

A Latin phrase meaning "and others," short for *et alia* — because "alia" is just such a pain to write out. Used in a style of cause (for example, *Smithwick et al. v. Miller*, to indicate that there are more parties to a legal action than are listed. See "action" and "style of cause."

evidence

Facts, or proof tending to support the existence of facts, presented to a judge at a hearing or trial. Evidence can be given through the oral testimony of witnesses, in writing as business records and other documents, or in the form of physical objects. Evidence must be admissible according to the rules of court and the rules of evidence. See "circumstantial evidence," "hearsay" and "testimony."

evidentiary burden

The obligation of a party to prove their case; the onus of proof. The burden of proof usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of statute. In civil litigation, a party must prove their case on the balance of probabilities.

examination-in-chief

The portion of a trial where a party asks questions of their own witnesses to elicit evidence of certain facts. The questions asked of the witness cannot be leading, that is, the answer cannot be suggested in the question. For example, "What colour is your car?" rather than "Your car is blue?" See "cross-examination" and "evidence."

examination for discovery

The cross-examination of a party, under oath or affirmation, about the issues in a court proceeding conducted prior to trial. An examination for discovery is held outside court, with no one in attendance except for the parties, the parties' lawyers, and a court reporter. The court reporter produces a transcript of the examination, which may, in certain circumstances, be used at trial. See "discovery."

excluded property

A term under the *Family Law Act* referring to property acquired by a spouse prior to the commencement of the spouses' relationship and certain property acquired by a spouse during the relationship, including gifts, inheritances, court awards, and insurance payments. A spouse is presumed to be entitled to keep their excluded property without having to share it with the other spouse. See "family property," "gift" and "inheritance."

execute

In contract law, to complete or accomplish; to complete the legal formalities necessary to give a document effect. One "executes" a separation agreement, for example, by signing it in the presence of a witness.

executor

The person responsible for carrying out the instructions in a will and wrapping up a deceased person's estate and debts. The lovely feminine form of the word is "executrix," though the masculine form is commonly applied to executrices and executors both. See "estate," "testator," and "will."

ex parte

A Latin phrase meaning "from one party." Refers to an application that is brought before the court without notice being given to the other party. Such applications are only heard in urgent situations, for example, where someone has threatened to flee with the children or destroy property. See "application."

expert evidence

Opinion evidence given by an expert at trial, orally, in an affidavit or in a formal report. Opinion evidence is a statement about what a witness thinks or believes, rather than something personally known as a fact, and is generally not admissible at trial except when the opinion is provided by an expert. A person presented as an expert witness must be approved by the court as a qualified expert in their field. In family law, experts typically called to give evidence include accountants, business valuators, doctors, and psychologists. See

"evidence" and "witness."

F

fair market value

A term describing the value of real property or personal property in terms of the amount a reasonable third party would pay for the property at its current location in its current condition.

family debt

A term under the *Family Law Act* referring to debt owed by either or both spouses that accumulated during the spouses' relationship, as well as after separation if used to maintain family property. Both spouses are presumed to be equally liable for family debt.

family home

In family law, the dwelling occupied by a family as their primary residence. See "family property" and "real property."

Family Law Act

Provincial legislation that deals with parentage, guardianship, parental responsibilities and parenting time, contact, child support, spousal support, and the division of property and debt.

Family Law Act Regulation

A provincial regulation that prescribes the training necessary to work as a family law mediator, a family law arbitrator, and a parenting coordinator, and adopts the federal Child Support Guidelines for the purpose of the *Family Law Act*. See "Child Support Guidelines" and "*Family Law Act*."

family law agreement

An agreement between two or more persons about family law issues that have arisen or may arise, dealing with their respective rights and obligations to one another, which the parties expect will be binding on them and be enforceable in court. Typical family law agreements include marriage agreements, cohabitation agreements and separation agreements.

family law arbitrator

A lawyer or another person with special training in the arbitration of family law disputes who meets the training and experience requirements set out in the provincial Family Law Act Regulation. See "arbitration."

family law mediator

A lawyer or another person with special training in the mediation of family law disputes who meets the training and experience requirements set out in the provincial Family Law Act Regulation. See "mediation."

family property

A term under the *Family Law Act* referring to property acquired by either or both spouses during their relationship, as well as after separation if bought with family property. Both spouses are presumed to be entitled to share equally in any family property. See "excluded property."

Family Relations Act

Former provincial legislation that dealt with custody, guardianship, access, child support, spousal support, and, for married spouses, the division of family assets. Now wholly repealed except for certain lingering effects involving the division of property and agreements made or proceedings started before the *Family Law Act* became law. See "*Family Law Act*."

final judgment

A judge's decision that finally determines some or all of the claims in a court proceeding, following which there is no other recourse open to a dissatisfied party except an appeal. See "decision."

Financial Statement

A legal document required by the rules of court in which a party to a court proceeding involving child support, spousal support, the division of property, or the division of debt must describe their income, expenses, assets, and liabilities under oath or affirmation. The Provincial Court Family Rules and the Supreme Court Family Rules each have a form called *Financial Statement*. See "affirm," "oath," and "perjury."

finding

A conclusion made by a judge which decides a point of law or a fact in dispute.

finding of fact

A judge's conclusion about the facts in a court proceeding, made after hearing all the evidence. See "decision," "error of fact" and "question of fact."

finding of law

A judge's conclusion about the law to be applied to the facts in a court proceeding, or how the law should be applied to the facts in a proceeding, made after hearing the parties' arguments on the applicable law. See "decision," "error of law" and "question of law."

fornication

Sex between two unmarried people. No longer a criminal offence in Canada, thankfully, although it remains one in certain American states. Check with your travel agent. See "adultery."

forum

In law, a particular court or level of court, sometimes used in reference to the court's jurisdiction over a particular issue.

foster care

A home where a child lives other than with their natural or adoptive parents. Such a situation usually arises when the child welfare authorities have apprehended a child or when a child's parents voluntarily give the child up. See "apprehension."

foster parent

An adult charged with the care of a child who is not their own natural or adoptive child, usually in the position of a guardian to the child, who receives money in exchange for caring for the child. See "apprehension" and "guardian."

frivolous and vexatious

A term under the provincial *Supreme Court Act* describing court proceedings or applications that are clearly unsupported by the evidence or the law. Such behaviour is considered to be a nuisance to other parties to those proceedings and a waste of the court's time, and may result in an order preventing the litigant from taking further legal steps without permission from the court. See "action."

frustration

(1) In contract law, the inability to complete or fulfill a contract, whether intentional or unintentional, or (2) the intentional interference with a person's rights under a contract or court order. (3) In family law, the motivation behind an application for annulment based on non-consummation of the marriage. A contract that cannot be completed or fulfilled is said to be "frustrated."

G

gainful employment

Steady work for pay. In family law, a dependent spouse usually has a duty to find gainful employment and become self-sufficient following the breakdown of a relationship. Under certain circumstances, a failure to find gainful employment, or to take reasonable steps toward finding gainful employment, may justify the termination of spousal support. See "dependent" and "spousal support."

gift

A voluntary transfer of property from one person to another, without expectation of payment or reward. Gifts to one spouse do not usually qualify as family property, and are excluded from the pool of property to be divided. See "donee," "donor," "excluded property" and "family property."

good faith

Acting in an honest, truthful, open, and fair manner, without the intent to deceive or defraud. Also known by the Latin phrase *bona fide*. See "bad faith."

guardian

(1) A person charged with the legal care of someone under a legal disability. (2) A term under the *Family Law Act* referring to a person, including a parent, who is responsible for the care and upbringing of a child through the exercise of parental responsibilities. See "disability," "parental responsibilities" and "parenting time."

guardian *ad litem*

An English word combined with a Latin phrase meaning a guardian "for the litigation." A person conducting a court proceeding on behalf of someone under a legal disability, as if they were that person. Also called a "litigation guardian." See "disability."

Guidelines

Short for the Child Support Guidelines, a regulation to the federal *Divorce Act*, adopted by each province and territory except Quebec, that sets the amount of child support a parent or guardian must pay, usually based on the person's income and the number of children involved.

H

Hague Conventions

Legal agreements binding between signatory nations at the Hague. While there are a number of these agreements, the most important for family law matters is the Hague Convention on the Civil Aspects of International Child Abduction, which deals with the return of children from foreign countries to which they have been wrongly removed by a parent or guardian.

hearing

In law, any proceeding before a judicial official to determine questions of law and questions of fact, including the hearing of an application and the hearing of a trial. See "decision."

hearsay

Evidence of which a witness has no direct, personal knowledge. For example, evidence to the effect that “Pierre told me that Mitsou trashed the car” or "Mitsou told me she trashed the car" are both hearsay. Hearsay evidence is not usually admissible. There are a number of exceptions to the general rule against hearsay, the most important of which allows hearsay evidence in interim applications as long as the source of the hearsay information is identified. See "affidavit," "application," "evidence" and "witness."

heirs

In wills and estates law, (1) the people intended or expected to receive property or other benefits under a will, or (2) a person's direct lineal descendants. See "executor" and "will."

I

indemnify

(1) To make good financial loss or harm suffered by another, or (2) to repay someone for expenses they have incurred.

indigent

Being impoverished. Persons with limited or no income used to apply to the Supreme Court and Court of Appeal for *indigent status*, which exempted them from paying the usual court fees for all or a part of a court proceeding. Thankfully, the terms *indigent* or *impoverished* are no longer used in such applications. The Rules for both the Supreme Court and Court of Appeal now refer to applications to *waive fees*.

infant

A person not yet of the age of majority, a minor, a child. See "age of majority," "child" and "disability."

Infants Act

Provincial legislation that governs both the legal capacity of minors and contracts involving minors. See "age of majority," "child" and "disability."

inherent jurisdiction

The power of superior courts to (1) make decisions and orders in absence of specific legislative authority, (2) maintain their authority, and (3) take steps to prevent their processes from being obstructed and abused. The superior courts of British Columbia are the Supreme Court and the Court of Appeal. See "*parens patriae* jurisdiction."

inheritance

Real property or personal property received as a result of the provisions of a will or under the *Wills, Estates and Succession Act*. Inheritances do not usually qualify as family property subject to division between spouses. See "family property," "real property" and "will."

injunction

A court order that someone not do or cease doing a thing; a restraining order. In family law, injunctions are often sought, for example, to stop someone from removing the children from a place, from disposing of assets, or from harassing someone. See "application" and "ex parte."

in loco parentis

A Latin phrase meaning "in the place of a parent." Acting as a parent in the place of the child's natural or adoptive parent or intending to stand in the place of that parent. A married spouse found to be *in loco parentis* to a child may be responsible to pay child support for that child under the *Divorce Act*. See "adoptive parent," "natural parent" and "stepparent."

in personam

A Latin phrase meaning "against the person." Refers to a right or an order made against a person rather than in reference to objects or property. See "in rem."

in rem

A Latin phrase meaning "against the thing." Refers to a right or an order made in reference to objects or property rather than against a person. See "in personam."

inspection of documents

The right of a party to a court proceeding to look at and copy documents held by the other party that relate to any issues in the proceeding; part of the discovery and production process. See "disclosure" and "discovery."

instructions

In law, the directions given by a client to their lawyer about either the conduct of their affairs or a court proceeding.

instrument

In law, a legal document that sets out certain rights and obligations, or records certain facts or entitlements to certain benefits and obligations, such as a contract, a waiver, and a will. See "family law agreements" and "will."

inter alia

A Latin phrase meaning "among other things." For example, "The children on the Brady Bunch included, *inter alia*, Cindy, Jan, and Bobby."

interim application

An application, also called an "interlocutory application," made after the start of a court proceeding but before its conclusion, usually for temporary relief pending the final resolution of the proceeding at trial or by settlement. In family law, interim applications are useful to determine issues like where the children will live, who will pay child support, and whether spousal support should be paid on a rough and ready basis. See "application" and "interim order."

interim order

Any order made prior to the final resolution of a court proceeding by trial or by settlement; a temporary, rather than permanent or final, order. See "application" and "interim application."

interlocutory

Literally, “between speaking,” refers to interim applications brought after the start of a court proceeding but before its conclusion. See "interim application" and "interim order."

interrogatories

Written questions given by one party to a court proceeding to the other that must be answered in affidavit form; part of the discovery process. See "discovery."

intestate

Dying without a will. In such circumstances, the distribution of the dead person’s estate is governed by the *Wills, Estates and Succession Act*. See also "estate," "inheritance" and "will."

in the alternative

A phrase used to indicate secondary relief or a secondary ground of relief in a claim or application, usually presented as an option to the primary relief or primary ground of relief. See "alternative," "motion," "pleadings" and "relief."

in trust

A phrase describing how property is held by one person for the benefit of another person who is ultimately entitled to the use or proceeds of sale of that property. Money held *in trust* is held in a lawyer's bank account on behalf of a client, on the lawyer’s promise not to use that money except as may be agreed.

in utero

A Latin phrase meaning "in the womb." Used in reference to fetuses.

J

J.D.

To practise law in British Columbia, one requires a law degree in the form of either a Bachelor of Laws degree (LL.B.) or a Juris Doctor degree (J.D.). “LL.M." stands for a Master of Laws degree and “LL.D." for a Doctor of Laws. A J.D. is the same thing as an LL.B. but sounds way more impressive.

joint account

A bank account owned by more than one person, normally with an equal entitlement to deposit or withdraw, with or without the consent of the other account holders.

joint custody

A term used by the old *Divorce Act* when both spouses have custody of a child, giving both the right to make parenting decisions concerning the child's health, welfare, and upbringing, but not necessarily requiring or implying that the spouses have equal or near-equal amounts of time with the child. See “access," "custody" and "decision-making responsibility."

joint tenancy

A form of property co-ownership in which each joint tenant has a right of ownership of the whole property that is indistinct from the ownership rights of the other joint tenants. In other words, each joint tenant has a right to the whole property. See "tenancy in common."

judge

A person appointed by the federal or provincial government to manage and decide court proceedings in an impartial manner, independent of influence by the parties, the government, or agents of the government. The decisions of a judge are binding upon the parties to the proceeding, subject to appeal.

judgment

A judge's conclusions after hearing argument and considering the evidence presented at a trial or an application; a decision, the judge's reasons. A judge's written or oral decision will include the judge's conclusions about the relief or remedies claimed as well as the judge's findings of fact and conclusions of law. A written decision is called the judge’s "reasons for judgment." See "common law," "conclusion of law," "finding of fact" and "final judgment."

jurisdiction

With respect to courts, (1) the authority of the court to hear an action and make orders, (2) the limits of the authority of a particular judicial official, (3) the geographic location of a court, or (4) the territorial limits of a court's authority. With respect to governments, (5) the authority of a government to make legislation as determined by the constitution, or (6) the limits of authority of a particular government agency. See “constitution."

justice

A judge of the superior courts of British Columbia, being the Supreme Court and the Court of Appeal.

justice of the peace

A court official appointed by the provincial government with limited decision-making authority and jurisdiction, usually charged with managing court schedules, the terms of release of arrested persons, and other administrative tasks with a discretionary element. See "judge" and "jurisdiction."

K

KC

The abbreviation of "King's Counsel." A KC is an honour often, but not invariably, granted to lawyers of particular excellence, and may also be granted for other reasons such as service to the legal community, the public or a political party.

L

land

Real property; a parcel of real property and the buildings upon it. See also "chattel," "ownership" and "possession."

Land (Spouse Protection) Act

Provincial legislation allowing married and unmarried spouses to file an "entry" on the title of the family home, whether court proceedings have been started or not, that will prevent the property from being sold without their consent. See "family home."

Land Title Act

Provincial legislation governing the ownership and transfer of land in British Columbia, including the issuance and registration of Certificates of Pending Litigation, liens, judgments, and mortgages. See "encumbrance" and "real property."

Land Title and Survey Authority

The provincial government agency responsible for maintaining written records of the ownership of real property in the province, together with a record of the encumbrances which may be registered against a property. See "Land Title Act" and "real property."

last will and testament

A legal document in which a person sets out how they wish their property to be disposed of after death; a will. See "will."

lawful

Conduct that is permitted both by the law. See "unlawful."

lawyer

A person licensed to practice law in a particular jurisdiction by that jurisdiction's law society. See "barrister and solicitor."

lawyer's fees

The money charged by a lawyer to their client for the lawyer's services, usually pursuant to the terms of the lawyer's retainer agreement. Most family law lawyers bill by the hour with a premium for success or the difficulty or novelty of the case. A lawyer's bill may include "disbursements," costs incurred by the lawyer for such things as courier fees, court fees, or photocopying expenses. See "account" and "Certificate of Fees."

lay litigant

A party to a court proceeding who is not represented by a lawyer and acts on their own behalf, also referred to as a litigant without counsel, a self-represented litigant, and a *pro se* litigant. "Lay" in this context means without professional training. See "action," "lawyer" and "litigant."

leading question

A question asked of a witness, normally during cross-examination, which suggests the answer. For example: "You've never worked a day in your life, have you?" See "cross-examination."

lease

An agreement that requires payment for the use of property, under which the owner of property, like a car or an apartment, gives up the right to occupy and use that property in exchange for a sum of money. A "lessor" is the person who retains ownership of the property and receives money for its use. A "lessee" is the person who purchases the right of possession and use of the property.

legal description

In real property law, the full formal identification of a particular piece of property by its lot number, district lot number, block number, plan number, and land district, rather than by its street address. See "Land Title and Survey Authority," "PID," and "real property."

legal duty

A legal obligation to do or not do a thing, whether by legislation, the common law, or an order of the court. For example, the *Criminal Code* imposes a legal duty on parents to provide the necessities of life to their children until they turn 16, while the *Family Law Act* imposes a duty on parents to make decisions in the best interests of their children. See "duty."

legislate

(1) The power of a government to create and change written laws governing things, people, and places, or (2) a right of the provincial and federal governments to propose, enact, and enforce laws derived from the *Constitution*. See "act" and "constitution."

legislation

An act; a statute; a written law made by a government. See "regulations."

limitation period

A time period after which someone may not make a claim because the right to do so has expired. The time for making a claim is set by legislation, and limitation periods differ depending on the type of claim or the relationship between people making and defending the claim.

lis pendens

The old name for a document now known as a Certificate of Pending Litigation. See "Certificate of Pending Litigation."

litigant

A party to a court proceeding, such as an appellant, an applicant, a claimant or a respondent. See "action."

LL.B

To practise law in British Columbia one requires a law degree in the form of either a Bachelor of Laws degree (LL.B.) or a Juris Doctor degree (J.D.). “LL.M." stands for a Master of Laws degree and “LL.D." for a Doctor of Laws degree.

M

maintenance

In family law, an antiquated term referring to child support and spousal support. See "child support" and "spousal support."

male fides

A Latin phrase meaning “in bad faith." Intentionally misleading someone else, whether by doing or not doing something; acting in a manner contrary to one's actual intention; failing to act honestly and openly. See "good faith."

malfeasance

Doing an act that is wrongful or unlawful by operation of law. A "malfeasor" is a person who has committed a wrongful or unlawful act. See "unlawful."

marriage

A legal relationship between two persons, whether of the same or opposite genders, that is solemnized by a marriage commissioner or licenced religious official and gives rise to certain mutual rights, benefits, and obligations. See also "conjugal rights," "consortium," and "marriage, validity of."

marriage, validity of

For a marriage to be valid, the spouses must be unmarried at the time of the marriage, not within the prohibited degrees of consanguinity, and capable of understanding the meaning of marriage, and the marriage must be performed by a person entitled to solemnize marriage in the jurisdiction where the marriage is performed under the laws of that jurisdiction. See "age of majority," "bigamy," "consanguinity," "disability" and "polygamy."

Marriage Act

Provincial legislation that governs people's capacity to marry and the formalities of the marriage ceremony.

marriage agreement

An agreement signed by people who are planning on marrying or who have married that is intended to govern their rights and obligations in the event of the breakdown of their marriage and, sometimes, their rights and obligations during their marriage. See "family law agreement."

marriage-like relationship

In family law, the quality of an unmarried couple's relationship that demonstrates their commitment to each other, their perception of themselves as a couple, and their willingness to sacrifice individual advantages for the advantage of themselves as a couple; a legal requirement for a couple to be considered spouses under the *Family Law Act* without marrying. See "cohabitation," "marriage," and "spouse."

Marriage (Prohibited Degrees) Act

Federal legislation that describes the degrees of relatedness within which persons cannot marry.

married spouse

A person who is validly married to another person as a result of a ceremony presided over by someone with the authority to conduct marriages. See "marriage" and "unmarried spouse."

master

Since January 2024, these provincially-appointed judicial officials of the BC Supreme Court are now called *associate judges*. They serve a similar role as justices of the BC Supreme Court, but have limited jurisdiction. Associate judges are usually charged with making interim decisions before final judgment in a court proceeding, and certain decisions after final judgment, including the assessment of lawyers' bills and the settling of bills of cost. See "interim application," "judge" and "jurisdiction."

material

In law, something that is relevant or important. A material fact, for example, is a fact relevant to a claim or a defence to a claim. See "claim," "evidence" and "fact."

matrimonial home

In family law, the dwelling occupied by a family as their primary residence. See "family property" and "real property."

mediation

A dispute resolution process in which a specially-trained neutral person facilitates discussions between the parties to a legal dispute and helps them reach a compromise settling the dispute. See "alternative dispute resolution" and "family law mediator."

mediation-arbitration

A dispute resolution process where the parties sign an agreement committing to a process that begins as mediation, but can turn into an arbitration process if the parties can't settle their issues. Also called "med-arb." A mediation-arbitration agreement says when the mediation phase ends and the arbitration phase begins, usually when the mediator-arbitrator reaches the conclusion that one or more issues cannot be resolved by the parties' agreement. See "arbitration" and "mediation."

memorandum of understanding

A document setting out the essential terms of a settlement reached between two or more people resolving a legal dispute, often used as a guide to the preparation of a formal final agreement or final order to be made with the consent of the parties. See "consent order" and "family law agreements."

minor

A person who is younger than the legal age of majority, 19 in British Columbia. Not to be confused with "miner," which means something else altogether. See "age of majority."

minutes of settlement

A document setting out the essential terms of an agreement reached between two or more parties to a court proceeding, produced after negotiations and signed by the parties and their lawyers. Minutes of settlement are normally used as a guide to the preparation of a formal final agreement or final order, and are often attached to that agreement order as a schedule. See "consent order," "family law agreements," "litigant" and "order."

miscarriage of justice

A term referring to the demonstrable and traumatic failure of the justice system in a particular court proceeding.

misrepresentation

Acts or words tending or intended to give a misleading or false impression as to the true state of affairs. See "bad faith."

mistake

(1) In law, an unintentional act or failure to act arising from a misunderstanding of the true state of affairs, from ignorance, or from an error not made in bad faith. (2) In contract law, an unintentional misunderstanding as to the nature of a term agreed to in a contract that may justify setting aside all or part of the contract. See "bad faith" and "contract."

mortgage

The conditional transfer of the title to real property by an owner to another person in return for money given by that person as a loan, while retaining possession of the property. The party to whom title is given, the "mortgagee," usually a bank, is allowed to register the title of the property in their name if the person taking

the loan, the "mortgagor," fails to make the required payments. See "encumbrance" and "real property."

motion

In law, an application to the court for an order, usually brought after the commencement of a court proceeding but before its conclusion by trial or settlement; an interim application. See "action," "interim application," and "order."

N

natural parent

A biological or birth parent of a child, as opposed to an adoptive parent or a stepparent. See "adoptive parent" and "stepparent."

negligence

Failing to do something that a reasonable person would do, or doing something that a reasonable person would not do, which results in harm to someone else.

negotiation

In family law, the process by which an agreement is formed between the parties to a legal dispute resolving that dispute, usually requiring mutual compromise from the parties' original positions to the extent tolerable by each party. See "alternative dispute resolution" and "family law agreements."

net income

The remainder of a person's annual income after mandatory deductions have been paid, which may include CPP, EI, income taxes, and union or professional dues. For self-employed persons, necessary and reasonable business and operating expenses may also be deducted to determine net income.

nil

A short form of the Latin word *nihil* meaning "nothing"; usually used to indicate a zero value. See "null and void."

non compos mentis

A Latin phrase meaning "not of sound mind." A legal disability arising from mental infirmity. See "disability."

notary public

A person authorized to administer affirmations and oaths, and to execute or certify documents. All lawyers are notaries public in addition to being barristers and solicitors. See "barrister and solicitor."

Notice of Appeal

A legal document required under the rules of British Columbia's Supreme Court and Court of Appeal which is used to give notice of a party's intention to appeal a decision. See "appeal" and "decision."

Notice of Application

A legal document required by the Supreme Court Family Rules to bring an interim application, setting out the relief claimed by the applicant, the grounds on which that relief is claimed, and the date on which the application will be heard. See "applicant," "grounds," "interim application" and "relief."

Notice of Family Claim

A legal document required by the Supreme Court Family Rules to begin a court proceeding, setting out the relief claimed by the claimant and the grounds on which that relief is claimed. See "action," "claim," "claimant," "pleadings" and "relief."

Notice of Hearing

A legal document required by the Supreme Court Family Rules that fixes the date for the hearing of a Petition. See "hearing" and "Petition."

O

oath

In law, a guarantee of the truth of a statement secured by one's faith in a god, and the prospect of torment in the afterlife in the event the promise is falsely made. People making affidavits and giving oral evidence in court will often give their evidence under oath. See "affidavit," "affirm," "perjury" and "witness."

obligation

A duty, whether contractual, moral, or legal in origin, to do or not do something. See "duty."

obstruction of justice

Doing a thing or not doing a thing with the intention or effect of hindering the proper administration of justice. See "contempt of court."

Offence Act

Provincial legislation that sets out the consequences for committing an offence under provincial laws, and the process by which a complaint that someone has committed a provincial offence is made and heard.

offer

In contract law, the expression, either orally or in writing, of a willingness to be bound by a proposed agreement, contract, or settlement. See "offer to settle."

offer to settle

A proposal made by one party to the other, prior to the trial of a court proceeding (or its conclusion) or the hearing of an application, setting out the terms on which the party is prepared to settle the trial or application. Offers to settle can have important consequences with respect to costs if the offer is close to what the judge decides following the trial or hearing, but must be clear and precise, and contain certain language required by the Supreme Court Family Rules. See "costs."

officer of the court

Any official of the court, including court clerks, sheriffs, lawyers and judges.

onus

The obligation of a party to prove their case; the burden of proof. The onus usually lies on the party who makes a claim, although in certain circumstances this burden is reversed, usually by operation of a statute.

omission

In law, a failure to do something, whether the failure was intentional or unintentional.

opinion

In law, (1) a lawyer's advice to their client, (2) a lawyer's analysis of a legal problem, or (3) the views of an expert on an issue in an action. See "expert evidence" and "opinion evidence."

opinion evidence

Evidence given orally at trial or in writing by an affidavit concerning a witness' convictions, feelings, or views on something. Opinion evidence is inadmissible except when the opinion is offered by an expert on a subject within their expertise. See "affidavit," "evidence," "expert" and "witness."

order

A mandatory direction of the court that is binding and enforceable upon the parties to a court proceeding. An "interim order" is a temporary order made following the hearing of an interim application. A "final order" is a

permanent order, made following the trial of the court proceeding or the parties' settlement, following which the only recourse open to a dissatisfied party is to appeal. Failing to abide by the terms of an order may constitute contempt of court. See "appeal," "consent order," "contempt of court," "decision" and "declaration."

ordinary service

Sending legal documents to a party at that party's "address for service," usually by mail, fax, or email. Certain documents, like a Notice of Family Claim, must be served on the other party by personal service. Most other documents may be served by ordinary service. See also "address for service" and "personal service."

ownership

A legal right to have and use a thing that is enforceable in court. See "possession."

P

paramountcy, doctrine of

In constitutional law, the rule that a federal law on a subject is superior to and takes precedence over a provincial law on the same subject where it is impossible to comply with both laws. See "act" and "constitution."

parens patriae jurisdiction

A Latin phrase meaning "parent of the country" and an English word. Refers to the court's inherent jurisdiction to deal with issues concerning persons under a legal disability, including children. See "children," "disability," "inherent jurisdiction" and "jurisdiction."

parent

In family law, the natural or adoptive father or mother of a child; may also include stepparents, depending on the circumstances and the applicable legislation; may include the donors of eggs or sperm and surrogate mothers, depending on the circumstances and the terms of any assisted reproduction agreement. See "adoptive parent," "assisted reproduction," "natural parent" and "stepparent."

parental responsibilities

A term under the *Family Law Act* which describes the various rights, duties, and responsibilities exercised by guardians in the care, upbringing, and management of the children in their care, including determining the child's education, diet, religious instruction or lack thereof, medical care, linguistic and cultural instruction, and so forth. See "decision-making responsibility" and "guardian."

parenting arrangements

A term under the *Family Law Act* which describes the arrangements for parental responsibilities and parenting time among guardians, made in an order or agreement. "Parenting arrangements" does not include contact. See "contact," "guardian," "parental responsibilities" and "parenting time."

parenting coordination

A child-focused dispute resolution process used to resolve disputes about parenting arrangements and the implementation of a parenting plan set out in a final order or agreement. See "alternative dispute resolution" and "parenting coordinator."

parenting coordinator

A lawyer or mental health professional with special training in the mediation and arbitration of family law disputes, family dynamics, and child developmental psychology who meets the training and experience requirements set out in the provincial Family Law Act Regulation. See "arbitration" and "mediation."

parenting order

A term under the *Divorce Act* referring to orders concerning decision-making responsibility and parenting time. See "decision-making responsibility" and "parenting time."

parenting time

Under the *Family Law Act,* a term which describes the time a guardian has with a child and during which is responsible for the day-to-day care of the child. Under the *Divorce Act,* a term which describes the time a spouse has with a child and during which is responsible for the day-to-day care of the child. See "guardian" and "spouse."

parol evidence

Oral evidence given in court, as opposed to written or physical evidence. See "evidence" and "witness."

partition

In law, the division of the ownership of a piece of real property between two or more people. See "real property."

party

In law, a person named as an applicant, claimant, respondent, or third party in a court proceeding; someone asserting a claim in a court proceeding or against whom a claim has been brought. See "action" and "litigant."

paternity

Fatherhood of a child, often contested by persons seeking to avoid a child support obligation. See "bastard" and "child support."

paternity test

A scientific test performed to determine the biological parentage of a child, usually by the genetic testing of the blood or saliva of the alleged parents and the child.

peace officer

A person having a duty to enforce the law as a result of their position or employment, including municipal police officers as well as RCMP officers, sheriffs, customs officers and mayors, among others.

pecuniary

Relating to money, which is exactly what someone who is "impecunious" doesn't have a great deal of. See "indigent."

peremptory

Something which is fixed, mandatory, or absolute. A judge, associate judge, or arbitrator might order that a hearing date be "peremptory on the respondent", for example, if the respondent is missing timelines, asking for late adjournments, or otherwise delaying steps in litigation in a way that risks (or has already resulted in) the court and the other parties wasting time and costs. A peremptory hearing date is a date on which a hearing will proceed without any further excuses, adjournments, or delay. An order that an April court date be adjourned to July on the condition that the new date be *peremptory* on a party will make it very hard for that party to request a further delay without convincing the judge that they are not trying to manipulate the system by orchestrating another delay.

perfected

In contract law, finished, legally complete, and enforceable; executed. A "perfected" agreement is one that has been dated and signed by all parties in the presence of one or more witnesses.

performance

In contract law, the fulfillment of an obligation or duty arising from a contract.

perjury

Intentionally lying to the court while giving evidence under oath or affirmation, including lying in a document made on oath or affirmation, such as an affidavit or a Financial Statement. This is a criminal offence and may also be addressed by the court through its powers to punish for contempt. See "contempt of court."

personal property

Chattels, goods, money; property other than real property. See "chattel" and "real property."

personal service

In law, the delivery of a legal document to a party in a court proceeding in a manner which complies with the rules of court, usually by physically handing the document to the party and verifying their identity. Personal service is usually required for the proper delivery of the pleadings that are used to start a proceeding to ensure that the party is given proper notice of the proceeding and the opportunity to mount a defence. See also "ordinary service," "pleadings" and "service, substituted."

Petition

A court form required by the Supreme Court Family Rules used to commence court proceedings that can be dealt with in the manner of an application, without the need for a protracted process of disclosure and discovery. See "action," "application," "disclosure" and "discovery."

petition respondent

The person against whom a court proceeding has been started by Petition. See "Petition."

petitioner

A person starting a court proceeding by Petition. See "Petition."

PID

The short form for "Parcel Identifier Description," a unique nine-digit number assigned by the Land Title and Survey Authority assigned to each parcel of real property in the province. See "Land Title and Survey Authority" and "real property."

platypus

A duck-billed egg-laying aquatic mammal, the males of which are venomous.

pleading

A legal document setting out either a claim or a defence to a claim prepared at or following the start of a court proceeding. In the Provincial Court, the pleadings are the Application to Obtain an Order and Reply. In the Supreme Court, the pleadings include the Notice of Family Claim, Response to Family Claim, Counterclaim, Petition, and Response to Petition. See "action," "claim" and "Counterclaim."

polyamory

Concurrent relationships between more than two people that may be emotional or sexual in nature, or both, and may involve different expectations of permanence and fidelity. Polyamorous relationships are not illegal, as long as any given member of the relationship is not married to more than one other person. See "polygamy," which is illegal.

polygamy

The act of going through a marriage ceremony with a person who is already married to more than two other persons or performing a marriage ceremony between three or more persons. This is a criminal offence in Canada, under section 293 of the *Criminal Code*, although one that is rarely enforced. In family law, all marriages subsequent to the first valid, subsisting marriage are void *ab initio*. See "ab initio," "bigamy," and "marriage, validity of."

possession

In law, the right to have the control and use of a thing. One can have a right to the possession of a thing without owning it, as in the case of a car lease, or ownership without possession, as in the case of a landlord who rents an apartment suite. See "ownership."

preamble

An introductory statement in legislation, an order or an agreement, usually describing the purpose of or facts behind the legislation, order or agreement. Preambles are normally used to provide a guide to the interpretation of the rest of the document. See "act" and "family law agreements."

precedent

(1) A historical decision of the courts, or (2) the principle that such historic decisions of the court are binding on subsequent judges hearing cases of a similar nature or with similar circumstances. (3) The term may also refer to templates or sample documents used to draft new documents. See "common law."

premises

(1) In real property law, a piece of property and a building situated on it, usually including the area of the property surrounding a building on that property. (2) In law generally, a premise is an assumption that founds a logical argument. See "argument" and "real property."

prima facie

A Latin phrase meaning at "first face." Refers to a fact or circumstance that is obvious at first glance or that is easily proven.

privilege

In law, (1) the duty a lawyer has to keep their client's information confidential, including communications between the lawyer and client and advice given to the client, or (2) the client's right to have their confidential communications kept secret and protected from disclosure. See "lawyer."

probate

The process of checking the validity of a will, distributing a dead person's estate, and settling their debts according to the instructions set out in that person's will. See "estate" and "will."

pro bono

The short form of the Latin phrase *pro bono publico*, meaning "for the public good." Usually refers to those situations in which a lawyer provides legal services without charge. See "lawyer."

proceeding

In law, (1) the whole of the conduct of a court proceeding, from beginning to end, and the steps in between, may also be used to refer to (2) a specific hearing or trial. See "action."

proof

(1) Information which establishes or tends to establish the truth of a fact, or (2) the conclusion of a logical argument. See "evidence" and "premises."

property

Something which can be owned. See "chattels" and "real property."

protection order

An order available under the *Family Law Act* for the protection of a person at risk of family violence. Protection orders include orders restraining someone from harassing, contacting, or stalking a person, as well as orders restraining someone from going to a person's home, place of employment, or school. See "application," "ex parte" and "restraining order."

Provincial Court

A court established and staffed by the provincial government, which includes Small Claims Court, Youth Court, and Family Court. The Provincial Court is the lowest level of court in British Columbia and is restricted in the sorts of matters it can deal with. It is, however, the most accessible of the two trial courts and no fees are charged to begin or defend a family law proceeding. The Family Court of the Provincial Court cannot deal with the division of family property or any claims under the *Divorce Act*. See "*Divorce Act*," "judge" and "jurisdiction."

Q

QC

The abbreviation of "Queen's Counsel." Under the reign of Her Majesty Queen Elizabeth II, QC was an honour often, but not invariably, granted to lawyers of particular excellence, and could also be granted for other reasons such as service to the legal community, the public or a political party. Since the passing of Her Majesty and the succession of His Majesty King Charles III, the recipients of this honour, past and present, are called King's Counsel, abbreviated as KC.

quantum meruit

A Latin phrase meaning "the amount deserved." Refers to payment for a service according to the amount deserved for the performance of the service, often calculated by an hourly wage.

quantum valebant

A Latin phrase meaning "the amount worth." Refers to the payment for a service according to the value or benefit of the service received.

quash

To set aside or vacate an order, direction, decision or judgment. See "action," "dismiss" and "order."

question of fact

An issue arising where the parties disagree about a fact relevant to a court proceeding, when only one party can be right. A court's decisions about the facts of a case are called the court's findings of fact. See "finding of fact."

question of law

An issue about which law should be applied to determine a court proceeding or about how the law should be applied in a proceeding. A court's decision about which law applies or how it should be applied is a finding of law. See "finding of law."

quid pro quo

A Latin phrase meaning "this for that." Refers to a benefit offered or owing in exchange for a benefit received, such as one government's announcement of the investigation of a political rival in exchange from the release of funding by another government. See "contract law."

R

real property

A parcel of land including any buildings on that land. See "chattel," "ownership" and "possession."

reapportion

In family law, the unequal division of family property or family debt between spouses. See "apportion," "family debt" and "family property."

rebut

In law, to reply to an argument, a statement of fact, or a legal presumption by presenting argument or evidence to the contrary, or evidence which tends to disturb a presumption.

reconciliation

In family law, the resumption of cohabitation between married spouses or unmarried spouses with the intention of attempting to salvage their relationship and making another go of it. See "maried spouse," "separation" and "unmarried spouse."

registrar

An officer of the court with the power to make certain decisions, including the settlement of a lawyer's bill, a party's costs of a court proceeding, and settling the form of an order. An officer of the court charged with the responsibility of reviewing and approving certain documents submitted to the court, such as pleadings. See "jurisdiction" and "pleadings."

registry

(1) A central office, located in each judicial district, at which the court files for each court proceeding in that district are maintained, and at which legal documents can be filed, searched, and reviewed, or (2) a courthouse.

regulations

A kind of legislation that provides supplemental rules for a particular act. Regulations are created and amended by the government, not by the legislature, and as a result the legislature has no say in how or what regulations are imposed by government. See "act."

rehearing

A reconsideration or retrial of a court proceeding or an application, sometimes based on the evidence which was presented at the first hearing or trial, sometimes based on new evidence. See "action," "application," "de novo" and "hearing."

release

In family law, a legal document in which a person gives up a right or a claim, or the entitlement to enforce a right or advance a claim; a waiver. Releases are usually signed following the settlement of a court proceeding or legal dispute. See "action" and "claim."

relief

In law, an order sought by a party to a court proceeding or application, usually as described in their pleadings. Where more than one order or type of order is sought, each order sought is called a "head of relief." See "action," "application" and "pleadings."

relocate

Under the *Family Law Act* and the *Divorce Act*, a term referring to a change in the place of residence of a person or a child that is likely to have a significant impact on the child's relationships with certain other people with important roles in the child's life.

reply

In law, an answer or rebuttal to a claim made or a defence raised by the other party to a court proceeding or legal dispute. See "action," "claim," "defence" and "rebut."

Reply

A legal document required by the Provincial Court Family Rules to respond to a claim made in an applicant's Application to Obtain an Order. See "applicant," "Application to Obtain an Order," "claim" and "Counterclaim."

representation

In contract law, a promise made by someone about a certain state of affairs, like "the plumbing was replaced last year" or "I had a vasectomy two years ago." See "misrepresentation."

rescind

To terminate or revoke a contract or agreement. See "contract" and "family law agreements."

residence

The geographic place where a person permanently lives. This is different from a person's "domicile" in that a person's residence is more fixed and less changeable in nature. A person's residence can also have an impact on a court's authority to hear and decide a legal action. See "domicile" and "jurisdiction."

res judicata

A Latin phrase meaning "a thing decided." A final order, unlike an interim order, permanently concludes a legal dispute and usually a court proceeding, unless it is appealed; the final order makes the legal issues raised in the proceeding *res judicata*. See "appeal" and "final order."

Response to Family Claim

A legal document required by the Supreme Court Family Rules in which the respondent to a court proceeding sets out their reply to the claimant's claim and the grounds for their reply. See "action," claim," "Notice of Family Claim" and "pleadings."

respondent

The person against whom a claim has been brought by Notice of Family Claim. See “application” and “Notice of Family Claim."

restraining order

An order which forbids a party from doing or not doing a thing. In family law, common restraining orders include stopping someone from travelling out of an area with the children, stopping someone from disposing of property, and stopping someone from harassing someone else. See "ex parte," "order" and "protection order."

resulting trust

In family law, the finding by a court that a party holds all or a part of their property in trust for someone else as a result of the parties' intention to make a trust; a trust relationship inferred by operation of law. See "constructive trust" and "trust."

retainer

(1) The act of hiring of lawyer, (2) the money paid to a lawyer to secure their services, or (3) the terms and extent of a lawyer's services on behalf of a client.

reversal

In law, usually refers to a decision of an appeal court overturning the decision of a lower court on a particular issue. The lower court's decision is said to have been "reversed on appeal." See "appeal" and "common law."

review

In law, the re-examination of a term of an order or agreement, usually to determine whether the term remains fair and appropriate in light of the circumstances prevailing at the time of the review. In family law, particularly the review of an order or agreement provided for the payment of spousal support. See "de novo," "family law agreements," "order" and "spousal support."

right of action

A right to claim relief resulting from a person's actions or lack of action, also called a "cause of action." For example, a spouse's adultery may give rise to a right of action allowing the other spouse to sue for a divorce order.

rules of court

The mandatory guidelines governing the court process and the conduct of litigation generally. Each court has its own rules of court.

S

sale

An agreement to transfer the ownership of property from one person to another in exchange for the reciprocal transfer of something else, usually money. See "agreement."

section 7 expenses

Section 7 of the Child Support Guidelines deals with children's "special or extraordinary expenses". These costs are often referred to as "section 7 expenses," and include expenses such as the cost of daycare, orthodontic work and extracurricular activities. Both parents are usually required to contribute to the cost of section 7 expenses, and these contributions are paid in addition to child support. See "child support" and "Child Support Guidelines."

self-represented litigant

A party to a court proceeding who is not represented by a lawyer and acts on their own behalf; also called a lay litigant, a litigant without counsel or a *pro se* litigant. See "action," "lawyer" and "litigant."

separation

In family law, the decision of one or both parties to terminate a married or unmarried relationship; the act of one person leaving the family home to live somewhere else with the intention of terminating the relationship. There is no such thing as a "legal separation." In general, one separates by simply moving out, however, it is possible to be separated but still live under the same roof. See "divorce, grounds of."

separation agreement

A contract intended to resolve all or some of the legal issues arising from the breakdown of a relationship and intended to guide the parties in their dealings with one another into the future. A typical separation agreement is signed following a settlement reached through negotiation and deals with issues including guardianship, parenting arrangements, contact, support, the division of property, and the division of debt. See "family law agreements."

service

In law, to formally deliver documents to a person in a manner that complies with the rules of court. Service may be ordinary (mailed or delivered to a litigant's address for service), personal (hand-delivered to a person), or substituted (performed in a way other than the rules normally require). See "address for delivery," "ordinary service," "personal service" and "substituted service."

service *ex juris*

An English word combined with a Latin phrase meaning service "outside the jurisdiction;" refers to service of legal documents on someone living outside of British Columbia in the manner required by the rules of court or by a court order. See "personal service."

settlement

A resolution of one or more issues in a court proceeding or legal dispute with the agreement of the parties to the proceeding or dispute, usually recorded in a written agreement or in an order that all parties agree the court should make. A court proceeding can be settled at any time before the conclusion of trial. See "action," "consent order," "family law agreements" and "offer."

shared custody

A term used by the Child Support Guidelines to describe circumstances in which a child's time is shared equally or almost-equally between their parents or guardians, often resulting in an amount of support that is different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

sine die

A Latin phrase meaning "without a day." An application adjourned *sine die* has been adjourned without a specific date being set for the hearing to resume, often in the expectation that it will never need to be set for hearing. See "adjournment" and "application."

special costs

Special costs, unlike ordinary costs, are intended tp approximate the fees charged by a lawyer. They are awarded by the court, usually in exceptional circumstances, to address a party's misconduct in the course of a proceeding, especially where the party has abused the court’s process, mislead the court, or persistently breached of the rules of court. See "bad faith," "costs" and "frivolous and vexatious conduct."

split custody

A term used by the Child Support Guidelines to describe circumstances where each parent or guardian has one or more children living with them most of the time. This results in an amount of support that is different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

spousal support

A payment made by one spouse to the other spouse to help with the recipient's day-to-day living expenses or to compensate the recipient for the financial choices the spouses made during the relationship.

Spousal Support Advisory Guidelines

An academic paper released by the Department of Justice that describes a variety of mathematical formulas that can be applied to determine how much spousal support should be paid and how long spousal support should be paid for, once a spouse is found to be entitled to receive support. The Advisory Guidelines are not a law, but are nonetheless very useful.

spouse

Under the *Divorce Act*, either of two people who are married to one another, whether of the same or opposite genders. Under the *Family Law Act*, spouse includes married spouses, unmarried parties who have lived together in a marriage-like relationship for at least two years, and, for all purposes of the act other than the division of property or debt, unmarried parties who have lived together for less than two years and have had a child together. See "marriage" and "marriage-like relationship."

squid *pro quo*

The exchange of cephalopods for goods or services of value.

standing

The right of a person to bring a particular claim under a particular act before a particular court. In most cases, someone who does not have a direct interest in a dispute will lack standing to be a party in a proceeding.

stare decisis

A Latin phrase meaning "stand by the thing decided." Refers to the common law principle that courts are obliged to follow the decisions of the courts before them, known as "precedent." See "common law" and "precedent."

status quo

A Latin phrase meaning "the state that was." Refers to whatever circumstances or conditions previously existed, or which presently exist and have existed in the same way for some time.

statute

An act, legislation; a written law made by a government.

statutory declaration

A legal document in which a person makes a written statement confirming they are doing something or declaring something is true for the purposes of satisfying some legal requirement, usually outside a court process, and usually made on oath or affirmation. See "act," "affidavit," "affirm" and "oath."

stepparent

The spouse of a person who has children from a previous relationship. A stepparent may qualify as a "parent" for the purposes of issues relating to child support and decisions about the care and control of the stepchildren under both the *Divorce Act* and the *Family Law Act*. See "parent" and "spouse."

style of cause

The information at the top of all court forms in a proceeding, including the file number, the name of the registry the proceeding is filed in, the name of the court, and the parties' names.

subpoena

A legal document, issued by the court or by a party pursuant to the rules of court, which compels a person to attend court to give evidence as a witness, and, sometimes, to produce a specific document. Failure to obey a subpoena may constitute contempt of court. See "contempt of court," "evidence" and "witness."

substantive

You probably seeing this word used in terms like *substantive law*, *substantive issues*, or *substantive orders*, and it is used to identify aspects of these things (be they laws, legal issues, or court orders) that deal with the legal rights and duties of the parties involved in a case. Substantive law defines and regulates the rights and obligations of individuals, as opposed to procedural law, which outlines the methods and means by which substantive law is made and administered. In family law, substantive issues often involve matters such as guardianship and parenting arrangements relating to children, support, and the division of property. A substantive order from a judge will be a decision about a substantive issue, versus a procedural order which will be about how steps in the litigation should.

substituted service

Personal service performed in a way other than required by the rules of court, as authorized by the court. If a respondent cannot be served for any reason, such as if they are hiding or refusing service, the court may allow a claimant to serve the other party "substitutionally" by means such as placing an ad in the legal notices section of a newspaper's classified ads or posting the document in the court registry. See "personal service."

suit

(1) In law, a court proceeding, a lawsuit, a legal action, a case, or (2) a claimant's claim against a respondent. (3) In fashion, menswear designed to inflict maximum discomfort at maximum cost. See "action."

support order

A term under the *Divorce Act* referring to an order for child support or spousal support. See "child support" and "spousal support."

Supreme Court

Normally referred to as the "Supreme Court of British Columbia," this court hears most of the trials in this province. The Supreme Court is a court of inherent jurisdiction and has no limits on the sorts of claims it can hear or on the sorts of orders it can make. Decisions of the Provincial Court are appealed to the Supreme Court; decisions of the Supreme Court are appealed to the Court of Appeal. See "Court of Appeal," "jurisdiction," "Provincial Court" and "Supreme Court of Canada."

Supreme Court of Canada

The highest level of court in Canada. This court hears appeals from the decisions of the Federal Court of Appeal and the provincial courts of appeal, including the Court of Appeal for British Columbia. There is no court to appeal to beyond this court. See "Court of Appeal" and "Supreme Court."

T

table amount

The amount of child support payable under the Child Support Guidelines tables. See "child support" and "Child Support Guidelines."

tenancy in common

A kind of co-ownership of property in which two or more owners have distinct, separate shares in the common property. A tenant in common may choose to sell or mortgage their share of the property independently from other owners. See "joint tenancy."

term of art

A phrase that has a particular meaning in law that is usually distinct from the common English meaning of the phrase, like the phrase "term of art."

testator

In estate law, a person who has made a will. The feminine form of this word is "testatrix," which is pretty cool. See "estate" and "will."

testimony

Oral evidence given by a witness in court or in an affidavit under the witness's oath or affirmation as to the truth of the statement. See "affirm," "evidence," "oath" and "witness."

third party

A person named in a court proceeding or joined to a proceeding who is neither the claimant nor the respondent. A third party may be joined to a proceeding where the respondent believes that the person has or shares some responsibility for the cause of action. See "action," "cause of action" and "party."

time, calculation of

A particular method for counting time for a legal deadline, as required by the rules of court and the *Interpretation Act*. See "business days," "calendar days" and "clear days."

title

In law, a document demonstrating ownership of a thing. See "ownership."

transfer

In property law, the act of an owner of a thing giving ownership of that thing to another person, usually in exchange for money or other property in the case of a sale, or in exchange for other rights in the case of a family law agreement. See "family law agreements," "ownership" and "sale."

trial

The testing of the claims in a court proceeding at a formal hearing before a judge with the jurisdiction to hear the proceeding. The parties present their evidence and arguments to the judge, who then makes a decision resolving the parties' claims against one another that is final and binding on the parties unless successfully appealed. See "action," "appeal," "argument," "claim," "evidence" and "jurisdiction."

trust

In law, a form of possession of property in which a "trustee" keeps and manages property for the benefit of another person, the "beneficiary," without owning that property and usually without acquiring an interest in that property other than as payment for their services. The trustee holds the property *in trust* for the beneficiary. See "constructive trust," "ownership," "possession" and "resulting trust."

trustee

A person who holds property in trust for the benefit of another person. See "trust."

U

undue hardship

In the context of family law, this phrase comes up in Child Support Guidelines as well as applications to waive court fees. The term "undue" essentially means excessive, exceptional, or disproportionate. for example, if someone would have to sacrifice a reasonable expense in their life in order to pay the amount in question, this would be an *undue hardship*. In the Child Support Guidelines this term describes circumstances when payment of the table amount of child support would cause financial difficulty for either the payor or the recipient of support, potentially justifying an award of support in an amount different than the table amount. See "child support," "Child Support Guidelines" and "table amount."

unjust enrichment

A legal remedy when money, services, or other benefits are unfairly received by one person at a corresponding loss to the person providing the money, services or benefits. See "constructive trust."

unlawful

Acts or omissions that are contrary to legislation or the common law. See "lawful."

unmarried spouse

Someone who is a spouse by the operation of a statute. Under the *Family Law Act*, unmarried spouses are people who have lived together in a marriage-like relationship for at least two years, or, for all purposes of the act other than the division of property or debt, who have lived together for less than two years but have had a child together. See "marriage-like relationship," "marriage" and "married spouse."

V

vacate

In law, the decision of a court to set aside or quash an earlier decision or order, sometimes as if the original order had never been made, and other times effective only as of the date the order is vacated. See "appeal," "decision" and "quash."

variation order

A term under the *Divorce Act* referring to an order that a contact order, parenting orders, a child support order or a spousal support order be changed. See "vary."

variation proceeding

A court proceeding under the *Divorce Act* in which a spouse seeks to change a contact order, parenting orders, a child support order or a spousal support order. See "vary."

vary

In law, an order of a court cancelling or changing an earlier order of the court. See "order."

vendor

A seller of a thing. See "sale."

verdict

In law, a judge's conclusions after hearing the arguments and considering the evidence presented at a trial or an application; a judgment, the judge's reasons. Usually used in a criminal law context to indicate the judge's conclusions as to the guilt or innocence of an accused person. See "decision."

W

waive

To give up a right or entitlement, or the opportunity to assert a right or enforce an entitlement. See "release."

waste

In law, intentionally or unintentionally allowing the value of a piece of property to diminish through carelessness, neglect, or purposeful harm.

will-say statement

A written summary of the evidence a witness will give in their direct examination, often used in arbitration to shorten or eliminate the time required for the direct examination of the witness.

without prejudice

(1) In the context of negotiation or mediation, an arrangement that neither party will be able to use the content of the settlement discussions in a court proceeding. (2) In the context of litigation, an arrangement that a party's agreement to a certain order will not affect the legal rights of either party. (3) In the context of a settlement proposal, a stipulation that the contents of the proposal may not be shown to the court until the court proceeding has concluded. See "consent order," "mediation," "negotiation," "offer to settle" and "settlement."

witness

A person with direct, personal knowledge of facts and events relevant to the issues before the court; a person giving oral evidence in court on oath or affirmation as to the truth of the evidence given. See "affirm," "evidence," "oath" and "opinion evidence."

wrongful act

Acts or omissions that are contrary to legislation, the common law, or that are immoral or unethical even if not necessarily contrary to a legal principle. See "lawful."

WTF

A litigator's mnemonic device for the order of events at trial, short for "Witnesses Testify First." Usually followed by AGL, "Arguments Go Last."

Y

YOLO

In criminal law, an acronym referring to a youth's last offence before turning 18, the age at which the federal *Youth Criminal Justice Act*, and the mercies it provides, ceases to apply. Short for "Young Offender's Last Offence."

youth

In law, in British Columbia a person under the age of 19.

yurt

A circular tent of felt or skins used by the nomadic tribespeople of Mongolia and Turkey.

Z

zealous witness

A term used to describe a witness who displays an obviously partisan attitude favouring a specific party.

zygostates

In law, an officer appointed to resolve disagreements about the weight of money.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Nate Russell, 14 February 2024.

References

[1] https://family.legalaid.bc.ca/glossary
[2] https://en.wikipedia.org/wiki/List_of_Latin_legal_terms

Helpful Guides & Common Questions

How Do I Get Married in British Columbia?

Get a marriage licence

First, you have to get a marriage licence. Either you or your future spouse must apply in person to the marriage licence issuer in your neighbourhood. (The Vital Statistics Agency [5] offers a convenient search tool [1] to help you find a marriage licence issuer near you.) You'll have to provide government-issued photo identification, pay a fee of about $100, and supply the following information:

- Your full name, address, date of birth, and place of birth.
- Your future spouse's full name, date of birth, and place of birth.
- Your present marital status (never married, widowed, divorced).
- Your future spouse's present marital status.

If you or your future spouse were divorced within the last 31 days, you'll also have to provide:

- Proof of your divorce (either the divorce order or a certificate of divorce).

If you or your future spouse are younger than age 19, you'll also have to have the consent of the parent of the minor. The marriage licence issuer will have the forms you'll need. No one under the age of 16 can be married without a court order.

You don't have to be a resident of British Columbia to get married here. Blood tests are not required.

Remember that a marriage licence is only valid for three months from the date of issue. If your marriage ceremony doesn't happen within those three months, you'll have to reapply for another one.

Get married

Next, you need to get married! There are two types of marriage ceremony to choose from, civil and religious. Civil ceremonies are performed by marriage commissioners, officials registered with the Vital Statistics Agency. Religious ceremonies are performed by religious officials such as ministers, rabbis, imams, priests, and so forth; however, the religious official must be registered with the Vital Statistics Agency for the marriage to be valid.

Whichever sort of marriage ceremony you're planning, your marriage must be witnessed by two people who are at least 19 years of age or older.

If you're planning on a civil ceremony, you'll need to book your marriage commissioner right away. It may be extraordinarily difficult to track someone down who's available at the last minute. The fee your commissioner will charge is $75, plus other costs for expenses like parking and transportation. The nice folks at the Vital Statistics Agency [2] have a search tool [3] to help you find a marriage commissioner.

Register your marriage

The marriage commissioner or religious official who conducts the ceremony will help you complete a Marriage Registration Form. This form must be sent, within 48 hours of the ceremony, to the Vital Statistics Agency for registration. The person who conducts your ceremony will normally take care of this for you.

The Vital Statistics Agency will send you a spectacularly ugly certificate of marriage, which will look something like this:


CANADA
BRITISH COLUMBIA

CERTIFICATE OF MARRIAGE

PROVINCE OF BRITISH COLUMBIA
Vital Statistics Agency

69040017

This is to certify that the following is an extract from the registration of the marriage record on file with the Vital Statistics Agency, Victoria, British Columbia

Name	BRYCE KEITH LENIUS	Sex	MALE
Place of Birth	CALIFORNIA, USA	Date of Birth	FEB 14, 1957
Name	SANDRA LEE MASON	Sex	FEMALE
Place of Birth	BRITISH COLUMBIA, CANADA	Date of Birth	JUL 19, 1954
Date of Marriage	DEC 31, 1982		
Place of Marriage	QUALICUM BEACH		
Registration Date	DEC 31, 1982	Registration No.	1982-59-098365

Given under my hand at Victoria, British Columbia
this 05 day of FEB 2010

Specimen

Jack Shewchuk
Chief Executive Officer
Vital Statistics Agency

This isn't something you're going to want to hang on the wall. It is, however, something you should hang onto, in case you need proof of your marriage or want to apply for a divorce.

The person who conducts your ceremony may provide you with a document confirming your marriage. This can be used to prove that you are married before your marriage is registered with the Vital Statistics Agency and you receive your government-issued marriage certificate.

Changing your name

It is not necessary that either you or your spouse change your surnames after marriage, but it is your right to change your surname to your spouse's surname if you wish. There will be no official change of name — or an amendment to your birth certificate, for that matter — but it is perfectly legal to use your spouse's surname without an official name change.

If you want a legal change of name, you must apply to change your name through the Vital Statistics Agency under the *Name Act*. However, as long as you don't legally change your name, you can revert to your old surname whenever you wish.

If you have decided to have a hyphenated surname following your marriage, you must apply for a legal change of name or you will not be able to obtain ID in the new name.

You can find out more about changing your name in the chapter Overlapping Legal Issues and Family Law within the section Naming and Changes of Name.

For more information

You can find out more about the laws on marriage in the chapter Family Relationships, within the section Marriage & Married Spouses.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Yun Chen, 24 October 2023.

References

[1] https://www.health.gov.bc.ca/cgi-bin/vs/marriage_offices.cgi
[2] http://www.vs.gov.bc.ca
[3] http://www.vs.gov.bc.ca/cgi-bin/search/marriage_commissioners.cgi

How Do I Prepare for Separation?

It may seem a bit morbid and ghoulish to "prepare" for your separation, but a little bit of planning on your part can help you avoid problems down the road. These tips are intended to help ensure that you know exactly who has what, who owes what, and to whom the debts are owed.

Family property, family debts and excluded property

Take a careful, but not too obvious, tally of what each of you owns. This might be difficult if you and your spouse keep separate bank accounts and maintain your own investments, but make your best efforts. A list of your spouse's RRSPs, stocks, investments, bonds, GICs, cars, motorcycles, boats, ATVs, insurance policies, properties, and bank accounts may prove to be extremely useful.

One less obvious tip is to keep a record of the names of the financial institutions that are sending your spouse mail. You don't even need to open the envelope, just record the name and address. If your family has a safety deposit box, you should go to it and make a list of the contents. Make a list of the more valuable items in the family home.

Next, you should make your best efforts to find out what property you owned and what debts you were responsible for when you and your spouse began to live together or got married, whichever was earlier. The online statements most banks provide don't go back more than two or three years, so you may have to dig into your paper files or think about ordering old statements from your banks and other financial institutions.

While you are preparing this tally, do not ever open any mail or other correspondence that belongs to your spouse unless you have their permission to do so. Recording the addresses and information on the outside of any envelope they receive is fine, as anybody can see that. But intruding on your spouse's privacy is not a good idea, even if you are thinking of separating.

New debts

Once you've decided that you're going to separate, stop involving yourself in shared debts. Don't sign any new credit card or loan applications, and especially don't sign any blank documents!

New property

Keep track of the money and property coming into the household. Make sure you know who bought it, why it was bought, and with what money it was bought! If you have recently or are about to receive a personal gift, like an inheritance, keep it separate from the family finances.

Personal matters

If you know you are going to separate, open a new bank account, in your own name, at a new bank, preferably a different one than your family uses. It's also a good idea for you to arrange for your personal mail to be sent elsewhere, like to a friend or a post-office box. You can file a notice of change of address with the post office and they will automatically redirect your mail for you. Finally, no matter how stressful your home situation is, don't quit work. You will, in all likelihood, need the income in the near future.

Leaving home

One word: *don't* — at least not just yet. Your situation may be difficult, perhaps even intolerable, but don't leave the family home until you've seen a lawyer, especially if you have children. You might find that living on your own is unmanageable; once you've left the family home it can be very difficult to get back in. Remember that you can be separated from your spouse and still live in the same home.

See a lawyer

Even before you've separated, it's usually a good idea to talk to a lawyer to get an idea of what your rights and duties are. Many lawyers will offer an initial interview at a flat or a lower rate. Use this opportunity to get the lawyer's opinion of your situation and an idea of what your options are.

Saving money for a lawyer

If you're worried about your spouse noticing from your credit card or bank statements that you've seen a lawyer, there's an easy way to save up enough for a small retainer fee or the cost of an initial interview with a lawyer. Each time you take out money to buy groceries or clothing, keep a small amount aside, in cash, and save it in a place your spouse won't easily find. If a store lets you take extra cash when you pay with your debit card, take out an amount that won't raise suspicion each time you go to that store. Many grocery stores and most provincial liquor stores will let you take extra cash out when you buy things.

It may take a while to save up enough money this way, but at least your spouse is less likely to find out.

For more information

You can find out more about separation in the chapter Separation and Getting Divorced within the section Separation.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, 19 October 2023.

How Do I Separate from My Spouse?

Separation isn't rocket science, whether you're married or not. You don't need any court papers or a written agreement to end the relationship, you don't need to see a lawyer or a judge, and there's no such thing as a "legal separation" in British Columbia.

A couple are separated once one or both spouses decides that the relationship is over, announces that decision to the other spouse, and ends the marriage-like aspects of their relationship, such as sleeping together, eating together, doing household chores for each other, and so forth.

You and your spouse do not have to both agree that the relationship is over to separate. That's a decision that only one of you needs to make to end the relationship.

Living together after separation

Most spouses separate when one spouse moves out. Moving out can sometimes be a problem, since living together is so cost-effective. When you're living under the same roof, there's only one mortgage or rent bill to pay, one hydro bill, one grocery bill, and one phone bill. When someone moves out, the same pool of income has to cover two rent bills, two hydro bills, two grocery bills, and two phone bills.

Because living in different homes can be so expensive, a lot of people decide to separate but remain living under the same roof. From the court's point of view, a married or unmarried couple can be separated but still live together as long as:

- you're not sleeping together,
- you're not having sex with each other,
- you each do your own chores (cooking your own meals, doing your own laundry, and so forth),
- at least one of your has announced the decision to separate to the other spouse, and
- you've stopped going to social functions together as a couple.

Proof of separation

Generally speaking, when someone says they separated from their spouse on a date, the court doesn't conduct an inquiry or look in any depth into whether or not someone communicated a clear and immediate intention to separate at that time.

However, proving the date of separation can be very important in terms of an entitlement to spousal support and dividing property and debt, and this can sometimes be a challenge. If this is going to be a problem, then the only sure way of proving when separation happened is the date that one spouse moves out. It's hard to argue about that. As an alternative, you might try writing a letter or sending an email announcing the separation to your spouse. Be sure to keep a copy.

Preparing for separation

See How Do I Prepare for Separation? for more information, including some helpful tips and tricks that could save you some grief down the road.

For more information

You can find out more about separation in the chapter Separating and Getting Divorced within the section Separation and the Law.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, September 18, 2023.

How Do I Find Out if I'm Divorced?

If you or your spouse has started a divorce action and you want to know whether or not your divorce order has gone through, just call the family registry of the courthouse that the action was started in. Ask them if your order has been approved yet, and, if not, when you can expect it to be approved.

If you and your spouse have been separated for a long time, and you want to find out whether your spouse ever applied for a divorce, contact the *Central Registry of Divorce Proceedings* [1] in Ottawa, Ontario. They're the folks who keep track of all Canadian divorce actions. You will need to complete the form located on their website [2] with the relevant details about you, your partner, and your relationship, and send it to:

> Central Registry of Divorce Proceedings
> Department of Justice Canada
> 284 Wellington Street
> Ottawa, ON K1A 0H8

If you ask for the information by telephone, make sure you have the following information at hand when you call:

- the full name and date of birth for both you and your former spouse, and
- the date you married.

You can find out more about divorce in the chapter Separating & Getting Divorced within the section Divorce and the Law on Getting Divorced.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 18, 2023.

References

[1] http://www.justice.gc.ca/eng/fl-df/divorce/crdp-bead.html
[2] http://www.justice.gc.ca/eng/fl-df/enforce-execution/self-meme.html

How Do I Get Divorced?

The only way to get divorced in Canada is by a Supreme Court order, and to get this order you have to start a court proceeding. (Only married spouses need to get divorced; the relationships of unmarried spouses are over when they separate.)

You must have lived in the province in which you are starting the court proceeding for at least one year before the Supreme Court in that province can issue you a divorce order. But once you've been in that province for at least a year, the court can issue an order for divorce no matter where you were married. You must start your court proceeding in the Supreme Court. Judges in the Provincial Court do not have the jurisdiction to issue orders for divorce.

The court proceeding can include other claims in addition to a divorce order. Typically people also ask for orders about the care of children, the payment of child support and spousal support, and the division of property and debt. It is a good idea for you and your spouse to reach an agreement about how you will divide your property before you apply for a divorce order. This is for two reasons:

1. Before you are divorced (and while you are still married spouses), you can take advantage of tax rules that allow spouses to share property as a result of separation, e.g. RRSP rollovers.
2. After you get a divorce order, and if you still have outstanding claims you want to make to divide property, you only have two years to file those claims.

A lot of people make efficient use of *uncontested divorce* applications, especially when they've resolved issues relating to children and money, they both live in the same province, and the only loose end is getting that divorce order. If this sounds like your situation, check out the Ministry of Attorney General's Online Divorce Assistant [26]. You can also visit Legal Aid BC's Family Law Website's helpful guides on doing your own uncontested divorce [1].

However, you'll be in for a fight if you and your spouse don't agree about the orders the court should make. Keep that in mind, as the following discussion assumes that the only order anyone is asking for is a divorce order.

Forms and documents involved

Note that only some of these forms will apply, and this will depend on whether there are children, and whether a sole or joint claim is involved.

- Marriage Certificate,
- Registration of Divorce Proceedings [2], which you fill out online then print to bring to the Supreme Court registry,
- Form F3 Notice of Family Claim or F1 Notice of Joint Family Claim, depending on whether you're filing jointly with your spouse, or on your own,
- Form F15 Affidavit of Personal Service, if you're doing it on your own since you need to prove your spouse has been served and has had the opportunity to respond,
- Form F35 Requisition (Divorce),
- Form F17 Requisition (General),
- Form F38 Affidavit Desk Order Divorce,
- Form F37 Child Support Affidavit, if applicable,
- Form F36 Certificate of Pleadings, and
- Form F52 Final Order.

Begin the court proceeding

You will need to file a Notice of Family Claim in Form F3, and attach Schedule 1. Schedule 1 gives the court the information it needs to make the divorce order. (A special Notice of Joint Family Claim in Form F1 is used when a couple is asking for the divorce together.) There is a $210 filing fee.

You will be required to file an original copy of your marriage certificate with your Notice of Family Claim. This is the ugly brown document you got from the government, not the flowery thing you received from your officiant. The Supreme Court will not accept a photocopy. If you cannot locate your original marriage certificate, you can obtain an original copy from BC's Vital Statistic Agency for $50 using their Online Certificate Ordering System [3].

You will also be required to fill out a Registration of Divorce Proceeding form. This form must be completed using the online form [4], printed off (do not complete it by hand), and submitted to the court registry with your Notice of Family Claim. The court staff will send this document with your original marriage certificate off to the Central Registry of Divorce Proceedings [1] in Ottawa.

Serve your spouse

Next, have your spouse personally served with a copy of the filed Notice of Family Claim. You can't do this yourself; you must get someone at least 19 years or older to do it for you. The person who serves your spouse, often called a *process server*, will need to swear an Affidavit of Personal Service in Form F15 to prove the time and fact that service was done. (Couples who are filing the Joint Notice of Family Claim together don't need to have anyone served.)

Wait

Your spouse has 30 days to defend your claim. What you hope is that your spouse won't file a Response to Family Claim or Counterclaim, because if this happens you're going to have to settle your differences or deal with a trial. (Couples who are filing the Joint Notice of Family Claim together don't need to wait.)

Apply for the divorce order

Once the 30 days are up, you will need to pay an $80 fee and file the following documents:

1. a Requisition in Form F35 asking for the divorce order,
2. a Requisition in Form F17 asking the court staff to search for a Response to Family Claim or Counterclaim,
3. the Affidavit of Personal Service your process server prepared,
4. a special affidavit in Form F38 giving the court the evidence it needs from you about the reason for your requested divorce, to make the divorce order,
5. if there are children, a Child Support Affidavit in Form F37 giving the court the evidence it needs from you to conclude that appropriate arrangements have been made for the support of the children (satisfactory *child support* payment arrangements in particular),
6. a blank Registrar's Certificate in Form F36, and
7. a draft divorce order in Form F52.

Couples who are filing the Joint Notice of Family Claim together can file these documents, without the Affidavit of Personal Service, as soon as they've filed their Notice of Family Claim.

Wait

It can take anywhere from 60 to 120 days for the court staff and a judge to process your divorce application. Start calling the court registry at the 60-day mark to see if your order is ready.

Pick up your divorce order

When your order is ready, head down to the court registry and pick it up. You must then send a copy of the order to your spouse. Congratulations! 31 days from the date the order is made, you'll be divorced. If you wish to obtain a Certificate of Divorce, you can request one in person at the registry where you filed your desk divorce and receive it for a $40 fee, or request and receive it by mail for $50.

For more information

The chapter on Separating and Getting Divorced within the section Divorce and the Law on Getting Divorced.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Shannon Beebe, 24 September, 2023.

References

[1] https://family.legalaid.bc.ca/separation-divorce/getting-a-divorce/do-your-own-uncontested-divorce
[2] https://www.justice.gc.ca/eng/fl-df/divorce/form-formulaire.html
[3] https://ecos.vs.gov.bc.ca/
[4] http://www.justice.gc.ca/eng/fl-df/divorce/pdf/form.pdf

How Do I Get my Certificate of Divorce?

You do not need a Certificate of Divorce to make your divorce “legal” or “official”. If you ever have to show legal proof of your divorce, you can use your divorce order. However, you can use the Certificate of Divorce to show legal proof of your divorce to third parties (for example, when you remarry) without giving away all the details in your divorce order. Some foreign jurisdictions may require a certificate if you are getting remarried.

When can I get my Certificate?

31 days after the divorce order is made, and the divorce has become final, it is possible to obtain a Certificate of Divorce — this is Supreme Court Family Form F56.

How can I apply for it?

There are a few different ways to apply. Note that there may be slight differences in process between different registries in BC, but the following generally applies:

In person — If you have a lawyer

The lawyer will go to the Supreme Court Registry [1] where the divorce is filed with:

- A copy of the divorce order (make a photocopy of the one you have and keep the original),
- A completed Requisition (Form F17) that specifies a *Certificate of Divorce* is required, and be sure to add a paragraph that "This requisition is supported by the Divorce Order dated ___",
- A completed Certificate of Divorce (Form F56), and
- $40 for each certificate.

In person — If you don't have a lawyer

You, or a friend on your behalf, can go in person to the Supreme Court Registry [1] where the divorce is filed with:

- Your court file number,
- A completed Requisition (Form F17 — some Registries may have this form available at the counter upon request) — that specifies a *Certificate of Divorce* is required, and be sure to add a paragraph that "This requisition is supported by the Divorce Order dated ___",
- $40 for each certificate. Cash, Interac, and personal cheques with 2 pieces of ID are accepted, and
- It is helpful if you have a copy of your Divorce Order, but it is not required. Providing a copy may expedite the court registry's ability to process your request. It is a good idea to bring government-issued photo ID, like your driver's license or passport.

Applying by snail mail

You can also make a written request by sending a letter to the Supreme Court Registry [1] where the divorce order is filed. Include with your letter:

- Your court file number (or the full names of both you and your ex-spouse as they appear on the Divorce Order) — the court file number is located at the top right of the Divorce Order,
- It is helpful if you include a copy of your Divorce Order, but not required. Providing a copy may expedite the court registry's ability to process your request,
- A self-addressed return envelope,
- Your telephone number, and

- A cheque or money order for $50 in Canadian dollars ($40 for each certificate + $10 mailing fee — if you want 2 certificates, you'd send $90) payable to the Minister of Finance. There is a $30 service fee for any dishonoured cheques.

Notes

Court file number

If you don't know where your divorce is filed or your court file number, call the Central Registry of Divorce Proceedings [1] at 613-957-4519 (or for the hearing impaired only — 1-800-267-7676) Monday to Friday, 9–4pm EST. They will be able to give you your file number and confirm the court registry location where your divorce is filed. You will have to tell them your date of birth and the ex-spouse's date of birth (or the date of marriage).

Copy of Divorce Order exception

If your divorce was finalized a long time ago (generally 15 years or longer), the Supreme Court Registry where your divorce order was issued may no longer hold the file. In this case, you may be required to obtain a copy of your old divorce order before applying for a Certificate of Divorce. You can request a copy of your divorce order from the website of the BC Archives [2] by completing their online Divorce Order Reproduction form [3].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 18, 2023.

References

[1] http://www.clicklaw.bc.ca/helpmap/service/1014
[2] https://royalbcmuseum.bc.ca/bcarchives/what-we-have/divorce-orders
[3] https://royalbcmuseum.bc.ca/divorce-reproduction-order-form

How Do I Get Out of Paying Child Support?

The answer is pretty simple most of the time: *you don't*.

Biological parents

The law in Canada is that a biological parent must pay child support when the child lives with the other parent most of the time.

Since child support is the right of the child, not the right of the parent, neither parent has the right or ability to bargain away child support in exchange for giving up, for example, the right to seek custody of, or access to, the child. Agreements like that are not upheld by the courts. It is the court's duty to ensure that after separation parents make appropriate financial arrangements for the children.

The duty to pay child support stems from the simple fact that both parents contributed some of their genes to make a baby, and that's something you just can't get out of. It's a biological fact that has nothing to do with the ages of the parents, their marital status, whether they lived together or not, or whether both parents have maintained or want to maintain a relationship with the child.

There are only two exceptions:

1. the child with your genes is born as a result of assisted reproduction and you are a donor — in this case, the donor is not, by reason only of the donation of their sperm or egg, the child's parent, or
2. someone else adopted the child with your genes.

If those two exceptions don't apply, the only way to get out of an obligation to pay child support is if:

- the child lives with you for the majority of the time, in which case the other parent will be required to pay child support to you, or
- you and the other parent have equal or close to equal parenting time with the child and both of you make the same income.

Stepparents

The *Divorce Act* and the *Family Law Act* both say that stepparents may be required to pay child support, but only if the parent and the stepparent separate.

Under the *Divorce Act*, this means someone who married a parent.

Under the *Family Law Act*, this means someone who married a parent, or lived in a marriage-like relationship for at least two years with a parent, and contributed to the support of that parent's child for at least one year.

The nice thing about being a stepparent is that the other biological parent's obligation to pay child support can be taken into account when the amount of the stepparent's child support payments is being figured out, which usually means that support will be paid in an amount less than what the Child Support Guidelines require.

You can find out more about the obligations of stepparents to pay child support in the chapter Child Support.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Get Out of Paying Spousal Support?

Unlike an obligation to support a child, there is no guaranteed obligation that one spouse must support the other. However, if you were in a relationship that qualifies as a spousal relationship, you must face the possibility that you might have to pay support when your relationship ends.

The *Divorce Act* deals only with married spouses.

The *Family Law Act* defines as spouse as including:

- married spouses,
- people who lived in a marriage-like relationship for at least two years, and
- people who lived in a marriage-like relationship for less than two years and have had a child together.

If you really want to get out of paying spousal support, the time to start planning is at the beginning of your relationship:

- Sign a cohabitation agreement (if you're not planning on getting married) or a marriage agreement (if you're getting married) that requires each of you to give up the right to make a claim for spousal support in the event that your relationship ends. Remember, this agreement must not only be fair at the time it is executed, it must also be fair at the time it comes into effect.

During the relationship, you can guard against causing or allowing your spouse to become financially dependent:

- Make sure that your spouse never leaves the paid work force.
- If you have a child together, make sure that you're the one who stays home to care for the baby or make sure that your spouse returns to work as soon as is humanly possible.
- Make sure that your spouse or partner never sacrifices a job opportunity to care for the family, such as passing up a promotion, going to part-time work, or leaving work altogether.

Spousal support may be payable whenever one spouse leaves a relationship at a financial disadvantage compared to the other spouse. As long as there is a difference in the parties' financial situations, there is a possibility that support will be paid.

There's a lot more information about the sorts of things the court will take into account in assessing a duty to pay support in the chapter Spousal Support.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Get Out of Sharing My Assets?

Married spouses and unmarried spouses

Presumption of shared property

Married spouses and unmarried couples who have lived together for at least two years are presumed to have a one-half interest in all property either or both of them acquired after the date the couple married or began to live together, whichever came first.

Excluded property

Certain property is excluded from the family property the spouses are expected to divide, including:

- the value of the property owned by each spouse on the date the couple married or began to live together, whichever came first,
- property bought with the property owned by each spouse on the date the couple married or began to live together,
- inheritances and gifts (provided that the gift was to the spouse only and not to the couple) received during the relationship,
- court awards for damages incurred prior to the relationship and insurance proceeds for pain and suffering (not wage loss) received during the relationship, and
- trusts to which the spouse did not contribute and which the spouse does not control.

Agreements

If you want to do better than this, you'll have to sign a marriage agreement or a cohabitation agreement at some point before or shortly after you marry or begin to live together. To ensure that agreement is enforceable, it is best practice to ensure both you and your spouse receive independent legal advice (ILA), and that you update the agreement any time you begin to depart from the terms of the agreement (for example, if you agreed to terms that assume no children, but you and your spouse later have kids).

Practical tips for managing assets in a relationship

If you don't want to spend the money getting an agreement drawn up, here are some other things that can help:

- When you begin to live together, take copies of the statements from all of your bank, investment, retirement, credit, and loan accounts, copies of your BC Assessments for all real property and staple them together and put them in a safety deposit box. This will help you to establish the value of the property you brought into the relationship.
- During your relationship, keep a careful record of what you buy with the property you brought into the relationship (so you can trace the excluded property that was used to buy new property during the relationship).
- During your relationship, keep records of the dates and values of any inheritances, gifts, insurance proceeds, or court awards that you receive.
- If you received a gift during the relationship, keep documents that proves the intention of the gift-giver (i.e. a letter, note, or electronic communication from the donor stating that the funds were a gift only to this particular person/spouse and not a gift to the couple, especially if the funds are then used to buy family property).
- Keep an eye on the debts your spouse incurs during the relationship.

Recent changes to law

In May 2023, the BC Government made updates to the *Family Law Act* that were intended to clarify how spouses can prove and trace their separate (excluded) property over time. For example, if you brought a home or bank account into the relationship and later added your spouse's name as a joint owner, that does not automatically mean your spouse is entitled to half. The judge will look at your intention at the time and whether you intended to gift that property to your spouse.

Court discretion in some cases

Under section 96 of the *Family Law Act*, if the court decides it would be *significantly unfair* not to divide up excluded property, the court has the power to do this. The factors the court will look at include how long the relationship lasted, and what the other spouse did to help with that property, but there are other factors that the court can turn to, and much of that is discretionary. A situation where things are *significantly unfair* is more likely in a relationship that has lasted longer than 20 years, a relationship where there are children, where there is any kind of verbal agreement about dividing the property someone now claims is excluded, and if there is insufficient income and family property available within the available *family property* pot to satisfy a spouse's entitlement to spousal support.

You can find out more about how married spouses and unmarried spouses divide property and debt in the chapter Property and Debt in Family Law Matters.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Shannon Beebe, September 24, 2023.

How Do I Start Negotiations with My Spouse?

Pick the right moment

When it comes to resolving issues like parenting arrangements, support obligations, property division, etc., negotiations give people the best chance of maintaining a functioning relationship. It's easiest to start negotiations when everyone's emotions are relatively calm.

For negotiation to work, both people must be able to listen and talk to one another with respect. Negotiations will not succeed if the wounds from the end of the relationship are still fresh. There are a few reasons for this:

- people who are angry aren't likely to be too accommodating and generally can't see reason even when it's staring them in the face,
- people who are upset and sad are likely to accept a bad deal, sometimes out of remorse and sometimes out of guilt, and
- people who are too stressed out are likely to accept a bad deal just to get everything over with.

When you've got the right moment, starting the process of negotiation can be as simple as calling your ex up and inviting them out for a cup of coffee at the local Tim Hortons:

> "Hey look, I think it's time that we sat down and started to talk about things. I know this has been a really hard time, and we also have some decisions to make."

Say whatever you want really, there's no perfect rule that will apply to every couple. Only you know how best to approach your ex. It might help to reassure your ex that you mean no harm:

> "I don't want to stop you from being a great mother/father, and I want to make sure you're there for the kids. We just need some ground rules about when we're each with the kids."
>
> "I'm not out to screw you over. I don't want your car or your grandmother's china collection, but we really need to talk about how we can fairly split our things up."
>
> "I want to help you and the kids get by, I know that your job doesn't pay enough. We have to discuss how I can pay for my place and my bills and how much you need. I've had a look at the Child Support Guidelines, and they say I should pay support at $325 per month. I'll give you $350."
>
> "This really isn't about you and it's not about me. It's about what will work best for the kids. We may not be partners anymore, but we're always going to be parents. I know that we both want what is best for the kids. With that goal in mind, I have faith that we can make it work."

Sometimes nothing seems to work. In cases like that, often all that helps is the passage of time. Some people need time to grieve and process their emotions as they move through this transition before they are ready to sit down and talk.

Starting the dialogue

When you and your ex are ready to start talking, start talking! Try to make the process as cooperative as possible, which usually means not preparing a stack of calculations to hand to your ex the moment they sit down. No one likes to be bombarded by a bunch of documents as if there was a done deal. Make a list of the things you need to talk about together. Usually this includes:

- where the children will live,
- how decisions about the children will be made,
- how much child support should be paid,
- whether someone is in need of spousal support, and how much should be paid, and
- how the family assets and debts will be divided.

Other lists will be useful as the negotiations continue:

- which assets are the family property that needs to be divided,
- how much that property is worth,
- what are the family debts and how much is owing,
- when will each parent be with the children,
- how will holidays and other special days be shared, and
- what additional information each of you needs to collect.

Most importantly, keep a separate written record of the things that you agree on as you agree on them. This could be an online document or a paper notepad. This will help to keep a record of the issues that have been decided, and give each of you a sense of commitment to those decisions.

As discussions go on, you might realize that you and your ex have different ideas about what the law says about an issue. This is the perfect time to take a break and arrange to meet a week later. You can tell your ex about this website and encourage them to read it to get the basic background information.

If you need more help, each of you could also meet with a lawyer to talk about things. If you decide to do this, it is important that the lawyers understand that you and your ex are negotiating these issues, not fighting about them.

Using lawyers

If you find that you're getting stuck on one or more points, or if your ex is refusing to talk to you at all, it's probably time to hire a lawyer.

Hiring a lawyer doesn't mean that you're headed to court and eventually to trial. It means that you're serious about these issues and you want to move things to the next level. Most lawyers will write a letter to your ex explaining that they've been hired by you to start or continue negotiations with an eye to reaching settlement.

Lawyers often negotiate directly with the lawyer for the other person, through letters and telephone calls. Sometimes lawyers will have a meeting where everyone's there: you, your lawyer, your ex, and your ex's lawyer. These are called four-way meetings, and they can be very helpful to move discussions along. If you are able to sit down with your ex and come to agreement on some matters, but get stuck on others, often the most efficient way to resolve the remaining issues is to sit down in a meeting with your lawyers or with a mediator. Where lawyers negotiate primarily through letters rather than phone calls and face-to-face meetings, this can quickly escalate misunderstandings and get people on the defensive. (Not to mention increasing your cost!). If you and your ex are both committed to resolving the remaining issues out of court, look for lawyers whose focus is on resolving matters outside of court. Lawyers trained in and practicing in the collaborative process model are one option for finding a lawyer with such an approach.

Using mediators

As an alternative to each of you hiring your own lawyer, you should also seriously consider hiring a professional mediator. The mediator's job is to help two people reach an agreement of their own; the mediator may direct the discussion, but the mediator isn't your ally or your ex's ally. The mediator is completely neutral.

Mediation can be very effective, and can often bring people to a settlement, even where their positions seem to be very far apart.

Before hiring a mediator, make sure you've looked into their background to make sure that the mediator has had special training as a mediator. Lawyers who have training and are accredited to mediate by the Law Society are called family law mediators, and will usually advertise themselves as such.

For more information

You can find out more about using out-of-court options in the chapter Resolving Family Law Problems out of Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Start Mediation with My Spouse?

Pick the right moment

With one exception, you can't force your ex to go to mediation with you, you can only do it with their agreement. Your ex isn't likely to agree to go and see a mediator if they are still pissed off about a recent argument or still resentful about the end of the relationship.

When you've got the right moment, suggesting mediation can be as simple as calling your ex up and inviting them out for a cup of coffee at the local Tim Hortons:

> "Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, and we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Sally what happened with her and Frank, and she said that they used a mediator."

At this point, it's all about getting your ex to try mediation, and it's your job to sell the idea. Here are some reasons why mediation is a really, really good idea:

- mediation is much cheaper than hiring lawyers and going to court,
- the mediator helps you and your ex make a decision together, a decision that you are both as happy with as possible,
- the decision a judge might make may be one that neither of you are happy with at all,
- mediation is much cheaper than hiring lawyers and going to court,
- settlements reached through mediation tend to last a lot longer and people tend to respect their agreements a lot more,
- mediation will leave you feeling less angry with each other than fighting about things in court,
- mediation is much cheaper than hiring lawyers and going to court,
- mediation can be over and done with in a fraction of the time that it takes to go to court, and
- if I haven't mentioned this, mediation is much cheaper than hiring lawyers and going to court.

Going to trial with a lawyer on your side will likely cost between $10,000 and $15,000 per day of trial. Most family law trials last one or two weeks or longer, and this figure ignores the costs of all the other things that have to happen before you walk into the courtroom on day one!

If these expensive numbers don't get your ex to agree to see a mediator, tell them to ask separated friends, family members, and co-workers how much it cost for their court proceedings and how long it took to go from start to finish.

It can also be helpful to give them some resources: like referring them to the Family Law Mediation section of this wikibook, or sending them to MediateBC [1] to learn more about family law mediation.

The exception I mentioned above is that if you and your partner have already started an action in Supreme Court, you may file a Notice to Mediate under the *Notice to Mediate (Family) Regulation* [10]. This rule provides a

mechanism for forcing parties to try mediation before they can have a trial.

Hire a mediator

Now that your ex has agreed to see a mediator with you, strike while the iron is hot: find a mediator and book an appointment immediately.

Before hiring a mediator, make sure you've looked into their background to make sure that the mediator has had special training as a mediator. Lawyers who have training and are accredited to mediate by the Law Society are called family law mediators, and they will usually advertise themselves as such.

When picking a mediator, first ask around. Have any of your friends used a mediator, and what did they think of the mediator? If that doesn't work, call a family law lawyer. Most family law lawyers keep a short list of the mediators they prefer to use, and will be happy to give you their names and phone numbers. You can also find a list of some family law mediators at Mediate BC [1].

For more information

You can find out more about using mediation in the chapter Resolving Family Law Problems out of Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

References

[1] https://www.mediatebc.com/find-a-mediator/family-roster

How Do I Start a Collaborative Process with My Spouse?

Pick the right moment

You can't force your ex to start the collaborative process with you, you can only do it with their agreement. Your ex isn't likely to agree to try a collaborative approach to settlement if they are still pissed off about a recent argument or still resentful about the end of the relationship.

When you've got the right moment, suggesting the collaborative process can be as simple as calling your ex up and inviting them to sit down at a coffee shop:

> "Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, and we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Harkamal what happened with her and Baljinder, and she said that they used the collaborative divorce process."

At this point, it's all about getting your ex to try the collaborative process, and it's your job to sell the idea. Here are some reasons why the collaborative approach is a really, really good idea:

- the collaborative process will give you and your ex the best chance of leaving your relationship on good terms,
- you can both participate in making the important decisions about your kids, your money, and your property,
- other helping professionals, like registered clinical counsellors and financial experts, can be brought into the process whenever their specific expertise would help, without paying the lawyers to do everything,
- everyone is committed to finding a settlement without going to court, including the lawyers,
- you can create the solution that is best for you and your family,
- settlements reached through negotiation tend to last longer than decisions imposed by a judge after a trial,
- the collaborative process is cheaper than going to court, and
- you'll be done in a fraction of the time that you would have spent in court.

Going to trial with a lawyer on your side will likely cost between $10,000 and $15,000 per day of trial. Most family law trials last one or two weeks or longer, and this figure ignores the costs of all the other things that have to happen before you walk into the courtroom on day one!

If this doesn't get your ex to agree to try a collaborative approach, tell them to ask separated friends, family members, and co-workers how much it cost for their court proceedings and how long it took to go from start to finish. Or maybe your ex would be willing to meet with a counsellor trained in the collaborative process who can help you both work on a parenting plan before starting the process with lawyers. Some people are more open to working on the parenting aspect and are wary of hiring a lawyer, so that can be a good way to start.

Hire collaborative lawyers

Now that your ex has agreed to the collaborative process, you each need to hire a lawyer trained in the collaborative practice model and get the process underway.

Lawyers who work in the collaborative practice model will say as much in their advertising. Before you hire your lawyer, first ask around. Have any of your friends used a collaborative lawyer, and what did they think of them? You can also find a list of lawyers through the BC-wide Collaborative Roster Society [4], or one of the other groups listed under the heading "Finding a collaborative professional" in the Collaborative Process section in the Resolving Family Law Problems out of Court chapter. Collaborative practice groups will have lists of their members who are lawyers, mental health professionals, and financial specialists, and the odds are pretty good that if you find a collaborative lawyer who you think you'll work well with, the lawyer will be able to recommend a handful of other

lawyers from the same practice group for your ex.

For more information

You can find out more about the collaborative process in the chapter Resolving Family Law Problems out of Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 21, 2023.

How Do I Start Arbitration with My Spouse?

Pick the right moment

You can't force your ex to go to arbitration with you, you can only do it with their agreement. Of course, your ex isn't likely to agree to arbitration if they are still feeling pissed off about a recent argument or resentful about the end of the relationship.

When you've got the right moment, suggesting arbitration can be as simple as calling your ex up, inviting them out for a cup of coffee at the local Tim Hortons, and making your case to try arbitration rather than another process, like going to court:

> "Hey look, I think it's time that we sat down and started to talk about things. I know you're still a bit upset about everything, but we really need to make a few decisions and I don't think we're going to be able to do this on our own. I've asked my friend Simeng what happened with her and Robert, and she said that they resolved everything through arbitration."

At this point, it's all about getting your ex to try arbitration, and it's your job to sell the idea. Here are some reasons why arbitration is a really, really good idea:

- arbitration is private, there is no court file and the hearing is not open to the public,
- you can arbitrate with the help of lawyers or on your own,
- you can pick an arbitrator who's an expert in the issues that are the most challenging or important for your family,
- you can get the help of professionals like child psychologists, business valuators, and tax planners in the arbitration process,
- with input of the arbitrator, you can design the rules that will apply to the arbitration process,
- with input of the arbitrator, you can decide on the documents and information that will be needed for your hearing,
- the arbitrator's decision is just as final and just as binding as a court award,
- you can schedule the hearing date as soon as you want, where you want, and
- with faster hearings and a more efficient process to get there, arbitration is almost always cheaper than litigation.

Going to trial with a lawyer on your side will likely cost between $10,000 and $15,000 per day of trial. Most family law trials last one or two weeks or longer, and this figure ignores the costs of all the other things that have to happen before you walk into the courtroom on day one! As well, trials in court can take anywhere from eight months to two years to start.

If this doesn't get your ex to agree to try arbitration, tell them to ask separated friends, family members, and co-workers how much it cost for their court proceedings and how long it took to go from start to finish.

Hire an arbitrator

Now that your ex has agreed to try arbitration, you need to strike while the iron is hot and find an arbitrator as soon as possible.

Before hiring an arbitrator, make sure you've looked into their background to find out if they have special training in arbitration, and any special expertise or interest in the issues that are most important in your family law dispute. Lawyers who have training and are accredited to arbitrate by the Law Society are called *family law arbitrators*, and they will usually advertise themselves as such.

When picking an arbitrator, go to the website of a professional arbitrators' association like the ADR Institute of British Columbia [4]. Associations like this will have a list of their members, the training and experience they require for membership, and a short biography of each member. If that doesn't work, call a family law lawyer. Most family law lawyers will know one or two arbitrators they can recommend, and will be happy to give you those arbitrators' names and phone numbers.

You could also try doing an internet search for something like "family law arbitrator penticton" or "family law arbitrator parenting."

When you first speak to an arbitrator you're interested in hiring, be careful not to say too much about your case or your ex. It is very important that your arbitrator remain unbiased, and your ex will want to know exactly what you've said to the arbitrator about your relationship and your legal dispute.

What happens next

Once you have contacted an arbitrator, they will reach out to your ex to confirm their interest in pursuing the process. They'll probably also send a copy of their standard arbitration agreement for each of you to look at. It's a good idea for you to get some independent legal advice about the agreement, as the agreement will describe:

- your responsibilities in the arbitration process,
- your ex's responsibilities in the process,
- the role of the arbitrator,
- how the arbitration will conclude, and
- the arbitrator's rates and when you will be responsible to pay for the arbitrator's bills.

The arbitrator will also schedule a conference to talk about the legal issues, schedule the place and date for the arbitration hearing, and work with you to develop the rules that will apply to the arbitration process. These rules are very important and will talk about:

- the documents and evidence you'll exchange with your ex before the hearing,
- the other steps that can be taken to get information about your case before the hearing,
- whether you will be hiring any experts to give opinions at the hearing,
- whether evidence will be presented at the hearing, and, if so, how it will be presented, and
- how arguments will be made at the hearing.

Don't skip this conference, it's very important!

For more information

You can find more information about arbitration in the chapter Resolving Family Law Problems out of Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Hire a Parenting Coordinator?

Who should hire a parenting coordinator?

A parenting coordinator can be helpful for families in which the parents have a history of high conflict, repetitive disagreements on parenting decisions, and/or the inability to cooperate on guardianship issues. Most separating parents do not need a parenting coordinator if they have a demonstrated ability to solve parenting disputes by agreement.

Parents who find themselves in court frequently asking a judge to make ordinary parenting decisions are the parents who would benefit most from parenting coordination.

A parenting coordinator may be engaged by agreement or by order of the court and can be given authority to make specific classes of parenting decisions if the parents cannot agree. In addition, a parenting coordinator can be given authority to settle specific questions (for example, choice of school) or to resolve disputes about section 7 expenses. (See the chapter Child Support Guidelines to learn what section 7 expenses are.)

When should you hire a parenting coordinator?

Under the current law, a parenting coordinator can only be appointed when there is a parenting plan in place as an order of the court, or which is included in a written agreement of the parties.

Parenting coordinators cannot make fundamental changes to a parenting arrangement, such as guardianship terms, residency, or significant changes to the parenting schedule. A parenting coordinator can make adjustments to the parenting schedule and assist with routine parenting decisions, such as extra-curricular activities, participation in special events, routine medical interventions, travel protocols, handling of child-related documents, and settlement of disputes over holidays.

Parenting coordinators can help resolve problems about parenting disputes, help parents to communicate more effectively, and coach parents to try and resolve problems themselves. If, with the parenting coordinator's help, the parents are not able to resolve a parenting dispute, the parenting coordinator has the power to make a decision for the parents on issues within the parenting coordinator's authority.

How do you pick a parenting coordinator?

The BC Parenting Coordinators Roster Society [1] website lists members alphabetically. It tells you the location of each member's practice, their profession (whether lawyer, psychologist, registered clinical counsellor, social worker, or mediator), and usually there is a link to the member's website.

When you've found a few candidates that look suitable, give them each a call or send an email to inquire about availability, rates, and general approach. You may be able to arrange a preliminary meeting, but be prepared to pay the parenting coordinator's rate for that meeting. Some candidates offer a free initial consultation, but you should confirm this first. You aren't obliged to hire the first person you meet; wait until you've spoken to someone you feel comfortable with and who you think the other parent might listen to.

When talking with potential parenting coordinators, ask about:

- their current workload,
- when the parenting coordinator will be available to help,
- their hourly fees and retainer requirements, and
- the manner in which their work is done, for example: personal meetings, email, or video chat.

Typically, the contract with a parenting coordinator is for two years and the fees are split equally between the parents, with discretion to the parenting coordinator to adjust the fees to ensure fairness and compliance with the process.

How do you hire a parenting coordinator?

Finding an available parenting coordinator is relatively easy. The common challenges are:

- getting the other parent to agree to try parenting coordination, and
- finding a parenting coordinator the other parent will agree to.

In most cases, it's helpful to suggest a list of two or three candidates, ask the other parent if they have their own list (or, out of fairness, if they would like to create one), and try to pick one that you can both agree on.

If there is no agreement on using the parenting coordination process or on whom to appoint, it will be necessary to make an application to the court and have the court decide.

For more information

You can find more information about parenting coordination in the chapter Resolving Family Law Problems out of Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

References

[1] http://www.bcparentingcoordinators.com

How Do I Execute a Family Law Agreement?

The most common family law agreements are:

- *cohabitation agreements*, used when a couple plan on living together together and may or may not get married in the future,
- *marriage agreements*, used when a couple plan to marry, and
- *separation agreements*, used when married spouses or unmarried spouses have separated.

Other agreements might include *interim agreements*, made after negotiations have started but before a final settlement, *parenting agreements*, *trust agreements*, *confidentiality agreements*, and so on.

Execution

All family law agreements are executed in the same way: the people entering into the agreement sign it (not necessarily at the same time) in the presence of a witness, while that witness watches. That's it!

Witnesses

The person who witnesses the signature can be anybody, with just a few exceptions. Witnesses must be 19 years of age or older, they must be sane, and they shouldn't be another party to the agreement or someone who stands to benefit from the agreement. The same person can witness both parties' signatures. *It is not necessary to pay to have a lawyer or notary public serve as witness.*

The role of the witness is to simply say that the witness knew the person signing the agreement and saw them sign the agreement: "I saw Frank sign the agreement, and I knew it was Frank because Frank has been my neighbour for the last six years" or "I saw Ming sign the agreement, and I knew it was Ming because I saw her driver's licence and the picture matched Ming's appearance and the name on the licence matched the name on the agreement."

Signing the agreement does not make the witness a party to the agreement or put the witness under any obligation at all to either party.

Signing the agreement

Family law agreements are executed by having each of the parties sign their names, using their normal signatures, in a spot on the last page of the agreement that looks like this:

```
SIGNED by Yitzhak    )
on April 20, 2023,   )
at Salmon Arm, BC,   )
in the presence of:  )
                     )
_____________________)  _____________________
Signature            )  YITZHAK BERNSTEIN
_____________________)
Name                 )
_____________________)
Occupation           )
_____________________)
Address              )
_____________________)
```

The party to this agreement, Yitzhak in this case, signs his normal signature above the line on the right. The witness signs above the top line on the left and fills out the extra information about the witness' address and occupation.

It is also a good idea (but not required) that each of the parties and the witnesses initial each page of the agreement other than the page with the parties' signatures.

Agreements can also be executed in *counterparts*, which simply means that each party and their witness signs a separate copy of the agreement. In this case, the agreement should include a clause saying that the parties have agreed that it may be signed in this way.

An agreement that has been executed by both parties is called a *perfected agreement*.

For more information

You can find more information about making and executing a family law agreement in the chapter Family Law Agreements.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, September 19, 2023.

How Do I Change a Family Law Agreement?

The most common family law agreements are:

- *cohabitation agreements*, used when a couple plan on living together and may or may not get married in the future,
- *marriage agreements*, used when a couple plan to marry, and
- *separation agreements*, used when married spouses or unmarried spouses have separated.

All of these agreements can be changed once they've been executed, as long as the parties to the agreement agree that the agreement should be changed. If the parties don't agree that the agreement should be changed, then the party who is unhappy with the agreement can ask the court to set aside the entire agreement or just part of it.

What can be changed

Normally, people only want to change one or two parts of an agreement while keeping the rest of the agreement intact. If you want a brand new agreement altogether, be careful. If the other party won't agree to throw out the old agreement, they will be entitled to go to court to enforce the old agreement, whether you're still happy with that agreement or not. This is, after all, why people execute contracts in the first place: they expect them to be permanent and they expect that the courts will hold people to the agreements they have made.

If the parties don't agree and one party asks the court to change the agreement, then, if the court is convinced that the agreement must change, it can set aside the entire agreement under the law of contracts or set aside the part of the agreement that is causing the problems and make an order in place of the part set aside.

Making the new agreement

Since, in most cases, the original agreement is being kept, changes to that agreement are made in new agreements called "amending agreements", "addendum agreements," or some other language to that effect. The new agreement is a separate contract that says in what ways the original contract is being changed. The new agreement will:

- state, in the recitals, the name and the date of the agreement that is being changed,
- briefly, also in the recitals, explain why the change is necessary, and
- state, for each change, the paragraph affected in the old agreement and how that paragraph is to be changed.

You might handle the first and second points by saying something like this: "this agreement amends the Separation Agreement executed by the parties on 1 April 2010," and "following the execution of the Separation Agreement, the schedule of the parties' parenting time has become unworkable as a result of certain changes in their hours of employment." The individual changes might be handled like this:

> 4. Paragraph 12 of the Separation Agreement is deleted and replaced with the following:
>
> "Sally will return the children to Harry's care at 7:00pm or at the end of the evening shift, whichever is earlier. Sally will give Harry 24 hours notice in the event she is scheduled to work the evening shift on the days she is to return the children to Harry's care."
>
> 5. Paragraph 36 of the Separation Agreement is deleted and replaced with the following:
>
> "Sally will pay child support to Harry in the amount of $525 per month for as long as the children remain children of the marriage as defined by the *Divorce Act*."

The key points here are that you must specifically identify the parts that are to be changed and how they are being changed, and the new language must be as clear and unambiguous as the language of the original agreement.

Executing the new agreement

The new agreement must be executed in front of a witness or witnesses in the same manner as the original agreement was executed. The witness or witnesses to the new agreement do not need to be the same person or people who witnessed the original agreement.

It is also a good idea (but not required) that each of the parties and the witness or witnesses initial each page of the new agreement other than the page with the parties' signatures.

For more information

You can find more information about changing a family law agreement in the chapter Family Law Agreements.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, September 19, 2023.

How Do I File an Agreement in Court?

Written agreements about most family law issues can be filed in the Provincial Court or the Supreme Court under the *Family Law Act* and the rules of court:

- agreements on parental responsibilities and parenting time can be filed under s. 44(3) of the *Family Law Act*,
- agreements on contact with a child or children can be filed under s. 58(3),
- agreements on child support can be filed under s. 148(2), and
- agreements on spousal support can be filed under s. 163(3).

Agreements that are filed in court can be enforced as if they were orders of the court in which they are filed.

Among other things, this means that the BC Family Maintenance Agency (BCFMA) can enforce an agreement for support exactly as it would enforce an order for support. Enforcement by BCFMA (which until recently was known as FMEP, because it was called the Family Maintenance Enforcement Program) is the usual reason why agreements are filed in court.

When there is an existing court proceeding

If a court proceeding has already been started, an agreement will normally be filed in the same court registry where the proceeding was started. This helps to keep the whole court file together and prevents confusion about the status of the agreement and the status of the litigation.

If the action is in the Provincial Court, take one original copy of the agreement to the family law counter along with the file number of the court proceeding. The court staff will help you with any paperwork. You don't need to see a judge or appear in court.

If the action is in the Supreme Court, take one original copy of the agreement to the family law counter along with something showing the style of cause of the court proceeding (the file number, the court registry, the name of the claimant, and the name of the respondent). The court staff will give you a blank Requisition to fill out. You don't need to see a judge or appear in court.

When a court action hasn't been started

If there is no existing court action, it's up to you to decide where you'd like to file your agreement. Since the BCFMA will enforce an agreement whether it's filed in the Provincial Court or the Supreme Court, it's usually easiest just to go to the courthouse nearest you.

All you need to take to the courthouse is one original copy of the agreement (usually both parties will have their own original copy of the agreement with signatures in ink). The court staff will open a court file for the agreement and help you with any paperwork.

Finding out if your agreement has been filed

It can be a bit tricky to find out if an agreement has been filed in court or not, since there's no requirement that agreements be filed or that agreements that are filed be filed in the same court registry as any court proceedings between the parties to the agreement.

If there is an existing court action, go the court registry where the litigation began and ask to see the court file. Because family law files are sealed from the general public, you'll need to bring some photo ID.

If there isn't an existing court action, you'll need to make at least two stops:

1. First, go to the local Provincial Court to ask the staff to do a province-wide search to see if a Provincial Court file has been opened in your name and the name of the other party.

2. Second, go to the closest Supreme Court to do the same search of Supreme Court files. You can also do the Supreme Court search using Court Services Online (https://justice.gov.bc.ca/cso/index.do), but you won't be able to get any details of the court file other than that one exists.

For more information

You can find more information about family law agreements in the chapter Family Law Agreements.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Beatrice McCutcheon, September 19, 2023.

How Do I Find My Ex?

In general, people need to find their ex for two reasons:

- because they want to start a court proceeding and need to find their ex to serve them with the papers that begin the proceeding, or
- to begin enforcing an order relating to child support or spousal support.

Private services

The fastest but most expensive way is to hire a *skip tracer* or a private investigator under a *locate* or *skip trace* service contract. Skip tracers are people or agencies that are usually hired by financial institutions, insurance agencies, or law firms to find someone who's avoiding a debt or a legal process, or to locate their assets. Recently, some skip tracing services have (for their own insurance purposes) stopped taking locate contracts from members of the public. Some agencies still take public locate contracts, however, so long as they are satisfied that the purpose is legitimate. Expect to be charged a few hundred dollars and be required to pay up front.

If you can find a lawyer who will retain the services of a skip tracer for you, you may find that you have a wider selection of options. Private investigators can also provide locate services, and will be more open to public locate contracts, but generally PIs are more adept at discovering information as opposed to locating people cost-effectively. Skip tracing can use a variety of techniques, from going through databases and listings, to surveillance and witness interviews.

Public services

If you need to find someone who owes you support due to an agreement or court order, the BC Family Maintenance Agency (BCFMA) [20] is a free service that may be able to help enforce and collect the payments for you. BCFMA will not help you find someone in order to start an action or get an order for support, but BCFMA will take action to enforce court orders and agreements and collect the money you are owed. The agreement or court order has to state the specific amount that the payor must pay you in order for BCFMA to enforce it.

BCFMA has some fairly long arms and unique legal authority, so it can be effective in cases where a payor is avoiding existing support obligations under an agreement or court order. BCFMA can:

- intercept federal sources of income such as income tax or EI,
- attach wages, bank accounts or other sources of income,
- cancel a current driver's licence or prevent a new licence being issued,

- prevent a motor vehicle registration being issued or renewed,
- suspend a passport or federal licences such as pilot's licence,
- report unpaid maintenance to a credit bureau,
- summons the payor to a default hearing in court,
- issue a lien against the payor's personal property or land.

To use the BCFMA service, visit their website and enroll online [1]. You can also call BCFMA and ask questions about the service: 1-866-557-2427.

Internet and social media

The explosive growth of the internet and social media has resulted in a heck of a lot of information being readily available, sometimes in ways people don't think of. If you're looking for someone online, try a Google search using the person's first and last names, in quotes, like this:

"John Doe"

or

"J Doe"

The quote marks force the search engine to look for that exact phrase, which increases the likelihood that you'll find the person you're looking for. If you have an idea of where the person might be, add that to your search phrase, but put it outside the quotes, like this:

"John Doe" Kamloops

or

"John Doe" "British Columbia"

If you know another keyword, such as a profession or interest, try adding that word outside their name in quotes.

Social media accounts are another frequent source of information for skip tracers. Facebook may connect you to family members, old friends, or other third parties with information that you need to locate your ex in order to continue with legal proceedings. LinkedIn can provide professional information and could be particularly useful if you know the person's profession.

You could also try one of these services:

- Canada411.ca [2], a Canada-wide phone book,
- 411.com [3], which allows you to find a person by looking up their phone number or address,
- Online tools like TinEye.com, FaceCheck.id, Iimages.google.com, etc. will allow you to perform a reverse image search which could provide clues about the person's location or online presence.
- Set up a Google Alert and enter keywords for the topics that you want to follow, for example, "John Doe, Kelowna". If something comes up, you will be alerted.
- Perform a search of the court records publicly available via Court Services Online. If there are any current BC criminal or civil proceedings, this could give you a clue as to which city your ex is living in and when that proceeding was last active.
- If you believe your ex may own real property in BC, contact Land Titles and perform a title search for property that they, or their family members, might own in BC. This could provide you with an address for your ex. There will be a fee associated with this process.

Avoid pay services operated out of the United States, especially those that want you to enter your credit card number on their website. They may not be able to search within Canada.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 18, 2023.

References

[1] https://www.bcfma.ca/enrol-in-bcfma/
[2] http://www.canada411.ca
[3] http://www.411.com

How Do I Start a Family Law Action in the Provincial Court?

Starting a court proceeding in the Provincial Court is fairly straightforward, but if your family law matter is at one of the *Early Resolution registries* you will need to follow a slightly different process than the one outlined below. At the time of writing, Victoria and Surrey are the only registries that follow the early resolution process, but that could change by the time you're reading this, so please check the government's Early Resolution Process webpage [1] to make sure you're dealing with the correct procedure for the registry that you're in. That website also explains the steps involved in the Early Resolution process, which are not addressed here.

This page talks about the procedure followed by the majority of the Provincial Court registries, which are either *Family Justice registries* (currently Vancouver, Kelowna and Nanaimo), or *Parenting Education Program registries" (all other locations).*

In most cases, you have to fill out a document called a Form 3 Application About a Family Law Matter. and file it in the registry of the court closest to you.

There are no filing fees, and the court will tell you how to go about serving the other side.

You can get a copy of the Form 3 Application About a Family Law Matter from the court registry for free. The forms are also available online. See Legal Aid BC's Family Law website's online list of forms [1].

You can even use the BC Government's new online form filing service which walks you through and automates much of the application process. See the online Apply for a Family Law Act Order [25] tool. The version of the form that you can get from the court registry includes lots of information about how to fill it out.

If you are making a claim for *spousal support* or *child support*, you'll also have to fill out a form called a Form 4 Financial Statement. The court registry will provide you with this form, or you can find it online. Again, the form is fairly easy to fill out. However, there are certain documents that you must gather and attach to the form, including your last three years' worth of tax returns, your most recent paystub, and so forth.

If you are making a claim for *guardianship* of a child, you will also have to fill out a special affidavit in Form 5, and provide copies of recent police and Ministry of Children and Family Development records checks.

When to use the Provincial Court

The authority of the Provincial Court is limited and it can only deal with certain issues. You can use the Provincial Court when the things you need to deal with involve any of the following:

- guardianship of children,
- parenting arrangements for children,
- contact with a child,
- child support,
- spousal support,
- protection orders, and
- after 14 January 2024, orders dealing with ownership of pets (or companion animals as they're referred to in the *Family Law Act*).

When not to use the Provincial Court

The Provincial Court cannot deal with issues involving property or debts, with the sole exception of dealing with pet ownership (which is a new jurisdiction of the Provincial Court effective 15 January 2024). The Provincial Court cannot make orders under the *Divorce Act*, including divorce orders. If you need orders about property, debt, or divorce, you might think about starting your court proceeding in the Supreme Court, which can deal with all of these issues and all of the issues that the Provincial Court can deal with.

What happens next?

Once you've filed your Form 3 Application About a Family Law Matter, you'll have to have it served on the other person and get your process server to complete an Form 48 Affidavit of Personal Service. Once the other person has been served, they will have 30 days to file a form called a Form 6 Reply to an Application About a Family Law Matter, and, if either of you are making a claim for spousal support or child support, their Form 4 Financial Statement as well. The court will mail you a copy of these documents.

When the court receives the other person's Form 6 Reply to an Application About a Family Law Matter, the court will normally schedule a date for a Family Management Conference. In certain registries there may be other requirements that you must meet before the Family Management Conference. For example, you may be required to take the Parenting After Separation course or the Parenting After Separation for Indigenous Families course. The registry will let you know what steps you have to take.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Matthew Ostrow, September 19, 2023.

References

[1] https://family.legalaid.bc.ca/forms/supreme

How Do I Start a Family Law Action in the Supreme Court?

The court forms to start your claim

Most of the time you'll need to fill out a form called a Notice of Family Claim in Form F3. (If your spouse and you are working together on a joint application process, you'll be completing and filing a Notice of Joint Family Claim in Form F1.)

In less-common and specific circumstances, a family law case is started with a Petition, Form F73. Petitions are used when someone is starting an adoption proceedings, seeking a name change under the *Names Act*, seeking permission to apply for parenting orders in an *Divorce Act* proceeding when they are not actually a *spouse*, asking for the return of a child under the Hague Convention on child abduction, and other situations covered by Supreme Court Family Rule 3-1.

And in some specific circumstances a family law case is started by *requisition*. A common example of a family law case started by requisition is when you need to file a family law agreement under the Family Law Act. This would be if you need to start a family law case to enforce your *separation agreement*, or to change your separation agreement, and there wasn't a family law proceeding already started. To do this, you would prepare a Requisition in Form F17.1 to file your family law agreement under the Family Law Act, which will commence a new action. A requisition is also used for filing an *arbitration award*, which requires the Requisition in Form 17.3.

But as you can see, *petitions* and *requisitions* are for pretty specific situations. As a new claim is most commonly commenced by filing a Notice of Family Claim in Form F3, this section primarily focuses on this process.

Form F3 is available online. Legal Aid BC's Family Law website links to the various forms that are part of the BC Supreme Court Family Rules [1]. The court will not provide you with a guide to filling this form out, so you must be as precise and accurate as possible.

Completing forms

There are a lot of free online resources that can help you complete these forms, and Clicklaw (www.clicklaw.bc.ca) is a great place to start. But if you have any questions, you should really see a lawyer, or if that's not possible for financial reasons, try reaching out to family duty counsel [1].

The Notice of Family Claim sets out the basic information about who you are, who the other side is, and describes the sorts of claims you are making.

You have to attach additional schedules to your Notice of Family Claim depending on the orders you are asking for. The schedules require you to provide more detailed information about your marriage, your children, your property and debts, and so forth.

Other forms you might need

If you are married and you are asking that the court make an order for your divorce, you must file the original copy of your marriage certificate. (This is the government document, not the certificate you received from the person who married you.)

If your claim involves the family home or other property, you may also want to prepare a Certificate of Pending Litigation (called a CPL). (More information about CPLs is available in the chapter Protecting Property and Debt in Family Law Matters.)

If your claim involves support, property, or debt, you'll also wind up filling out a Financial Statement in Form F8. This isn't due until later on in the court proceeding, but you can and should get started now.

If your claim involves guardianship of a child and you are not already a guardian, you'll need to fill out a special affidavit in Form F101. You don't have to file this form right away when you're starting a court proceeding, but the form can take some time to fill out and you will need to order records checks from the police and the Ministry of Children and Family Development. You might as well get started on this now.

Filing your materials

When you've finished filling out your Notice of Family Claim, make three complete copies and take everything, including your marriage certificate and your CPL (if needed), to the courthouse.

If you are seeking a divorce, you will also be required to fill out a Registration of Divorce Proceeding form. This form must be completed using the online form [4], printed off (do not complete it by hand), and submitted to the court registry with your Notice of Family Claim. The court staff will send this document off to the Central Registry of Divorce Proceedings [1] in Ottawa.

It will cost $200 for you to file your Notice of Family Claim ($210 if you are asking for an order for divorce as part of the Notice of Family Claim), plus another fee to file your CPL, if you need one.

The court will give your action a file number, and stamp all four copies of your materials with the seal of the court, a date stamp, and the file number of your action. If you have filed a CPL, the court will stamp that too. Note that you must also file your CPL at the Land Title and Survey Authority for it to take effect; they will charge you another fee.

What happens next?

Once you've filed your Notice of Family Claim, you must arrange to have it served on the other side. You cannot serve the other person yourself, you must get someone else to do that for you, whether that person is a professional process server or a helpful friend. The person who serves the Notice of Family Claim should swear an Affidavit of Personal Service in Form F15. This affidavit gives the courts the guarantee that your spouse has been served and that they know a family case has been started.

Response and counterclaim

After the other person has been served, they will have 30 days to file a Response to Family Claim in Form F4. The other side may also file a form called a Counterclaim in Form F5. If this happens, the other side is making a claim of their own against you, and you will need to prepare a Response to Counterclaim in Form F6.

Once all of those forms are filed and served (collectively, these forms are called *pleadings*), it's safe to say the family law case has begun. There may be many steps that follow, up to and including trial, but the family law action is now an open file with the courts. I will describe one more step, however.

The Judicial Case Conference

This step is worth noting because it is practically mandatory to participate in a Judicial Case Conference (or JCC) before further steps in your family law case can be taken. When you have received the other person's Response to Family Claim, you will have to set up a JCC. The form to do this is called a Notice of Judicial Case Conference in Form F19, and the registry will have it on hand.

More information about JCCs and the rules that govern them is available in the Online Help Guide [2] produced by the Justice Education Society. But essentially, a JCC is an informal hearing before a judge or associate judge intended to review the issues between the parties, and see what issues can be agreed on and what can't be. The judge or associate judge will also canvass different ways of settling the action. It's not uncommon for entire family law disputes to resolve at one of these conferences.

It can be very important to have a JCC as soon as possible, as most applications for interim orders can't be made until a JCC happens. There are some exceptions to this rule:

- if you are making an application for a financial restraining order against your spouse,
- if the other side consents to the order you want, or
- if there is an emergency and you have to make your application without notice to the other side.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 14, 2023.

References

[1] https://legalaid.bc.ca/legal_aid/familyDutyCounsel
[2] https://supremecourtbc.ca/family-law/before-trial/judicial-case-conference/judicial-case-conference-introduction

How Do I Waive Filing Fees in the Supreme Court?

The Supreme Court registry usually charges fees for a whole host of common court activities, such as for filing court forms, making applications to a judge or associate judge, and for hearings that go longer than 3 days. Some of these fees can be quite high and become a barrier to someone seeking access to the justice system. These fees are set out in Appendix C [3] of the *Supreme Court Family Rules*.

Rule 20-5 allows the court to waive all or some of these fees for all or part of a court proceeding if the court is satisfied that you cannot afford them. You must make an application for a finding that you cannot afford the filing fees. This used to be called "applying for indigent status" or "applying for impoverished status."

Since 2015, after an important Supreme Court of Canada case that challenged the old rule requiring people to be on welfare and totally impoverished before getting an order to waive fees, the court no longer uses the term *indigent* or *impoverished* to refer to people who apply to waive fees. Rule 20-5 of the *Supreme Court Family Rules* [3] now refers to *persons who are not required to pay fees*, and this can be anyone receiving income or disability assistance, or anyone who cannot pay the court fees without *undue hardship*. You don't need to be impoverished to claim undue hardship in this context. If you can show that you would have to sacrifice other reasonable expenses in your life in order to pay the court fees, then you can probably succeed in an application to waive fees. A judge who grants an order to waive fees can waive them broadly for the whole of the proceeding, for a limited period of time, or for specific steps or parts of the family law case.

Making the application

Most people apply to waive filing fees at the same time that they're filing their Notice of Family Claim, or a Response to Family Claim or Counterclaim. The point, of course, is to avoid the fees that you'd normally pay to file these documents. You can also apply in the middle of a court proceeding if you need to.

The court registry will have blanks of the forms you need to fill out, and the BC Supreme Court website also offers a downloadable collection of the forms you need [1]. You'll need a Requisition in Form F17, a draft of the proposed order you seek in Form F85, and an Affidavit in Form F86. The Affidavit will require you to describe the amount and sources of your income, your monthly expenses, your job skills, and your education.

If you file your materials before 10:00am, the registry may send you before a judge that morning, otherwise you may have to wait for the next day chambers is held. You do not have to give notice to the other side of your intention to make this application, and no fees are charged to apply to waive fees.

When your application is called, using the evidence set out in your affidavit, you'll have to explain to the associate judge or judge why it is that you can't afford the court fees. Living on income or disability assistance, Employment Insurance (EI), Old Age Security, or CPP benefits is usually enough. It will be helpful if you can provide copies of your income assistance statements, EI statements, or other evidence to prove your income. Documents you rely on in court should be attached to your affidavit as exhibits.

You may want to look at the case of case of *Ma v. Zhao* [2], 2019 BCCA 248 to understand how the courts are beginning to treat applications to waive fees. Here is what the Court of Appeal said:

> "The application judge or associate judge is not required to accept the appellant's financial information at face value. However, if the financial information can reasonably be interpreted as supporting the proposition that the appellant cannot afford to pay court fees without foregoing reasonable expenses, some explanation for rejecting such evidence would be necessary in light of the constitutional dimension of this issue."

If the court allows your application, you can then go back to the registry and file your pleadings — and any future materials set out in the order you obtained — free of charge. An Order to Waive Fees only covers the fees set out in

Appendix C [3] of the *Supreme Court Family Rules*, however. If you need transcripts, for example, those must still be paid for.

If the court doesn't allow your application, well, you'll have to pay and that's that.

Exceptions to the rule

It is important to know that the court will also look to the merits of the case when deciding whether to grant or refuse applications to waive fees. Being unable to pay fees without undue hardship is not the only consideration. Rule 20-5(1) sets out three specific grounds for the court to refuse your application:

- if your claim is unreasonable, or if your defence to the claimant's claim is unreasonable,
- if your claim is "scandalous, frivolous, or vexatious," or
- if your claim or your defence is, for any other reason, an "abuse of the process of the court."

In other words, if you're one of those people who sues the King, the Prime Minister, the Premier, and the Attorney General or sues their neighbour every time they play their music too loudly, you can expect that your application to waive fees will be turfed. If your claim is legitimate and well-founded, and you meet the general criteria for Rule 20-5, you are well positioned to get the order to waive fees.

For more information

You can find more information about Supreme Court procedure for waiving fees in Legal Aid BC's *Get an Order to Waive Fees* guide [3]. Courthouse Libraries BC also has an What is impoverished status? information page on waiving court fees [4].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton, September 14, 2023.

References

[1] http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/sc_info_packages/order_to_waive_fees_package.pdf
[2] https://canlii.ca/t/j1bsj
[3] https://family.legalaid.bc.ca/bc-legal-system/court-orders/get-order-bc/supreme-court/get-order-waive-fees
[4] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/what-impoverished-status

How Do I Personally Serve Someone with Legal Documents?

An average person who is a party might think the term *personally serve* implies that they have to personally do the serving of documents to another person. In fact, Rule 6-3(2) of the Supreme Court Family Rules explicitly states that only someone who is not a party can personally serve a document. The person being handed the documents is *personally served* (as in, they're getting the documents served on them in person), but the person serving the documents cannot be a party. In short, never try and personally serve documents on someone when you're a party.

In general, the only documents that have to be *personally served* on someone in the course of a Supreme Court proceeding are:

- the claimant's Notice of Family Claim,
- the application materials when an application is made to change a final order, and
- the application materials when an application is being made for a finding that someone is in contempt of court.

Personal service is required when starting a court proceeding. Once the other side files their Response to Family Claim, almost all legal documents after that can simply be delivered to each side by *ordinary service*, at their respective addresses for service.

The easiest way to ensure personal service is properly done is to hire a process server, but you can arrange for someone else to do it for you. Whatever you do as a party do not try serving documents on someone *personally* (i.e. don't do it yourself), as that would be invalid service!

What's the difference between personal service and ordinary service?

Personal service, also called *service of process* is the formal delivery of a document to someone in a manner that can be proven in court and which complies with the Supreme Court Family Rules about service. In a nutshell, personal service means someone (not a party!) is personally giving someone else a document, usually by handing it to them.

Ordinary service means simply sending a document to someone by email, mail, or sometimes fax. A document is served by ordinary service by sending the document to the address for service set out by the claimant in the Notice of Family Claim and by the respondent in the Response to Family Claim.

Personal service

The requirements for valid personal service are set out in Rule 6-3 of the Supreme Court Family Rules. The Notice of Family Claim must be physically handed to the respondent; dropping it through the mail slot won't do.

Since the court will require proof that the respondent was properly served, the person who did the service should prepare an Affidavit of Personal Service in Form F15. For this reason, the person doing the service usually must:

- be provided with a photograph of the respondent, so that they can confirm that the person served looked like the person in the photograph,
- ask the respondent to confirm that they are the person named in the Notice of Family Claim, or
- ask the respondent to produce their driver's licence (or other official government photo identification) and confirm that the name on the licence matches the name in the Notice of Family Claim and that the person served looks like the photograph on the licence.

Again, the claimant in a family law proceeding cannot serve the respondent personally. You must get someone else to do it for you! That person can be anyone who is age 19 or older, and sane.

Substituted service

Of course, not everyone is willing to be nice about things and cooperate with service. When the respondent is avoiding service, you can get an order that they be served in some other way than the usual, proper way. This is called *substituted service*.

You will have to prove that you can't serve the respondent in the normal manner before you will be allowed to serve them substitutionally, so you'll have to provide the court with an affidavit from your process server describing how the respondent is avoiding service, or your own affidavit stating that you don't know where the respondent is and that they can't be found, and setting out all of the steps you have taken to find them.

The court has a fairly wide latitude when it comes to making orders for substituted service. The court can order that the respondent be served by:

- posting a copy of the documents to the door of their home or office,
- running ads in the legal notices section of a newspaper distributed where the respondent lives,
- leaving a copy of the Notice of Family Claim with an adult living where the respondent is thought to live,
- mailing it to the respondent by registered mail, or
- posting a copy of the documents in the court registry.

The court will likely impose conditions on the substitutional order, like extending the time for the respondent to reply. Once those conditions are met, service will be considered to have been effected. You will have to prepare an affidavit proving that you have met the conditions the court has set.

See How Do I Substitutionally Serve Someone with Legal Documents?

Contempt applications

You must personally serve a party when you are making an application that they be found in contempt of court. Rule 21-7 requires that the other side be personally served with the Notice of Application, asking that the party be found in contempt of court, plus copies of the affidavits that will be used in support of your application.

More information

You can find more information about the procedure for serving documents from Legal Aid BC's Family Law website and the information page on *Serving Documents* [1].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Jane DePaoli, September 11, 2023.

References

[1] https://family.legalaid.bc.ca/bc-legal-system/legal-forms-documents/serving-documents

How Do I Substitutionally Serve Someone with Legal Documents?

Rule 6-3 of the Supreme Court Family Rules requires that a person being sued be notified about the court proceeding and be formally served with copies of the Notice of Family Claim. This is called *personal service*.

Personal service is normally accomplished by getting another adult (not the one who's making the claim) to physically hand a copy of the Notice of Family Claim to the respondent; really, the documents only need to touch the respondent's body. This is not always possible. If you do not know where the person you want to sue lives, or if that person is avoiding being served, you may have to apply to court for an order that gives you permission to personally serve the respondent using an alternative method. Rule 6-4 talks about the process for alternative methods of service, also known as *substituted service*. Someone who receives substituted service is said to be *substitutionally served*.

Applying for an order for substituted service

If the person you're trying to sue is hard to find, or is evading your efforts to serve them, you must get the court's permission before the court will accept any other means of service.

For BC Supreme Court proceedings, once you have filed your Notice of Family Claim, you can apply for an *order for substituted service*. You can do this by *desk order*, which involves getting the registry to send your request for an order to a judge, without having to appear before the judge yourself. To do this, you need to prepare and file at the registry:

- a Requisition for Consent Order or Order Without Notice in Form F29
- your Affidavit in Form F30
- a draft Order Made Without Notice in Form F34

The *requisition* will describe the order that you want the court to make and your *affidavit* will set out the reasons why personal service is impossible. Since the documents you file are all that a judge will see in a desk order application, you need to be thorough, and the judge will not allow the application if they don't think you have made a sufficient degree of effort.

What should your application include? If service is not possible because you don't know where the respondent is, you should say so. You should also state whether or not you have means of contacting the respondent, for example, through family or friends. If you can't serve the respondent because they are avoiding service, you should describe how you've tried to serve the respondent and how often you've tried. If you hired a process server, and that was not successful, include details and evidence of that effort in your affidavit.

Your application should also present a plan for how substituted service should be done, whether that's:

- sending the materials to an email address you know they use,
- leaving the materials with a friend, employer, or family member of the respondent whom you have reason to believe will get their attention,
- mailing it to an address there's a valid reason to think they will receive it,
- by advertisement in a newspaper classifieds, assuming you have some idea what region they are in, or
- if options are truly limited, by asking to be allowed to post it in the registry.

Because the respondent hasn't been served, you can make your application for a desk order without having to follow the usual rules that give the respondent time to reply to your application.

Options for substituted service

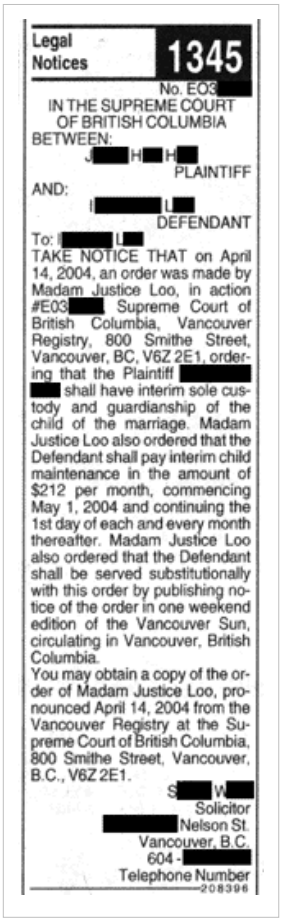
Posting in the registry

If you have no idea at all where the respondent might be, you can ask the judge to allow you to serve the respondent by posting a copy of your Notice of Family Claim in the court registry for a certain period of time, usually no less than 30 days. This is the cheapest means of alternative service, and you really have to show that you've got no idea where the respondent is, no relatives or friends to contact them through, and no idea where the respondent works.

If the court grants this order, the court will specify how long the Notice of Family Claim must remain posted. Your job will be to take the judge's order and a copy of your Notice of Family Claim to the court registrar. The registrar will arrange for the posting, take note when it was put up, and take note when it was taken down.

Notices in the classified ads

If you have a general idea of where the respondent might be (in Vernon, in the Peace District, or in the Lower Mainland, for example) you can ask the court for an order that you serve the respondent by posting an ad in the legal notices section of the area's local paper. The judge will usually specify the newspaper and the number of issues the ad must be run in.



Legal Notices 1345

No. E03[redacted]
IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:
J[redacted] H[redacted] H[redacted]
PLAINTIFF
AND:
I[redacted] L[redacted]
DEFENDANT
To: I[redacted] L[redacted]
TAKE NOTICE THAT on April 14, 2004, an order was made by Madam Justice Loo, in action #E03[redacted], Supreme Court of British Columbia, Vancouver Registry, 800 Smithe Street, Vancouver, BC, V6Z 2E1, ordering that the Plaintiff [redacted] shall have interim sole custody and guardianship of the child of the marriage. Madam Justice Loo also ordered that the Defendant shall pay interim child maintenance in the amount of $212 per month, commencing May 1, 2004 and continuing the 1st day of each and every month thereafter. Madam Justice Loo also ordered that the Defendant shall be served substitutionally with this order by publishing notice of the order in one weekend edition of the Vancouver Sun, circulating in Vancouver, British Columbia.
You may obtain a copy of the order of Madam Justice Loo, pronounced April 14, 2004 from the Vancouver Registry at the Supreme Court of British Columbia, 800 Smithe Street, Vancouver, B.C., V6Z 2E1.
S[redacted] W[redacted]
Solicitor
[redacted] Nelson St.
Vancouver, B.C.
604 - [redacted]
Telephone Number
208396

An example of this means of substituted service under the old Rules of Court appears at right. In this ad, the plaintiff (claimant) J.H.H. is suing the defendant (respondent) I.L. for orders involving the care and control of a child, child support, and probably other relief. (Note that in the course of making the order for substituted service in this example, the judge hearing the application also made other orders relating to child support, and custody and guardianship of the child. This is a bit unusual. Normally the courts will not make those sorts of orders without notice to the other party, even if that party's whereabouts are unknown.) You can see how this ad:

- advises the defendant of the fact of the lawsuit, and provides important information about the style of cause, the court registry, and the court file number,
- states the terms of the order for substitutional service (posting in one issue of the weekend newspaper),
- tells them how to get a copy of the plaintiff's materials, and
- gives the name and contact information for the lawyer representing the plaintiff.

Under Rule 6-4(3), newspaper ads must be in Form F11. This form looks a bit different than the example given here.

Be wary of pursuing this means of substituted service: the costs can be quite high, as newspapers sometimes charge special rates for legal notices. The example on the right, which came from an old issue of the *Vancouver Sun*, probably cost between $400 and $550.

Service through friends, relatives and employers

You may know another way by which the court proceeding can be brought to the respondent's attention with a fair degree of certainty. The court may allow service to occur through a third party, providing that there is reason to believe that the respondent has a fair amount of contact with the third party and that the third party can be relied on to bring the proceeding to the respondent's attention. Typical examples are:

- through the respondent's work (co-workers or employers, who will probably be in contact with the respondent),
- through family (a relative that you know the respondent keeps in touch with),
- through friends (friends who see the respondent on a pretty regular basis), and
- through the respondent's residence (a landlord or other people sharing the respondent's apartment).

If you are certain that leaving your materials with one of these people will ensure that your court proceeding is brought to the respondent's attention, the judge may give you an order to that effect. The order will usually say something to the effect of:

> service upon the Respondent may be effected by delivering a copy of the Notice of Family Claim with any adult resident at Apartment 123 at 456 Main Street in Anytown, British Columbia

or

> service upon the Respondent may be effected by delivering a copy of the Notice of Family Claim to his employer, John Doe, of John Doe's Autobody, whose place of business is at Unit 123 at 456 Main Street in Anytown, British Columbia

This means of service is usually reserved for respondents who are, or appear to be, avoiding service.

Other means of service

The court really does have a wide latitude when it comes to making orders for substituted service. Among other things, the court can order that the respondent be served by:

- posting a copy of the documents to the door of their home or office,
- posting a copy of the documents in the local post office,
- mailing it to the respondent by registered mail,
- emailing or sending the materials by some other internet-powered means, if you have an email or other online account that you know the respondent is using.

The particular method the court considers appropriate will always depend on the circumstances and what is reasonable in those circumstances.

The effect of substituted service

The goal of serving someone substitutionally is to try to alert that person to the fact of the court proceeding and tell them how to get more information about the proceeding.

The effect of an order for substituted service is that a person will be deemed to have been served once all the terms of the order for substituted service are met.

Whether the respondent is actually alerted to the proceeding is another story. The point here is that the court will consider the respondent to have been properly served. This will allow you to go on with your court proceeding in the normal manner once you've met the terms of your substituted service order, whether the respondent has found out about your claim or not.

The key point to understand about substituted service is that the countdown to take further action in your court case, like applying for a default judgment or requesting temporary relief, only begins once you have fully complied with

the substituted service order's conditions. In other words, it isn't until the terms of the order are done that you can start counting the time until your next application to court.

For example, say the order allows you to serve someone by posting a copy of your pleadings in the court registry for 45 days. It isn't until the forty-sixth day that you can start counting time. Since the respondent has 30 days to file a Response to Family Claim, you will have to wait 76 days (46 plus 30) from the date you got the order and the order was posted before you can ask for a default judgment or make any other application to the court.

More information

The steps listed above focus on BC Supreme Court. You can find more information about both Supreme Court and Provincial Court procedure for serving documents by substitute service on Legal Aid BC's Family Law website's information page: Arrange for Alternative (Substitutional) Service [1].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Jane DePaoli, September 11, 2023.

References

[1] https://family.legalaid.bc.ca/bc-legal-system/legal-forms-documents/serving-documents/alternative

How Do I Change Something in My Notice of Family Claim?

The pleadings

Pleadings are the documents that start a court proceeding or reply to a court proceeding. The information and terms below (including the form name *Notice of Family Claim*) apply to claims filed in the Supreme Court. This information is not applicable to claims in the Provincial Court.

For the person who starts a proceeding, the *claimant*, pleadings are usually:

- Notice of Family Claim in Form F3
- Response to Counterclaim in Form F6 (if the respondent has filed a Counterclaim in Form F5)

For the person who is replying to a court proceeding, the *respondent*, these documents are usually:

- Response to Family Claim in Form F4
- Counterclaim in Form F5

Sometimes a party's pleadings need to be changed, or *amended*. Usually, a change is required because a fact is wrong, like a date or a name. At other times, a change is required to raise a new defence or to make a new claim.

For example, say a claimant had a job when an action started and then lost it halfway through the case. If the claimant now needs spousal support but didn't make that claim in their Notice of Family Claim, the claimant would need to amend their pleadings to include the new claim for spousal support subject to any time limitations in the *Family Law Act*.

The rules

Pleadings are important because they describe the basic nuts and bolts of a party's claim or defence, and the facts that are said to support the claim or defence. They are the foundation of the court proceeding and the basis upon which each party will prepare for trial. As a result, there are special rules about amending pleadings. These are set out in Rule 8-1 of the Supreme Court Family Rules [1].

Firstly, you can't just amend your pleadings when you feel like it:

- under Rule 8-1(1)(a), you can make one set of changes, however major or minor, at any time before the Notice of Trial has been served,
- under Rule 8-1(1)(b), you can make another set of changes with the written consent of the other party, and
- to make changes in any other circumstances, you'll first need to get the court's permission, also known as leave of the court.

Secondly, you must mark all of your amendments. All of the changes are to be underlined in red ink to make it obvious exactly what's been changed. When a lot of text has been changed, say the size of a whole paragraph or more, the lines can be made to run up the left and right sides of the amended text instead of under each and every line of text (i.e. put the paragraph in a bracket).

Next, the title of the changed document always starts with the word *Amended*, such as the Amended Notice of Family Claim or the Amended Counterclaim, to distinguish the new, changed document from the original. When an amended document is amended again, the title of the new document begins with the phrase *Further Amended*, as in the Further Amended Notice of Family Claim.

You'll also need to add some information to the top of the first page to indicate why you were able to change your pleadings, and still note when the original document was filed. For example, for a change made before delivery of the Notice of Trial, you would write:

```
Amended pursuant to Rule 8-1(1)(a).
Original filed on 25 October 2022.
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File the amended documents in the court registry where the action was started. You may need to pay filing fees again for the newly amended pleadings. Serve the new pleadings on the other side by *ordinary service* within seven days, unless no response was ever filed by that party. In that case, since you don't have anything official from them that says their address for service, you need to promptly and *personally* serve the amended pleadings on them all over again, and before nay other steps are taken in the family law case.

Lastly, it's important to note that there are two types of amendments you cannot make under Rule 8-1:

1. You can't add or change a party.
2. You can't withdraw an admission.

If you need to change, add, or remove a party to the litigation you must follow the additional steps set out in Rule 8-2, and get a court order under that rule.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton, September 14, 2023.

References

[1] http://canlii.ca/t/53n38

How Do I Stop a Family Law Action in the Supreme Court?

Only the claimant to a Supreme Court proceeding can stop the court proceeding before the proceeding goes to trial or is settled.

No one can stop a court proceeding for the claimant or force the claimant to stop a proceeding.

While it often happens that a proceeding is abandoned, typically when no one does anything in the action for a long time, that doesn't stop the court proceeding altogether or cancel any orders that have already been made.

To bring everything to a halt, the claimant must file a Notice of Discontinuance in Form F39, and deliver a copy of the filed notice to everyone else named in the proceeding. If the claimant does this too late, after a court proceeding has already been set for trial, the claimant can only stop everything with the consent of the other parties or a court order.

While there is no fee charged to file a Notice of Discontinuance, Rule 11-4(4) says that the respondent may be entitled to claim their court costs of the proceeding up to the date it is discontinued.

The discontinuance of a claim does not itself prevent a claimant from commencing a new proceeding later, including a later proceeding for the same (or substantially the same) claims that were discontinued.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Julie Brown, September 21, 2023.

How Do I Respond to a Family Law Action in the Provincial Court?

While the new Provincial Court Family Rules and its forms no longer call one party the *applicant* and the other party the *respondent*, these terms are still used around the courthouse and in published reasons for judgment. Once you have been served with the other party's Form 3 Application About a Family Law Matter, that person becomes the applicant, and you become the respondent. You have 30 days to file a form called a Form 6 Reply to an Application About a Family Law Matter, which is available at provincial court registries or online. A copy may have been delivered to you with the Form 3 Application About a Family Law Matter.

As the respondent, you must file your Form 6 reply at the same court registry that the Form 3 application was filed, and you can tell which registry this is by looking at the box at the upper right-hand corner of the form. There are no fees charged to file your Form 6 Reply to an Application About a Family Law Matter.

You have 30 days to file your Form 6 Reply to an Application About a Family Law Matter from the date *you were served*, not 30 days from the date the Form 3 Application About a Family Law Matter was *filed in court*.

When you fill out your Form 6 Reply to an Application About a Family Law Matter, you will be asked to indicate which parts of the Form 3 Application About a Family Law Matter you agree with and which you disagree with. The form can also be used to make a claim of your own against the applicant, this is called a *counter application* and can be made by ticking the box at the top right-hand corner of the first page of the Form 6 Reply to an Application About a Family Law Matter. If you are the respondent don't need to file a Form 3 Application About a Family Law Matter of your own.

After you have filed your Form 6 Reply to an Application About a Family Law Matter, the court may schedule a date for you to meet with a family justice counsellor and you may be required to attend a Parenting After Separation course or Parenting After Separation for Indigenous Families course, depending on which registry the application was filed in. The registry will take care of scheduling your meeting with the family justice counsellor, but it's up to you to arrange for the Parenting After Separation course or Parenting After Separation for Indigenous Families course.

If the applicant is making a claim for child support or spousal support, you will also have to fill out and file a Form 4 Financial Statement. If such a claim is being made, you will normally be given a blank Form 4 Financial Statement at the same time you are served with the Form 3 Application About a Family Law Matter.

Once the applicant receives your Form 6 Reply to an Application About a Family Law Matter, and if you've made a counter application, they can file a Form 8 Reply to a Counter Application in which they can agree to one or more of the orders in the Counter Application or disagree with any order requested, stating their reason for disagreement and proposing a new order. The Form 8 Reply to a Counter Application must be filed within 30 days of them being served with the Form 6 Reply to Application About a Family Law Matter with a counter application.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Matt Ostrow, September 19, 2023.

How Do I Respond to a Family Law Action in the Supreme Court?

Once you have been served with the claimant's Notice of Family Claim, you have some choices:

- you can do nothing, indicating that you either agree with the claimant's claim or don't object to it,
- you can defend the claimant's claim — that is, you can oppose it, or
- you can defend the claimant's claim and make your own claim against the claimant.

If you decide to respond to the claimant's claim, you'll need to fill out and file a Response to Family Claim in Form F4. If you decide to make a claim of your own against the claimant, you'll also need to fill out and file a Counterclaim in Form F5. The forms are available online; see Legal Aid BC's helpful Family Law website, which has a guide on how to respond when you are served with a Supreme Court form [1].

You must file your Form 4 Response to Family Claim (and if applicable your Form 5 Counterclaim) within 30 days of being served with the Notice of Family Claim. This deadline runs from the date you were served, not the date the Notice of Family Claim was filed in court. If you were served after 4:00 pm, or on a Saturday, Sunday, or any weekday that's a statutory holiday, the date of service will technically be the next business day. You must file your forms at the court registry where the claimant filed the Notice of Family Claim. The court registry is indicated at the upper right-hand corner of the first page of the Notice of Family Claim. When you go to the courthouse to file your Response to Family Claim and Counterclaim, take 4 copies of each form with you. The Courthouse will keep the original documents, and you will receive three stamped copies.

Once you have filed the Response to Family Claim and the Counterclaim, these documents must be served on the Claimant by way of ordinary service.

The forms

Your Response to Family Claim is your reply to the claimant's Notice of Family Claim. In this form, you will say which of the facts set out by the claimant you agree with and disagree with, and which of the claimant's claims you agree with and disagree with.

Your Counterclaim is a mirror of the form used by the claimant in the Notice of Family Claim. You must fill out each section of the form and attach all the schedules that relate to the claims you wish to make. While you can use the claimant's Notice of Family Claim as a guide, be careful to include all of the relief you are seeking and use the actual court form to check that you haven't missed anything, since the claimant may not be asking for all of the same orders that you are.

What happens next?

If either of you is claiming for child support, spousal support, or division of property and debt, you have to fill out a Form F8 Financial Statement. Once you've filed your Response to Family Claim and, if you want, your Counterclaim, the usual next step is to attend a *judicial case conference* (JCC). Except in certain circumstances, you can't make an application to the court without having a JCC first. Read the page on How Do I Schedule a Judicial Case Conference for Hearing?. Note that your Form F8 Financial Statement is due at least 7 days before the JCC is heard.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 14, 2023.

References

[1] https://family.legalaid.bc.ca/bc-legal-system/ive-been-served/supreme-form

How Do I Waive Filing Fees in the Supreme Court?

The Supreme Court registry usually charges fees for a whole host of common court activities, such as for filing court forms, making applications to a judge or associate judge, and for hearings that go longer than 3 days. Some of these fees can be quite high and become a barrier to someone seeking access to the justice system. These fees are set out in Appendix C [3] of the *Supreme Court Family Rules*.

Rule 20-5 allows the court to waive all or some of these fees for all or part of a court proceeding if the court is satisfied that you cannot afford them. You must make an application for a finding that you cannot afford the filing fees. This used to be called "applying for indigent status" or "applying for impoverished status."

Since 2015, after an important Supreme Court of Canada case that challenged the old rule requiring people to be on welfare and totally impoverished before getting an order to waive fees, the court no longer uses the term *indigent* or *impoverished* to refer to people who apply to waive fees. Rule 20-5 of the *Supreme Court Family Rules* [3] now refers to *persons who are not required to pay fees*, and this can be anyone receiving income or disability assistance, or anyone who cannot pay the court fees without *undue hardship*. You don't need to be impoverished to claim undue hardship in this context. If you can show that you would have to sacrifice other reasonable expenses in your life in order to pay the court fees, then you can probably succeed in an application to waive fees. A judge who grants an order to waive fees can waive them broadly for the whole of the proceeding, for a limited period of time, or for specific steps or parts of the family law case.

Making the application

Most people apply to waive filing fees at the same time that they're filing their Notice of Family Claim, or a Response to Family Claim or Counterclaim. The point, of course, is to avoid the fees that you'd normally pay to file these documents. You can also apply in the middle of a court proceeding if you need to.

The court registry will have blanks of the forms you need to fill out, and the BC Supreme Court website also offers a downloadable collection of the forms you need [1]. You'll need a Requisition in Form F17, a draft of the proposed order you seek in Form F85, and an Affidavit in Form F86. The Affidavit will require you to describe the amount and sources of your income, your monthly expenses, your job skills, and your education.

If you file your materials before 10:00am, the registry may send you before a judge that morning, otherwise you may have to wait for the next day chambers is held. You do not have to give notice to the other side of your intention to make this application, and no fees are charged to apply to waive fees.

When your application is called, using the evidence set out in your affidavit, you'll have to explain to the associate judge or judge why it is that you can't afford the court fees. Living on income or disability assistance, Employment Insurance (EI), Old Age Security, or CPP benefits is usually enough. It will be helpful if you can provide copies of your income assistance statements, EI statements, or other evidence to prove your income. Documents you rely on in court should be attached to your affidavit as exhibits.

You may want to look at the case of case of *Ma v. Zhao* [2], 2019 BCCA 248 to understand how the courts are beginning to treat applications to waive fees. Here is what the Court of Appeal said:

> "The application judge or associate judge is not required to accept the appellant's financial information at face value. However, if the financial information can reasonably be interpreted as supporting the proposition that

> the appellant cannot afford to pay court fees without foregoing reasonable expenses, some explanation for rejecting such evidence would be necessary in light of the constitutional dimension of this issue."

If the court allows your application, you can then go back to the registry and file your pleadings — and any future materials set out in the order you obtained — free of charge. An Order to Waive Fees only covers the fees set out in Appendix C [3] of the *Supreme Court Family Rules*, however. If you need transcripts, for example, those must still be paid for.

If the court doesn't allow your application, well, you'll have to pay and that's that.

Exceptions to the rule

It is important to know that the court will also look to the merits of the case when deciding whether to grant or refuse applications to waive fees. Being unable to pay fees without undue hardship is not the only consideration. Rule 20-5(1) sets out three specific grounds for the court to refuse your application:

- if your claim is unreasonable, or if your defence to the claimant's claim is unreasonable,
- if your claim is "scandalous, frivolous, or vexatious," or
- if your claim or your defence is, for any other reason, an "abuse of the process of the court."

In other words, if you're one of those people who sues the King, the Prime Minister, the Premier, and the Attorney General or sues their neighbour every time they play their music too loudly, you can expect that your application to waive fees will be turfed. If your claim is legitimate and well-founded, and you meet the general criteria for Rule 20-5, you are well positioned to get the order to waive fees.

For more information

You can find more information about Supreme Court procedure for waiving fees in Legal Aid BC's *Get an Order to Waive Fees* guide [3]. Courthouse Libraries BC also has an What is impoverished status? information page on waiving court fees [4].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton, September 14, 2023.

How Do I Change Something in My Response to Family Claim or Counterclaim?

The information below applies to claims in the Supreme Court, not the Provincial Court.

The pleadings

Pleadings are the documents that start a court proceeding or reply to a court proceeding. For the person who is replying to a court proceeding, the *respondent*, these documents are usually:

- Response to Family Claim in Form F4
- Counterclaim in Form F5

For the person who starts a proceeding, the *claimant*, this is:

- Notice of Family Claim in Form F3
- Response to Counterclaim in Form F6 (if the respondent has filed a Counterclaim in Form F5)

Sometimes a party's pleadings need to be changed, or *amended*. Usually, a change is required because a fact is wrong, like a date or a name. At other times, a change is required to raise a new defence or to make a new claim.

For example, say a spouse had a job when an action was started against them, but lost it halfway through the case. If that spouse now needs spousal support but didn't make that claim as the respondent in their Form F5 Counterclaim, they would need to amend their pleadings to include the new claim.

The rules

Pleadings are important because they describe the basic nuts and bolts of a party's claim or defence, and the facts that are said to support the claim or defence. They are the foundation of the court proceeding and the basis upon which each party will prepare for trial. As a result, there are special rules about amending pleadings. These are set out in Rule 8-1 of the Supreme Court Family Rules.

Firstly, you can't just amend your pleadings when you feel like it:

- under Rule 8-1(1)(a), you can make one set of changes, however major or minor, at any time before the Notice of Trial has been filed,
- under Rule 8-1(1)(b), you can make another set of changes with the written consent of the other party, and
- to make changes in any other circumstances, you'll first need to get the court's permission.

Secondly, you must mark all of your amendments. All of the changes are to be underlined to make it obvious exactly what's been changed. When a lot of text has been changed, say the size of a whole paragraph or more, the lines can be made to run up the left and right sides of the amended text instead of under each and every line of text.

Next, the title of the changed document always starts with the word *Amended*, such as the Amended Counterclaim, to distinguish the new, changed document from the original. When an amended document is amended again, the title of the new document begins with the phrase *Further Amended*, as in the Further Amended Counterclaim.

You'll also need to add some information to the top of the first page to indicate why you were able to change your pleadings, and when the original document was filed. For example, for a change made before delivery of the Notice of Trial, you would write:

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Amended pursuant to Rule 8-1(1)(a).
Original filed on 25 October 2012.
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Finally, you must file the amended documents in the court registry where the action was started. You must then serve the new pleadings on the other side by ordinary service within seven days.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton, September 14, 2023.

How Do I Stop Defending a Family Law Action in the Supreme Court?

If you are a respondent, you may want to end your defence to a court proceeding. If you have filed a Counterclaim, you may want to stop that claim as well.

This often happens where a settlement has been reached.

Preparing a Notice of Withdrawal

To stop defending a court proceeding, you must file a Notice of Withdrawal in Form F40, and deliver a copy of the filed form to everyone else named in the action. This will allow the claimant to proceed as if no Response to Family Claim had ever been filed, and possibly apply for a default judgment.

Preparing a Notice of Discontinuance

To stop a counterclaim against a claimant and completely abandon an action, you must file a Notice of Discontinuance in Form F39, and deliver a copy of the filed form to everyone else named in the action.

Forms and fees

The forms are available online; see Legal Aid BC's helpful Family Law website, which has a list of forms used in BC Supreme Court [1].

While there is no fee charged to file a Notice of Discontinuance or Notice of Withdrawal, Rule 11-4(4) says that the claimant may be entitled to claim their court costs of the action up to the date of withdrawal or discontinuance.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Julie Brown, September 21, 2023.

How Do I Make a Priority Parenting Matter Application in the Provincial Court?

Priority parenting matters in BC Provincial Court

For most family law orders, the BC Provincial Court expects people to apply using the Form 3 Application About a Family Law Matter. See How Do I Start a Family Law Action in the Provincial Court? under the Helpful Guides & Common Questions section, for more about this standard process. There are exceptions to this usual process, however:

- when someone needs to apply for a *protection order*,
- when there's an agreement or court order that needs to be enforced, or
- when there is a specific issue known as a *priority parenting matter.*

This page deals with the last item in that list. *Priority parenting matters* involve immediate concerns that could impact a child's well-being. Look at Form 15 Application About Priority Parenting Matter at paragraph and you will see nine specific family law issues that qualify for priority treatment. These priority parenting matters can be heard whether or not an existing family law case already exists. In practice, if your issue does not fall into one of these categories, you will probably not be able to convince a judge to make an order when you apply under this process.

What constitutes a priority parenting matter?

You should read the nine checkboxes on the Form 15 Application About Priority Parenting Matter, but here's a summary of the various kinds of issues that count as priority parenting matters:

- Urgent health decisions (including giving or withdrawing consent for treatment) for a child where guardians are in disagreement (checkbox 1).
- Immediate needs for passports, licenses, or benefits for a child (checkbox 2).
- Wrongful denial of consent for a child to travel or participate in an activity (checkbox 3).
- Issues relating to relocation or removal of a child, i.e.:
    - a guardian is about to relocate a child's residence, there is no existing court order or agreement between them and other guardians, and where the child's relationship with another guardian could be significantly impacted by the move (checkbox 4);
    - orders to prevent removal of a child from a geographical area, including orders to seize passports or take collateral in order to prevent removal (checkbox 5)
- When other jurisdictions are involved, might get involved, or should get involved with parenting arrangements (generally called *extraprovincial matters respecting parenting arrangements*), and an order from the BC Provincial Court can help sort out where the dispute should be handled, where the child should be, or how the child can be protected in the meantime (checkboxes 6, 7, and 8).
- Interventions by a director under the *Child, Family and Community Service Act* that involve removing the child from someone's care, and another person wants to get an order about parenting arrangements or guardianship (checkbox 9).

A common mistake people make is to apply for orders using the priority parenting matter process because they *feel the issue is a priority* (often understandably), but the matter is not technically a *priority parenting matter* within the meaning of the Provincial Court Family Rules. For example, a denial of parenting time is distressing, but it is not likely going to count as a priority parenting matter. If you had an agreement or court order that included terms for parenting arrangements, then you could file and serve a Form 29 Application about Enforcement to try and deal with the issue more urgently, but if you have informal parenting arrangements with another guardian and they suddenly start denying parenting time, you will have to proceed under the standard Form 3 Application About a Family Law

Matter process.

Different than ordinary applications

Unlike ordinary applications for family law orders using Form 3, which allow 30 days for the other side to prepare their reply—and which deal with common issues like child or spousal support, parenting arrangements, guardianship, or contact with a child—applications about priority parenting matters are dealt with quickly due to their urgent nature. A typical court application process using Form 3 ensures fair timelines to give all parties an opportunity to prepare their evidence and arguments, but a priority parenting matter offers much less time to do this. Priority applications bypass other steps that would normally take place if only a Form 3 Application About a Family Law Matter were filed. The court may allow priority parenting matter applications to proceed with less than 7 days' notice or even without notice to the other party in special circumstances.

How to make a priority parenting matter application

To make an application for a priority parenting matter that gives the other side at least seven days notice, you will need to complete and file a Form 15 Application About Priority Parenting Matter. As mentioned, a priority parenting matter can be heard whether or not an existing case has been created. If a Form 3 Application About a Family Law Matter has already been filed in your case, however, you must file your Form 15 Application About Priority Parenting Matter in the same court registry. The staff may book a date for the hearing of your application right there. The hearing date will be written on your Form 15 Application About Priorty Parenting Matter.

You must serve the filed Form 15 Application About Priority Parenting Matter on the other side at least seven days before the date set for the hearing, along with a copy of any documents you intend to use at the hearing (such as affidavits).

If your matter is so urgent that it cannot wait at least seven days, you can also file a Form 11 Application for Case Management Without Notice or Attendance with your Form 15 Application About Priority Parenting Matter and ask the judge to:

- waive the requirement to give any notice to the other party (an application *without notice* means the other side is not told about the application), or
- ask the judge to shorten the notice requirement to something less than seven days.
- **Filing Location**: File your Form 15 at the court registry where the initial Form 3 Application to Obtain an Order was filed (if there is an existing case).
- **Service**: Serve the filed Form 15 on the other party at least seven days before the hearing date, unless the court allows for shorter notice.
- **Additional Forms**: If the matter is extremely urgent, you may also need to complete a Form 11 Application for Case Management Order Without Notice or Attendance.

The rules

Consult the Provincial Court Family Rules [2]:

- Rule 75-79: applications for priority parenting matters
- Rule 171-175: affidavits

Additional Resources

You should consider using the BC Government's new online form filing service which walks you through and automates much of the application process. The service is available online: Apply for a Family Law Act Order [25].

Legal Aid BC's Family Law website also has a useful guide on how to get an order about priority parenting matters [1].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Matthew Ostrow, October 31, 2023.

References

[1] https://family.legalaid.bc.ca/bc-legal-system/court-orders/get-order-bc/provincial-court/get-order-about-priority-parenting

How Do I Make an Interim Application in a Family Law Matter in the Supreme Court?

What is an interim application?

An *interim application*, in the context of family law cases in the BC Supreme Court, refers to a temporary court order (as opposed to a final order) that is meant to address immediate or urgent issues that cannot wait until the end of the trial or final resolution of the case. Interim applications are made after the family law proceeding has commenced, but before a final order is made or a settlement is reached.

Other terms you might encounter that mean basically the same thing as *interim application* are:

- application for interim relief
- application for a temporary order
- interlocutory application
- chambers application

Interim applications are quite common in Supreme Court proceedings, and more common than trials. If you need child support payments now, you can't wait a year or more for a trial just to get an order. You can ask a judge or associate judge for an interim child support order while you wait for the final judgement to be made.

While interim applications are often for *temporary orders* (i.e. an order that isn't intended to cover a long period of time), not all orders requested through interim applications are temporary. Ones that are not temporary are usually urgent in some way. They can be used to force the other side to do something, like share important documents, so that the family law matter can move along. If the other person is not giving you the financial disclosure they are supposed to, you can make a chambers application for an interim order for disclosure. There is nothing temporary about an order for disclosure (once the other party is forced to disclose their bank statements, the disclosure is permanent), but there would have been some urgency (you can't continue with the litigation if someone is stalling and not disclosing important information), which is why the interim application was justified.

Why make an interim application?

People often make interim applications to get orders about:

- *Interim parenting arrangements:* very common when parents can't agree on where children should live, who should exercise parental responsibilities, etc., until a final decision is made.
- *Interim child or spousal support:* interim applications for support are common to arrange temporary financial assistance to a spouse or child during the litigation process.
- *Interim contact:* an application to establish when and how someone who is not a guardian will spend time with the children.
- *Interim guardianship:* common where a relative seeks interim guardianship of children because parents are not able to provide for the child.
- *Interim property protection:* interim applications can be used to prevent the disposal or dissipation of family assets before a trial.
- *Interim exclusive occupation:* an application to decide who will temporarily have the right to live in the family home.
- *Interim protection orders:* an application for orders to protect one person from another family member, such as in cases of family violence.
- *Interim conduct orders:* an application to regulate how the parties may communicate with each other or the children, or manage substance use during the litigation.

When to make an interim application

In most BC Supreme Court family law cases, you need to wait until a *judicial case conference* (JCC) has been heard, although Rule 7-1 of the Supreme Court Family Rules [9] has a list of exceptions to this general rule.

In a genuine emergency, you can make an application any time after a Notice of Family Claim in Form F3 has been filed, with no notice or very little notice given to the other side.

Once a JCC has been held, however, applications can be brought at any time.

An update to Supreme Court Family Rules in May 2023 now requires that before you ask a judge to make an order for child support, spousal support, or parenting orders (called *corollary relief* in the *Divorce Act*), you will need to file Statement of Information for Corollary Relief Proceedings in Form 102. This is only applicable where the *Divorce Act* is involved, which means if your relationship was common-law this would not apply to your proceeding. Form 102 provides the court with a basic understanding of whether family violence is a factor, and asks if any protection orders, child protection issues, or criminal charges are involved. You need to update and re-file the form if any of your answers change in the future before you ask for any additional orders for support or parenting.

How to start the application process

You will want to familiarize yourself with the specific rules from the BC Supreme Court Family Rules that address applications, and these are mentioned below.

The first two court forms you'll need are:

- Notice of Application in Form F31
- Affidavit in Form F30

The forms are available online. See Legal Aid BC's Family Law website's online list of forms [1].

The Notice of Application in Form F31 tells the court and the other side:

- when you want the application heard,
- the orders that you want the court to make,
- the basic facts supporting your application,

- a summary of your argument in support of your application,
- the rules, acts, or regulations that give the court authority to make the orders you're asking for, and
- the affidavits, expert reports, or other evidence you'll rely on when you argue the application.

The affidavit explains who you are, the orders you want the court to make, and why you want the court to make those orders. When you swear or affirm your affidavit under oath in front of a lawyer or notary, the information you put in the affidavit becomes evidence – your written testimony. Your affidavit contains the evidence you will be relying on in support of your application.

When you're ready to go, you must file your Notice of Application and affidavit in court and serve a copy of the filed documents on the other side, the *application respondent*, by ordinary service. It costs $80 to file an application, unless you have an order to waive fees (see How Do I Waive Filing Fees in the Supreme Court?).

Ordinary service is accomplished by mailing the documents to the other side's address for service, by faxing them to a fax number for service, or by emailing them to an email address for service.

Serving and receiving service by email

Starting September 1, 2023, all parties to a BC Supreme Court action, whether represented by a lawyer or not, must provide an email as well as a mailing address to allow ordinary service of materials. The form for updating a party's address for service is the Notice of Address for Service in Form F10. You should ensure you have included an email as your address for service in the Form F31 Notice of Application if you have not already included it in a previous notice, and you can insist that the other side (the *application respondent*) file their Notice of Address for Service in Form F10 with an email address if they have not yet agreed to receive materials by email.

Timeline to serve your application on the other party

You must serve your materials on the application respondent, by sending them to the postal or email address they have identified for receiving service, at least eight business days before the hearing date.

When counting days, skip statutory holidays and any days the court is closed for judges' conferences. You should check the court calendar links on the Supreme Court's main scheduling webpage [12] to make sure you know when the court will not be open.

Counting days example: Say you want to have your court application heard on Monday, November 18, 2024. How do you count backwards to know when the 8-day deadline is?

- count backward from the day you want to have the application heard and think of Monday, November 18 is day zero
- skip Sunday the 17th and Saturday the 16th because those are weekend days
- Friday, the 15th would be day #1 in the 8-day count
- Thursday the 14th is day #2
- Wednesday the 13th is day #3
- Tuesday the 12th is day #4
- Monday the 11th is a statutory holiday (Remembrance Day), so skip it
- Sunday the 10th and Saturday the 9th are weekend days, so skip them
- Friday the 8th is day #5
- Thursday the 7th is day #6
- Wednesday the 6th is day #7
- Tuesday the 5th is day #8

To hear an application on Monday, November 18, 2024 you need to serve materials no later than 4:00 pm on Tuesday, November 5, 2024. However...

The court calendar shows a three day judges' conference scheduled from Wednesday to Friday (November 13-15, 2024). In this case:

- count backward from the day you want to have the application heard and think of Monday, November 18 is day zero
- skip Sunday the 17th and Saturday the 16th because those are weekend days
- you cannot count those three days (Wednesday the 13th, Thursday the 14th, and Friday the 15th)
- Tuesday the 12th would actually be day #1 in the 8-day count
- Monday the 11th is a statutory holiday, so skip it
- Sunday the 10th and Saturday the 9th are weekend days, so skip them
- Friday the 8th is day #2
- Thursday the 7th is day #3
- Wednesday the 6th is day #4
- Tuesday the 5th is day #5
- Monday the 4th is day #6
- Sunday the 3rd and Saturday the 2nd are weekends, so skip them
- Friday the 1st is day #7, and
- Thursday, October 31 is day #8

If you wanted to hear an application on Monday, November 18, 2024 you actually need to serve materials a full 18 days prior, given that 10 days (in this somewhat extreme example) do not count. Serve materials no later than 4:00 pm on Thursday, October 31, 2024.

The application respondent's response

In most cases, the application respondent will have five business days to respond to your application by filing an Application Response in Form F32 and any affidavits that the application respondent intends to use. The application response tells the court and you:

- the orders that the application respondent agrees to,
- the orders that the application respondent intends to oppose,
- the orders that the application respondent might agree to if certain conditions are met,
- the basic facts which oppose the applicant's version of the facts,
- a summary of the application respondent's argument against the application,
- a summary of any legal rules, statutes or court cases that contradict the applicant’s proposed legal basis, and
- the affidavits the application respondent will be relying on when the application is argued.

What if they do not respond?

Although Rule 10-6, the rule that explains how interim applications are brought, says that someone who doesn't file an application response isn't entitled to notice of when the application will be heard, do not expect that the court will simply let your application go ahead in default of an application response. The court will likely want to give the other side every chance to defend against your application.

Instead, if the other party does not file an application response and does not show up on the date you have set for the hearing, you can ask the judge for an order that the application respondent must appear at another date in 2-4 weeks' time and that the order be *peremptory* upon the application respondent. This will make it easier for the judge who hears you on your next hearing date to make a default order if the application respondent still has not responded and does not appear.

Your reply to the application respondent's reply

If you wish to reply to something the application respondent has said in their affidavit, you can make a new affidavit of your own. You must deliver this affidavit to the application respondent by 4:00pm on the business day that is one full business day before the hearing.

Reply affidavits are intended to address only new points raised by the application respondent's affidavit or to explain updates on issues that have developed since you filed your first affidavit, such as medical treatment for a child or new, relevant information you have received, such as a tax assessment or invoice. Try to avoid re-explaining your position on any points you wrote about in your first affidavit.

Application records

You must prepare an *application record* for the hearing of your application. The application record is traditionally a three-ring binder that contains all of the application materials, with an index noting the material included at numbered tabs, with the material separated by numbered tabs corresponding to the index. The application record is for the benefit of the judge or associate judge hearing your application, so prepare it as neatly and carefully as you can; the judge will appreciate the effort. It is often easiest to make a second copy of all the materials for yourself at the same time you are preparing the court's copy of the application record.

Application records will usually contain the following documents in the following order:

1. an index,
2. your Notice of Application in Form F31 at tab 1,
3. the Application Response in Form F32 at tab 2,
4. your affidavits in order of the dates they were filed (including your Financial Statement in Form F8, which counts as an affidavit),
5. the application respondent's affidavits,
6. any new affidavit you have prepared in reply to the application respondent's affidavits, and
7. any existing agreements or court orders that are relevant to the orders you are asking for.

You must file your application record by 4:00pm on the business day that is one full business day before the hearing. If your hearing is on Thursday, file it before 4:00pm on Tuesday. Make sure you provide a copy of your index to the application respondent at the same time. The other side is responsible for preparing their own copy of the application record for them to use at the hearing (providing them the index allows them to know what it contains).

The Justice Education Society's Online Help Guide for BC Supreme Court Family Law has a helpful webpage [1] with more information about application records, and BC Legal Aid's Family Law website has an Application Record Index listed under its webpage with BC Supreme Court forms [1].

Electronic application records: Note that the BC Supreme Court has been experimenting with application records in electronic (PDF) format, instead of printed out pages clipped into three-ring binders, for hearings of 30 minutes of less, in certain courts only, and only before a *associate judge* (i.e. not a judge). As of writing, this pilot project had expanded quickly to most registries across the province, but was not yet mandatory for self-represented litigants. That said, maybe you prefer to deal with PDFs rather than three-ring binders. And perhaps as you read this the pilot project will have expanded to more registry locations or become expected of all participants. See the BC Supreme Court website for more information about the Associate Judges Chambers Pilot Project [2].

The rules

The following Supreme Court Family Rules [9] are of particular relevance:

- Rule 6-1(1)-(1.1): Both email and postal address for service required
- Rule 6-2: How to serve documents by ordinary service
- Rule 7-1: The JCC rules
- Rule 10-4: The rule about affidavits
- Rule 10-5: Directions for bringing interim applications
- Rule 10-6: The usual application procedure, including what notices of application must include, when things need to be served, what the application record contains, etc.

For more information

You can find helpful information from the Legal Aid BC's Family Law website's guide on "What Happens in a Supreme Court Chambers Hearing?" [3] and Justice Education Society's Online Help Guide for Supreme Court Family Law Chambers Applications [4]. The Canadian Judicial Council has also created a series of guides for self-represented litigants [5], including a Family Law Handbook [6] with significant detail about family law matters in Canadian courts. The BC Supreme Court website also has an information page for self-represented litigants [12], and a Chambers Application Package [7] that is helpful.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Shannon Beebe, September 24, 2023.

References

[1] https://supremecourtbc.ca/family-law/before-trial/chambers-applications/prepare-application-record
[2] https://www.bccourts.ca/supreme_court/practice_and_procedure/associate_judges_chambers_pilot_project.aspx
[3] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/supreme-court-chambers-hearing
[4] https://supremecourtbc.ca/family-law/before-trial/chambers-applications/chambers-applications-introduction
[5] https://cjc-ccm.ca/en/what-we-do/initiatives/representing-yourself-court
[6] https://perma.cc/6D5R-PXS9
[7] https://perma.cc/A3R2-V4N2

How Do I Reply to a Priority Parenting Matter Application in the Provincial Court?

Replying to the application

The process for dealing with *priority parenting matter* applications is different from how you respond to regular applications for family law orders in Provincial Court. Things happen much quicker, so you need to watch your time.

The person making an priority parenting matter application, the *applicant*, will probably serve you with their Form 15 Application About Priority Parenting Matter at least seven days before the date of the hearing. They will also serve other documents that they will use at the hearing. The hearing date will likely have been fixed by the court registry, not by the applicant. It's possible that the applicant may be serving you with fewer than seven days notice if they had obtained permission from the court to have the matter heard on *short leave*, in which case your time to prepare could be even less.

There is no document that you must file to reply to the application, but you can respond using the Form 19 Written Response to Application. Form 19 is available online. See the Legal Aid BC's helpful list of Provincial Court forms [1]. Also, you should look into the relatively new Apply for a Family Law Act Order [25] tool from the BC Government, which is not only for applicants, but application respondents too. This tool helps you prepare documents online, and it can save you time.

Whether you file a written response or not, you must show up on the date set for the hearing or the court may make the order sought by the applicant. Make sure that you bring any important documents with you that will help at the hearing of the application.

The rules

Consult the Provincial Court Family Rules [2]:

- Rule 75-79: applications for priority parenting matters
- Rule 171-175: affidavits

More information about priority parenting matters

For more information about the steps you need to take to respond to a priority parenting matter application, look into Legal Aid BC's Family Law website's practical guide [2] on this topic. If do consult the Legal Aid BC guide, remember that the form you are responding to is *Form 15* (since the guide covers a few other kinds of applications).

Read How Do I Make a Priority Parenting Matter Application in the Provincial Court?, which is another Helpful Guides and Common Questions page in this section. That page explains what an applicant needs to think about, but it also discusses:

- What are *priority parenting matters*, and what are not.
- How priority parenting matters are different from ordinary applications for a family law order using Form 3.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Matthew Ostrow, September 19, 2023.

References

[1] https://family.legalaid.bc.ca/forms/provincial
[2] https://family.legalaid.bc.ca/bc-legal-system/ive-been-served-court-form/served-provincial-court-form/respond-to-form-10-12-15-16-or-29

How Do I Reply to an Interim Application in a Family Law Matter in the Supreme Court?

What is an interim application?

Read the page How Do I Make an Interim Application in a Family Law Matter in the Supreme Court? for a description about what interim applications are, and how they are used in BC Supreme Court.

Notice of the application

You will be entitled to notice of almost every application the other side, the *applicant*, intends to bring to court. The most common exceptions to this general rule are when:

- the applicant makes an application without notice to you when the application is urgent (called an *ex parte* or *without notice application*),
- the applicant is applying for permission to compress the usual timelines for the hearing of their application (called a *short leave application*),
- the applicant is asking to be exempted from the requirement that a judicial case conference be held before the first interim application, or
- you are the respondent and you haven't filed your defence to the applicant's Notice of Family Claim.

Assuming the applicant is required to give you notice, however, the applicant will send you a copy of their Notice of Application in Form F31 and any new affidavits they intend to rely on at the hearing. These documents are supposed to be sent to your address for service, which may include your fax number for service (if you've given one) or your official email address for service. (As of September 1, 2023 you are expected to list an email address for service).

For most applications, the applicant will provide their Notice of application and new affidavits at least eight business days before the date of the hearing.

The Notice of Application will tell you:

- the orders that the applicant will be asking the court to make,
- the facts the applicant says support the application,
- a summary of the applicant's argument in favour of the application,
- the rules, acts, or regulations the applicant will be relying on, and
- the affidavits the applicant will be using to argue the application.

The affidavit ought to tell you why the applicant wants the court to make the orders they are asking for and state the facts that support the making of those orders.

Replying to the application

In most cases, to reply to an application you will prepare and file an Application Response in Form F32 and at least one new affidavit in Form F30. The forms are online. See Legal Aid BC's Family Law website's online list of forms [1].

Your Application Response tells the applicant and the court:

- the orders that you agree to the court making,
- the orders that you intend to oppose,
- the orders that you might agree to if certain conditions are met,
- your understanding of the facts that relate to the application,
- a summary of your argument against the application,
- the rules, acts or regulations you'll be relying on, and
- the affidavits that you will be relying on at the hearing of the application.

You should do two things in any new affidavit you prepare in replying to an application:

1. you should respond to any important statements in the applicant's affidavit that you disagree with or think are inaccurate, and
2. you should tell the court about the facts that support your position on the application.

You must send two copies of your filed materials to the applicant within five business days from the time you were served with the application materials.

When you are preparing your application response, please remember that this form does not allow you to ask the court to make orders that *you* might want. If you want to seek your own orders about some of the same issues raised by the applicant in their Form F31 Notice of Application, you need to file your own Form 31 Notice of Application, set to be heard at the same time as the other side's application. This is commonly known as a *cross-application". For example, if one party asks for an order for parenting arrangements, you might file your own Form F31 Notice of Application asking for different parenting orders that you believe are appropriate.*

The applicant's reply

The applicant may decide to prepare a new affidavit to reply to something you've said in your affidavit. The applicant must give you a copy of any new affidavits by 4:00pm on the business day that is one full business day before the hearing.

You do not have an automatic right to serve an affidavit of your own in reply to this new affidavit. You can prepare another affidavit if you want, but be prepared for the judge or associate judge hearing the application to refuse to admit your affidavit.

Application records

The *application record* is a three-ring binder that contains all of the application materials, with an index and separated by tabs, that is assembled by the applicant. The *application record* is prepared for the benefit of the judge or associate judge hearing the application.

The applicant will give you the *index* to the application record by 4:00pm on the business day that is one full business day before the hearing. But you need to assemble your own application record using the applicant's index. Doing this will ensure that you, the applicant, and the judge are all on the same page (literally) when you're referring to the materials that are organized in the application record.

The rules

The following Supreme Court Family Rules [9] are of particular relevance:

- Rule 6-2: How to serve documents by ordinary service
- Rule 7-1: The JCC rules
- Rule 10-4: The rule about affidavits
- Rule 10-5: Directions for bringing interim applications
- Rule 10-6: The usual application procedure

For more information

You can find helpful information from the Legal Aid BC's Family Law website's guide on "What Happens in a Supreme Court Chambers Hearing?" [3] and Justice Education Society's Online Help Guide for Supreme Court Family Law Chambers Applications [4].

The Canadian Judicial Council has also created a series of guides for self-represented litigants [5], including a Family Law Handbook [6] with significant detail about family law matters in Canadian courts.

The BC Supreme Court website also has an information page for self-represented litigants [12], and a Chambers Application Package [7] that is helpful.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton and Stephanie Pesth, September 14, 2023.

How Do I Prepare an Affidavit?

An affidavit is a written statement, made on oath or affirmation, about facts that are personally known to the person making the affidavit, the *deponent* (also called an *affiant* by some, but the terms hold no real difference). Because an affidavit is sworn to be true or is affirmed to be true, it is evidence of the facts that it sets out, just as if the facts were given verbally at a trial. Affidavits are formal legal documents.

- **Supreme Court:** If your family law action is in the Supreme Court, the form you must usually use is Form F30 and the rules about affidavits are set out in Rule 10-4 of the Supreme Court Family Rules. The form is available online. See the Supreme Court Forms section.
- **Provincial Court:** If your family law action is in the Provincial Court, the form you must usually use is Form 45 and the rules about affidavits are set out in Part 12, Division 3 of the Provincial Court Family Rules. The form is available online (www.gov.bc.ca/court-forms) or at any Provincial Court Registry.

Formal requirements

The text of an affidavit is set out in numbered paragraphs. It's a good idea to state who you are and how you have personal knowledge of the facts that you are describing in the first paragraph of your affidavit (this is taken care of in the form required by the Provincial Court), and to say why you are swearing the affidavit in the second paragraph. For example, in the first paragraph you must say something like:

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.

In the second paragraph you might say:

2. I make this my affidavit in support of my application by Notice of Application dated 1 April 2023.

If you are having a friend or relative make the affidavit, the first paragraph might read:

1. I am the sister of the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.

Every page of your affidavit must be numbered, including each page of any exhibits you might have attached. An *exhibit* is a document, including a picture, that is included in an affidavit to support the facts described in the affidavit.

In the Supreme Court, you must put, in the upper-right hand corner of the first page, the name of the person swearing the affidavit, the sequential number of the affidavit in the affidavits sworn by that person so far, and the date the affidavit was sworn on. For example, if you are Jane Alice Doe, and this is your third affidavit, you would put this:

```
This is the 3rd affidavit
of J.A. Doe in this case
and was made on 1 April 2023
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Once your affidavit is done, you must have it *notarized*. Affidavits can be notarized by lawyers, notaries public, and certain court clerks, or anyone else who is authorized to take oaths in British Columbia.

The lawyer or notary public will ask you whether you understand the contents of your affidavit and then ask you to swear an oath or affirm that the contents are true.

If you say yes, the lawyer or notary will ask you to sign your name to the affidavit and will watch as you sign the document.

The lawyer or notary will then sign their name and provide certain additional information about where the affidavit was notarized, the date, and so forth. The lawyer or notary will ask you to produce government-issued photo identification, like a driver's licence, to prove that you are who you say you are.

After you've had your affidavit notarized, make at least four copies. The original is filed in court and another copy or two, depending on the circumstances, must be sent to the other side. Make sure you keep an extra copy for yourself!

Telling your story

Following the introductory paragraph, tell your story in an orderly manner. Remember to keep things as simple as possible and avoid irrelevant information. The easiest way to do this is to ask yourself if a stranger would understand what you've written. If you don't think a stranger would understand what you're talking about, you should probably rewrite your affidavit!

Your goal is also to explain things in an easy-to-understand way for the judge. The judge will not know who "Phil" is unless you've introduced Phil somewhere else in your affidavit. Nor will the judge understand what "the other car" means, unless you've already described which cars you have and who owns them. You must not assume that the judge knows everything about you. The judge won't. Again, ask yourself if a stranger would understand your story.

In order to make things as simple as possible, I usually break my affidavits down into four basic sections following the initial introductory paragraph:

- **Application:** State what you're asking the court for. If you're responding to an application, tell the court your position on each of the claims the applicant is making.
- **Background:** Describe who you are, who the other side is, when your relationship started and stopped, who your children are and how old they are, when the court proceeding started, and note any significant orders that have been made since litigation started.
- **Circumstances:** Describe the immediate circumstances that triggered the application to court and anything significant that's happened since. This should be the part where you provide the facts in favour of your application or in opposition to the applicant's application.
- **Summary:** If necessary, summarize your position and perhaps describe the order that you want the court to make.

Affidavits drafted by me often look something like this:

1. I am the Claimant in this matter and as such have personal knowledge of the facts hereinafter deposed to.

   Application

2. In my application, by Notice of Application dated 15 January 2023, I seek an order that the Respondent be restrained from removing the children, Sally Ann Doe, born on 1 January 2018, and John Fred Doe, born on 1 January 2019, from Kelowna, British Columbia, and an order that the Respondent pay support to me for the benefit of the children.

3. In the Respondent's application, by Notice of Application dated 1 January 2023, he seeks an order that I pay spousal support to him. I oppose the Respondent's application because he works full-time and is self-sufficient.

   Background

4. I am 32 years old and am presently employed as an accountant by the firm Smith, Smith and Smith. I earn approximately $42,000 per year.

5. The Respondent is 34 years old and works full-time as a bricklayer with ABC Contracting. He earns about $38,000 per year.

6. The Respondent and I met in the summer of 2013, and moved in together on 1 January 2014. We lived together in a unmarried relationship until 1 January 2022, when the Respondent left our home.

7. The Respondent and I have two children, Sally Ann Doe, who is 5 years old and in Grade 1 at Foggy Bottom Elementary, and John Fred Doe, who is 4 years old and in pre-school at ABC Community Centre.

8. I started this action on 1 July 2022, when I filed my Notice of Family Claim. I am asking for an order that the Respondent and I share parental responsibility for the children, that the children live mostly with me, and that the Respondent have parenting time with the children every other weekend and overnight every Wednesday. I also seek an order that the Respondent pay child support to me for the benefit of the children.

9. On 1 September 2022, Master Smith made an order that the Respondent and I share parental responsibility for our children. The Master did not make an order for parenting time or child support, but the Respondent has been seeing the children on weekends and has been paying $200 per month to me as child support.

...and so on. Keep in mind that lawyers often write out their clients' affidavits for them, using what they've learned during interviews of their client, just as I am demonstrating here in this example. But this is the evidence of that person, and written for them in their voice. Once I'm done introducing the basic background of the parties, I'll describe the events that led the applicant to be making the specific application before the court.

Circumstances of application

21. On 25 December 2022, the Respondent had Sally and John from noon until 7:00pm. We had agreed that he would return the children to my home at that time.

22. The Respondent did not return the children as we agreed. I phoned him to find out what was wrong at 8:00pm. He told me that he was keeping the children until 27 December 2022 because his family wanted to see them on Boxing Day. He also said that he and the children would be moving to Calgary, Alberta.

23. The Respondent has family in Calgary. I am afraid that he intends to remove the children from Kelowna, where they have spent all of their lives and where they have family and friends.

...and so on. If necessary, usually when an affidavit is particularly long or the facts are particularly complicated, I may summarize the orders I'm asking for and why I'm asking for them.

Summary

45. As a result of the Respondent's conduct, I believe that the Respondent may decide to take the children to Calgary. I seek an order that the Respondent be restrained from removing our children from Kelowna without my express permission or the further order of this Honourable Court.

Remember to tell your story in the first person. It is *you* who is telling your story, and you are me, myself, or I, not "the Claimant" or "the Respondent."

Rules about content

Only certain kinds of information are permitted in an affidavit. If your affidavit is written for use at a trial, you cannot describe things you believe are true or have heard from someone else. You can only set out information that you have actual, personal knowledge of. If you are writing your affidavit for the purposes of an interim application, however, you may include both things you believe to be true as well as hearsay.

Hearsay

Hearsay means saying anything you don't know yourself but have learned from someone else. It also includes repeating someone else's statements in your own affidavit. It's hearsay, for example, to say "Sally told me that she went to the park at noon on Saturday." It is not hearsay to say "I saw Sally in the park at noon on Saturday" or "Sally and I went to the park at noon on Saturday."

Hearsay is permitted in affidavits used for interim applications. However, double hearsay is not, nor is anonymous hearsay.

Double hearsay is saying something like "Frida told me that Sally said she was in the park at noon on Saturday." In other words, double hearsay is stating as a fact what someone told someone else.

Anonymous hearsay is saying what someone told you but without identifying the person who told you, like "someone told me that Sally was in the park at noon on Saturday", or "I have been advised that Sally was in the park

at noon on Saturday, but I cannot identify the person who told me that she was in the park."

Opinions

The other thing that is generally not permitted in an affidavit is *opinion evidence*. Only people with special, recognized skills, like doctors or engineers or psychologists are allowed to write about their opinions in affidavits. Again, some opinion evidence is permitted in affidavits used for interim applications, however, it is never permitted in affidavits prepared for trial.

The easy way to spot opinion evidence is by sentences that start with "I think..." or "I believe that...." For example, saying "I believe that Sally is not a good mother because she spends too much time in the park" is really your opinion about Sally's parenting skills; it is not a statement of fact and is not allowed in your affidavit.

Expressions of emotion

A lot of people want to put everything in their affidavits, including how they feel about things or how they reacted to something. Don't do this. The court won't pay much attention to it, and you risk the court having a bad impression of you rather than of your ex. Good lawyers will carefully winnow out statements like "I was shocked and appalled that Bob would actually do such a thing." You should get rid of that sort of thing.

The court does not care how something made you feel; the court is interested in *facts*. Overblown and hysterical statements will undermine the credibility the court is prepared to extend to you. Statements like "I was disgusted to see Sally in the park on Saturday," "I could see the anger in her eyes as she came at me," or "I couldn't believe what a rotten person Sally was" will not go over well in court.

"Never" and "always"

Avoid using the words "never" and "always," or any other absolute statement of frequency, as it is rarely the case that something *always* happened or *never* happened. Saying "Bob never helped with the children" is an invitation to the court to discount what you're saying. Even if you did 99% of the work with the children, Bob is certain to have done something with them, and that means that "never" and "always" aren't true.

Just as over-the-top statements of emotion will undermine your credibility, so will using statements that are as absolute as "always" and "never." Instead of words like those, just say "I did virtually all of..." or "Sally rarely helped with...."

Exhibits

Exhibits are documents that you attach to your affidavit, usually to support some point you're making in your affidavit. If, for example, you say that your income is $42,000 per year, you might want to attach your most recent T4 slip or your most recent income tax return to show that your income is in fact $42,000 per year.

Exhibits can be almost anything: a receipt, a printout of your child's school's website, a letter, a doctor's note, a company search result, a report card, a speeding ticket, a photograph, an appraisal, a bank statement, a Valentine's Day card...,pretty much anything. If something can be reduced to paper, it can be an exhibit.

When you attach an exhibit, you have to introduce it in your affidavit. You can't just attach reams of documents to the back. You have to explain what the document is in your affidavit and say that the document you are attaching is a "true copy" of the original (note that the exhibits to an affidavit are almost always scanned or photocopied reproductions of the original, and original receipts, cards, photos, etc. are reproduced this way to ensure the pages are all the same size). Each exhibit is identified sequentially by a letter, "A," "B," "C," and so forth. For example:

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16. I have a lovely home on two acres of land. There are three bedrooms, a sauna, an outdoor
    swimming pool, and a private petting zoo for when Michael comes over. Attached to this my
    Affidavit as EXHIBIT "G" are true copies of photographs of my home.
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17. My home is worth about $350,000. Attached to this my Affidavit as EXHIBIT "H" is a true copy of the 2023 BC Assessment for my home.

Each separate exhibit is marked as an exhibit and shows which exhibit it is. Lawyers and notaries public will have a stamp that they use to give the basic information. The stamp says something like this:

> This is Exhibit "___" in the Affidavit of _____ , sworn before me at _____ , British Columbia, this ___ day of _____ , 20_____ .

The stamp also provides a space for the lawyer's or notary's signature, and the phrase "A Commissioner for the taking of Oaths for the Province of British Columbia." Filled out, the stamp will read like this:

> This is Exhibit **"D"** in the Affidavit of **Jane Alice Doe,** sworn before me at **Nanaimo,** British Columbia, this **20th** day of **March,** 20**23.**

The important thing about exhibits is that they are *hearsay*. Just because you've attached something as an exhibit doesn't make the statements made in the exhibit true. While business information like a bank statement or a receipt will be taken as true, subjective information — like the contents of a letter from your mother, brother, friend, or co-worker — won't be automatically accepted by the court.

This is important to understand, because lots of people want to attach testimonials and other sorts of information to their affidavits to make them look as good as possible, or to make their ex look as bad as possible. For example, "Sally is the best mother I have ever seen; she obviously treasures her children and they mean the world to her" or "Bob is a terrible parent who used to throw rocks at the children when they were infants to see if they'd flinch." What will the court get out of such obviously biased information? Not a lot.

The letter from your mother is hearsay, just as if you'd said what your mother told you in your affidavit. The court will accept as true the fact that your mother wrote the letter, but it won't necessarily accept what your mother says in the letter as true. If what your mom has to say is so important, get her to prepare an affidavit of her own. That is something that the court will pay attention to.

Summary

Be calm, be cool, be collected. Tell your story in a logical, orderly manner so that a judge, who doesn't know you from a hole in the ground, will understand what the heck you're talking about, what you want, and why you want it.

Avoid inappropriate expressions of emotion and stick to those facts that you have personal knowledge of when you can. You want to come across as a sane, reasoning human being, not a hysterical jumble of raw emotion.

If you have any documents that support the statements you're making, attach them to your affidavit as exhibits. Use documents that are neutral and unbiased, like a bank statement or an appraiser's report, but avoid inflammatory and subjective documents like letters from friends and relatives.

Above all, when you're done, ask yourself this: would a complete stranger know what I'm talking about? If you can't answer that question, give your affidavit to a complete stranger, your next-door neighbour for example, and find out!

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Prepare a Supplemental Affidavit?

In many family law court proceedings, it is not uncommon to have three, four, or even fifteen affidavits prepared in the course of things. In most cases, the first affidavit describes the background facts about who the couple are, when they met, when they separated, who their children are, and so forth. Affidavits after that usually update the court about events occurring since the previous affidavit was sworn.

New affidavits don't *replace* any of the previous affidavits, they just add to the written evidence in the court file. Each affidavit stands on its own.

To make a new affidavit after the first affidavit, follow all the steps described in How Do I Prepare an Affidavit? and make sure that you change the number of the affidavit given in the top right-hand corner of the first page. Instead of:

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This is the 1st affidavit
of J.A. Doe in this case
and was made on 1 April 2013
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...the second affidavit might read:

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This is the 2nd affidavit
of J.A. Doe in this case
and was made on 15 April 2013
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Apart from this minor change, affidavits prepared after the first affidavit are prepared in exactly the same way as the first affidavit was prepared.

Note that you can refer to previous affidavits in your new affidavit. Just be sure to identify the affidavit by the date the affidavit was made and by the person who made it. If you're going to be referring to specific parts of that affidavit, mention the paragraph numbers as well.

13. In my third affidavit, sworn on 10 August 2023, I state at paragraph 42 that I was the parent who was primarily responsible for taking the children to their medical appointments. I was also the parent primarily responsible for attending to the children's dental, counselling, and therapeutic appointments. I was also the parent who attended the children's parent-teacher meetings.

14. The Respondent alleges, at paragraph 17 of his second affidavit, sworn on 1 August 2023, that he was the parent who booked and paid for the children's ballet and hockey lessons. The truth of the matter is that while he did pay for two or three of the children's hockey lessons, I was the parent who spoke to their coaches and instructors, arranged for their enrollment, and paid for the majority of the cost of these lessons.

For more information, see How Do I Prepare an Affidavit? and How Do I Fix an Error in an Affidavit or Add to an Affidavit?.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Fix an Error in an Affidavit or Add to an Affidavit?

Once you've sworn your affidavit, it's done. With one exception — for typos, discussed below — the only way you can fix a mistake in that affidavit or add additional information to it is to make a new affidavit.

It's not uncommon to have three, four, or even fifteen affidavits prepared in the course of a court proceeding in a family law dispute. These affidavits are mostly made to update the court on events occurring since the previous affidavit was sworn.

Note that new affidavits don't replace any of the previous affidavits, they just add to the written evidence already in the court file. Every affidavit stands on its own.

Adding new information

If you have to add new information or documents that should have been in the previous affidavit, you'll have to do up a new affidavit. In the beginning of the affidavit, just state that you're making the affidavit to give the court new information, and then set out the additional information you need to give the court.

In the example below, paragraph 1 is the standard beginning paragraph of an affidavit. Paragraph 2 explains that the affidavit is filed to give additional information. The other paragraphs add a new document and give some new information.

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.
2. I make this my affidavit to supplement the evidence given in my second affidavit, sworn in this matter on 1 April 2023 (the "Second Affidavit").
3. At paragraph 32 of the Second Affidavit, I describe how the Respondent and I bought our 2000 Ford Escort. I have now found the sales receipt for that purchase, which shows that I paid all of the down payment. Attached to this my Affidavit as EXHIBIT "A" is a true copy of the sales receipt, dated 1 April 2016.
4. At paragraph 44 of the Second Affidavit, I discuss how the Respondent and I bought the green filing cabinet. I have had the chance to give further thought to this purchase, and I now recall that it had four drawers. I accidentally omitted this fact in the Second Affidavit.

...and so on.

Fixing less important information

If you've made a typo in an affidavit that's already been sworn, you don't have to prepare a whole new affidavit. This is what you do:

1. Take the sworn affidavit to a lawyer or notary public, preferably the lawyer or notary who executed the affidavit.
2. When you're in front of the lawyer or notary, correct the mistakes on the affidavit in pen (cross out the incorrect information and write the correct information).
3. Write your initials in the margin of the page beside the line you have corrected. The lawyer or notary will put their initials there too. Repeat until you have corrected all errors.
4. The notary or lawyer will then have to re-swear your affidavit, which just means that you'll have to give your oath that the corrected affidavit is true and sign the affidavit again, below your old signature, and the lawyer or notary will sign the affidavit again.

This will not be appropriate for all mistakes. You can fix a number, change an "I did" to an "I did not," fix a misspelling, or even delete a whole paragraph. It is not appropriate to fix major mistakes about important facts and claims. To fix those, you really should prepare a new affidavit to explain yourself.

Fixing important information

If you've made a major error in an affidavit that's already been sworn, you must prepare a whole new affidavit to explain why you've changed your evidence and what your mistake was.

In this example, the first two paragraphs introduce the new affidavit and explain why it is being made. Paragraphs 3, 4, and 5 show how different types of mistake could be corrected. The last paragraph confirms, with the exception of the corrected information, that the balance of the earlier affidavit is true.

1. I am the Claimant in this matter, and as such have personal knowledge of the facts hereinafter deposed to.
2. I make this my affidavit to correct certain evidence given in my second affidavit, sworn in this matter on 1 April 2023 (the "Second Affidavit").
3. At paragraph 12 of the Second Affidavit, I discuss how the Respondent and I bought the green filing cabinet. I have had the chance to give further thought to this purchase, and I now recall that it was a black filing cabinet and that it had four drawers, not three. I was mistaken with respect to these two facts in the Second Affidavit.
4. At paragraph 15 of the Second Affidavit, I state that the Respondent was late in picking the children up from school on 1 April 2022. Since I made the Second Affidavit, I have had the chance to review my calendar and refresh my memory, and I realize that the Defendant was not late in picking the children up that day.
5. At paragraph 18 of the Second Affidavit, I state that the Respondent has two cars. I have read the Respondent's third affidavit, sworn in this matter on 12 April 2023, and I admit that the Respondent is correct when he says that he has but one car. The evidence I gave in the Second Affidavit on this point was incorrect. I had forgotten that the Defendant sold the Ford Escort in 2021.

...and so on. Finish with this:

13. In all other respects, the evidence given by me in the Second Affidavit is true and accurate.

You must be careful about correcting major mistakes, especially those that are important to a claim you or your former spouse are making. Too many corrections may make you look sloppy and careless, and could possibly undermine your credibility. The best way to avoid problems like this is to ensure that each affidavit you make is as accurate as possible before you swear it.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Address the Judge?

How you address the judge depends on which court you are in. Each court has a particular honorific that should be used when addressing the judge, and the judge is properly addressed by that honorific when in court, not as "sir," "ma'am," or something else.

Judges of the BC Court of Appeal and BC Supreme Court are officially called *Justices*. Please note, they are no longer addressed as “My Lord,” “My Lady,” “Your Lordship,” or “Your Ladyship”. Since November of 2021 the ways to address judges are:

- For Justices of the Court of Appeal use “Chief Justice” (for the Chief Justice only), “Justice”, “Madam Justice”, “Mr. Justice”, or, if addressing more than one, as “Justices”, according to the context. It is no longer acceptable to address them as “My Lady”, “My Lord”, “Your Ladyship” or “Your lordship”. In a Registrar’s hearing at the Court of Appeal, the Registrar is to be addressed as “Your Honour”.
- Associate judge and registrars of the Supreme Court are addressed as “Your Honour.” Note that effective January 15, 2024, the *Supreme Court Act* was amended to replace the title of *master* with the title of *associate judge*. All references to a *master* of the BC Supreme Court should be read as a reference to an *associate judge*. Provincial Court judges are also called “Your Honour.”
- For Justices of the BC Supreme Court use “Chief Justice” (for the Chief Justice of the BC Supreme Court only), “Justice”, “Madam Justice”, or “Mr. Justice”. Here too, the terms “My Lady”, “My Lord”, “Your Ladyship” or “Your lordship” are no longer acceptable. The most appropriate form of address for an associate judge of the BC Supreme Court is “Your Honour”. A District Registrar or the Registrar of the BC Supreme Court is called "Your Honour."
- For BC Provincial Court judges, the proper form of address for a judge is “Your Honour”. For *Judicial Justices*, *Judicial Case managers",* justice of the Peace Adjudicators*, or* Court Services Justices of the Peace*, the proper term is still “Your Worship.”*

Courthouse Libraries BC maintains a helpful resource which includes references as well as ways to address a judge outside the courtroom. See *Forms of address* [1], on their website. You can find information about what to expect in court in How Do I Conduct Myself in Court at an Application?. You can find information about court processes in the chapter Resolving Your Legal Problem in Court.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Nate Russell, May 12, 2023.

References

[1] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/forms-address

How Do I Address the Lawyer When I'm Representing Myself?

When you're in court, you'll see the lawyers on opposing sides address each other as *my friend* or, in the case of lawyers who are Queen's Counsel, as *my learned friend*. You shouldn't do this, unless you're a lawyer too. (Besides, I doubt very much that you're going to be inclined to call the lawyer representing your ex "my friend.")

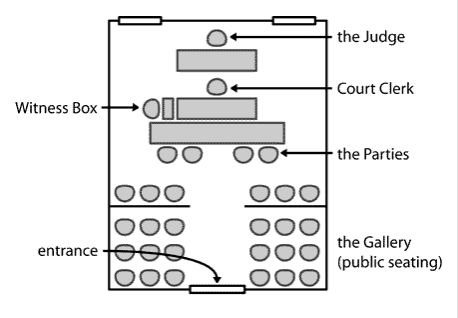
If you're representing yourself, just refer to the lawyer acting for your spouse by the lawyer's last name, as "Mr. _____" or "Ms. _____."

You can find information about what to expect in court in How Do I Conduct Myself in Court at an Application?.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Conduct Myself in Court at an Application?

The courtroom



The drawing here shows how most courtrooms are laid out. In some courtrooms the witness box will be on the right rather than the left. Other courtrooms may have seating for a jury; others may have a separate entrance and seating for the criminally accused; others may have a very small or a very large area for the gallery.

Checking in

Get to the courthouse about 20 minutes ahead of the time shown on your Notice of Application or Notice of Hearing. In the Provincial Court, hearings generally start at 9:30am. In the Supreme Court, the court day starts at 10:00am.

Somewhere around the entrance to the courthouse there will be a bulletin board with lists of all the hearings that are going on that day and that note which courtroom each hearing is in. Find your courtroom, and get there early.

The clerk will open the courtroom about 10 or 15 minutes before the court day starts. Enter the courtroom and walk to where the clerk sits. Tell the clerk who you are. The clerk will find your file on the day's list and will ask you how long you expect the hearing to take.

After you've checked in, take a seat in the gallery. Lawyers will sit in the row of chairs just beyond the gallery, past the bar, although in some busy courtrooms like the chambers courtrooms in Vancouver and New Westminster, all of the seating is considered past the bar. In a case like that, where there is no obvious gallery, sit wherever you find a seat.

The start of the court day

The court day starts when the judge enters the courtroom. The clerk will make an announcement when the judge is entering the room. Stand up when the judge enters the room, and sit down only when the judge sits down.

The clerk will then start calling the day's cases, one by one. In the Supreme Court, the clerk calls the cases in order from the shortest cases to the longest cases. In the Provincial Court, the clerk will call the cases where one or both parties are represented by lawyers before moving on to the cases where neither party has a lawyer.

When your case is called

Walk up to the long table in front of the clerk, and take a position to the right or left. It usually doesn't matter which side you choose.

While you're doing this, the judge will probably be taking some notes. Remain standing until the judge looks up from their notes. The person who is making the application, the *applicant*, should introduce themselves first, followed by the other person, the *respondent*, introducing themselves:

> Applicant: "Good morning, my name is Jane Doe and this is my application."
>
> Respondent: "I am John Doe."

Once that's done, the respondent can sit down. Usually, the applicant will then move to the little lectern at the centre of the table and make their pitch about why the judge should make the orders they are asking for. When the applicant is done, the applicant sits down and it's the respondent's turn to stand up, move to the lectern, and say why the application is a bad idea.

Etiquette

The judge, the court clerk, and the other party are deserving of your respect and courtesy. Plus, you really want the judge to think well of you. Here are some general guides.

Dress

For women, something along the line of business casual will do. It doesn't matter whether you're wearing a dress, skirt, or slacks. Avoid excessively casual clothing like jogging suits, sweatshirts, runners, and such. If you feel driven to wear make-up, remember that you're going to a formal event, not a night out at the Roxy.

Men should also think business casual. If you have a sport jacket, wear that along with a clean pair of pants. Ties and proper suits are nice but not necessary at all. Your shirt should be of the button-up variety and not have a beer logo on it. Don't wear a hat in court.

The general goal is to look respectable and respectful, not like you just rolled out of bed or are gearing up for a night out on the town. Do your best to make it look like it matters to you that you're in court.

Addressing the judge

In the Provincial Court, the judge should be addressed as "Your Honour". Associate judges (formerly called *masters*) of the BC Supreme Court are also addressed as "Your Honour". Justices of the BC Supreme Court are addressed as "Justice", "Madam Justice", or "Mr. Justice", and no longer addressed as "My Lord", "My Lady", "Your Lordship", or "Your Ladyship". Do not call any judge (whether a Provincial Court judge, a Supreme Court justice, or a Supreme Court associate judge) "sir," "ma'am," or "dude," or anything else for that matter.

Addressing the other side

If the other side is a lawyer, "Mr. Smith" or "Ms. Smith" will do. Ignore how the lawyers address each other in front of the judge.

If the other side doesn't have a lawyer, it's usually all right to use first names, but it's better to address each other formally as "Mr. _____" and "Ms. _____".

Standing up and sitting down

Always stand when the judge is speaking to you or when you're speaking to the judge, unless of course you are unable to stand. Sit down at all other times.

General rules

- Always be early. Simply being on time is your last resort.
- Don't interrupt, no matter how much you want to. Interrupting is rude and makes the transcript impossible to read, if it needs to be read. Above all, never interrupt the judge.
- Don't use foul language. Be polite and courteous at all times.
- Never say that the other side is "lying" or is a "liar." There's usually a better way of getting your point across, without using harsh, judgmental language like that. Say, "my understanding of events is that..." or "perhaps Mr. Smith misremembers what happened. I recall that..."
- Stay calm at all times. No outbursts!
- By the same token, don't make faces or grunt when the other person is talking. You will have your chance to reply; rolling your eyes is not going to convince the judge that you're right.
- If you have an objection to make, do your best to save it until the other side is done. If you simply cannot wait, stand up, wait until the judge recognizes you and explain what your concern is.
- Try your best to speak slowly. The judge will be taking notes of what everyone is saying, and it can be very difficult to keep up with someone who's talking a mile a minute.
- If the judge chastizes you for something, take what the judge is saying to heart — especially if it concerns your conduct in court — and take it like an adult. No pouting.
- If there's something you don't understand, ask for an explanation. Stand and wait until the judge recognizes you, and ask for clarification.

When your case is done

After the judge delivers their judgment, stand up and thank the court, whether you won or lost, and leave the courtroom.

It is extremely poor form to gloat over a victory, or, otherwise, to sulk and rage about a loss. Take it like a grownup and leave the courtroom. Save your boasting or complaining for your friends.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Appeal a Provincial Court Decision?

Under section 233(1) of the *Family Law Act*, only final decisions of the Provincial Court can be appealed. Appeals of final decisions of that court are made to the Supreme Court. Interim decisions of the Provincial Court can only be challenged by a judicial review under the aptly named *Judicial Review Procedure Act*. This information is about appeals to the Supreme Court.

Forms involved

You can obtain a document package from the Supreme Court's website (http:/ / www. courts. gov. bc. ca/ supreme_court/ self-represented_litigants/ sc_info_packages/ appeal_package_general. pdf) or one of its registries that contains the forms and describes the general rules and procedures for appeals of a Provincial Court decision to the Supreme Court. In general, the rules, forms and the Family Practice Direction (FPD) involved are:

1. Supreme Court Family Rule 18-3 – Appeals
2. Supreme Court Family Form F79 – Notice of Appeal if Directions Required
3. Supreme Court Family Form F80 – Notice of Appeal – Standard Directions
4. Supreme Court Family Form F77 – Notice of Interest
5. Supreme Court Family Form F81 – Notice of Hearing of Appeal
6. Supreme Court Family Form F82 – Notice of Abandonment of Appeal
7. FPD – 10 – Standard Directions for Appeals from Provincial Court – Family Law Act

Making an appeal to the Supreme Court

To appeal a decision, you must file a form called a Notice of Appeal in Form F80 within 40 days of the decision. Appeals from the Provincial Court are governed by Rule 18-3 of the Supreme Court Family Rules. This form is a lot more complex than the forms you've used in the Provincial Court. In the form you must indicate:

1. when the order you are appealing was made,
2. the name of the judge who made the order,
3. that you are bringing your appeal pursuant to section 233 of the *Family Law Act*, and
4. the reason or reasons why you are bringing the appeal.

Once you've filled out your Notice of Appeal, you must file it in the registry of the Supreme Court. The Supreme Court will charge you a fee to do this. The registry will stamp your Notice of Appeal with the seal of the court, a date stamp, and the file number of your new court proceeding. You must then serve the notice on the other person by personal service, and file another copy of the notice in the Provincial Court registry where the order was made

Reasons for appealing a decision

When a judge makes a decision following a hearing, the judge does three things. First, the judge makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the judge decides what the law applicable to the case is. Third, the judge applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it. You must have a proper legal reason for bringing the appeal and show that the judge made an error in their findings of fact or an error in their findings of law.

In most cases, you will not be able to appeal a decision because of a mistake in the judge's findings of fact. Because appeal courts do not hear the evidence all over again, unless the trial judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the trial judge found them to be.

Most often, appeals are based on errors in the judge's conclusions about the applicable law or how the judge applied the law to the facts, called an *error of law*. In appeals like these, the argument is based on a claim that the judge didn't apply the correct legal test or failed to properly apply the legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing a judge's decision, you should seriously consider hiring a lawyer.

Deadlines and procedures

After the other side has been served with your Notice of Appeal, they will have seven days to file a Notice of Interest in Form F77. This form is used to acknowledge your appeal.

Normally you would have to apply to the court for some directions about how your appeal will be conducted. However, because your appeal is about a family law problem, the directions for your appeal are set out in the standard set of directions in Supreme Court Family Practice Direction 10 [10], which is available on the court's website and at the court registry.

According to the Practice Direction, you must order both a transcript of the oral evidence given at the Provincial Court hearing that resulted in the decision you are appealing and a transcript of the judge's reasons for judgment. You must also file proof that you personally served the party within 30 days.

You must file a copy of the transcript with the court and serve it on the opposing party within 45 days of filing the Notice of Appeal. Within 30 days after filing your Notice of Appeal, you must provide proof that you have ordered these transcripts.

Within 45 days after filing the Notice of Appeal, the appellant must file a written outline setting out:

- the grounds of the appeal,
- the relief you are seeking, i.e. the order you want the court to make,

and

- the factual and legal basis on which you are seeking the relief, including any legal cases you intend to rely on.

You must serve the written outline on the other party at least 21 clear days before the date set for hearing the appeal.

A person who has filed a Notice of Interest must file a response and serve it on the appellant, no less than 14 clear days before the date set for hearing the appeal. The response must set out the factual and legal basis upon which you are opposing the appeal.

The appellant may, but does not have to, file a reply to the response and serve it at least 3 clear days before the date set for hearing the appeal.

Neither party is permitted to use new evidence that was not before the Provincial Court judge, unless they get the permission of the Supreme Court judge.

The cost of appeals

There are two fees that you'll have to pay to have your appeal heard. First, you'll have to pay a fee to file your Notice of Appeal. Second, and more expensively, you'll have to pay for the transcript of the Provincial Court hearing.

Transcripts are produced by private companies under agreement with the Ministry of Attorney General. You can learn more about these transcription companies, their fees, and the regions and types of court proceedings each is able to serve by visiting the BC Government's website's court transcripts information page [1]. A court reporter employed by the company retrieves the audio of the hearing from the court and painstakingly transcribes each and every word. J.C. WordAssist Ltd., one of the larger companies that provides this service, charges around $10 to $14 per page (depending on the turnaround time you need) to produce transcripts of court hearings. And the rule of thumb is that each hour of a hearing is about 30 pages of transcript. So a four hour hearing will easily cost over $1,200 to transcribe, plus extra fees for copies.

Be warned! Appeals can be expensive.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

References

[1] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-transcript

How Do I Appeal an Interim Supreme Court Decision?

Interim orders are made in the Supreme Court by an associate judge or judge in chambers. Final orders are made by a judge following trial or with the agreement of the parties. The rules about appealing interim orders are different, depending on whether the order was made by a judge or an associate judge.

Associate Judge's orders

An interim order made by an *associate judge* can be appealed as of right to a judge of the Supreme Court. Because the appeal is being heard by a judge from the same level of court, you're not going to have to deal with Court of Appeal Rules and Court of Appeal forms.

Steps for appealing an associate judge's order

Under Rule 22-7 of the Supreme Court Family Rules, an appeal from a judge's decision is brought by filing a Notice of Appeal from Associate Judge, Registrar or Special Referee in Form F98 of the Supreme Court Family Rules within 14 days of the date the order was made. This deadline applies to orders that the associate judge made under the Supreme Court Family Rules or the *Family Law Act*. If the associate judge made orders under the *Divorce Act*, you have to look at section 21(3) of that Act, which says that an appeal must be made within 30 days.

The date the appeal will be heard is written on the Form 98 Notice of Appeal from Associate Judge, Registrar or Special Referee. It is a good idea to leave this part of the form blank until you've had a chance to talk to the court registry staff. Depending on how long your appeal will take to be heard and the court's schedule, they may want to select the date of the hearing for you.

It's important to know that filing Form F98 does not, on its own, operate to cancel the order pending the appeal. You can, if you want, apply to the associate judge who made the order for an order that the order will be *suspended* until the appeal is heard.

Judge's orders

An order made by a judge of the BC Supreme Court can only be overturned by a judge from a higher court, which is the Court of Appeal.

Getting permission to appeal

To appeal a judge's order, even an interim one, you need to go to the Court of Appeal, but you will probably need to get permission first. You need to read Rule 11 of the Court of Appeal Rules to determine if the order you want to appeal is a *limited appeal order* or not. Since it's an interim order, it probably will require leave. A good resource to help you understand Rule 11 is *The CanLII Manual to British Columbia Civil Litigation* [26], and it has a section about understanding what are limited appeal orders under Rule 11 of the Court of Appeal Rules. Again, most interim orders are limited appeal orders, and certainly any interim orders made under the *Family Law Act* or the *Divorce Act* are limited appeal orders. Limited appeal orders can only be appealed *with leave*, i.e. the Court of Appeal's permission.

Steps for appealing a judge's order

If you're lucky and the order you're appealing is not a *limited appeal order*, you file a Form 1 Notice of Appeal from the Court of Appeal Rules [13] within 30 days of the order being made.

If you're like most appellants with an interim order, or if you are not sure, you will need to go through the steps for requesting leave to have the appeal heard. This is done by:

1. Completing and filing a Form 1 Notice of Appeal, but indicating that leave to appeal is required.
2. Getting a hearing date for your application from the registry.
3. Completing a Form 4 Notice of Application, and indicating on the form that the application is for *leave to appeal*.
4. Preparing an *appeal application book*.
5. Not more than 30 days after you filed the Form 1 Notice of Application:
    - Filing both the Form 4 Notice of Application and the appeal application book.
    - Serving the Form 4 on the respondents at least 10 days before the hearing date.

The rest of the appeal process is set out in the Court of Appeal Rules. These are fairly complicated, and you should seriously consider hiring a lawyer to help you with your appeal.

If you are going ahead without a lawyer, be sure to read on for tips for representing yourself.

It's important to note that filing a Notice of Appeal or a Notice of Application in the Court of Appeal does not, on its own, operate to cancel the order pending the appeal. You can, if you want, apply to the judge who made the original order for an added order that the order you will be appealing will be *suspended* until the appeal is heard.

Representing yourself in the BC Court of Appeal

For more information on the appeals process through the Court of Appeal, see the Justice Education Society's Court of Appeal BC Online Help Guide [1]. There are separate guidebooks for appellants and respondents, visual flow charts called process overviews for appellants and respondents, and links to MS Word versions of the Court of Appeal forms. This is a very valuable resource for self-represented people.

You might also find the *The CanLII Manual to British Columbia Civil Litigation* [26] (which is freely available online), and its chapter about the Court of Appeal Rules, to be helpful if you have to navigate this on your own. Be warned that the procedures and forms for the BC Court of Appeal changed in 2022, so be cautious if you're reading any books or guides that were written before July 2022 and not revised since then.

Reasons for appealing a decision

When an associate judge or judge makes a decision following a hearing, they do three things. First, the court makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the court decides what the law applicable to the case is. Third, the court applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it, and you cannot appeal a decision just to stall its consequences. You must have a proper legal reason for bringing the appeal.

In many cases, you will not be able to appeal a decision because the court made an mistake about a *finding of fact*. Because an appeal court does not hear the evidence all over again, unless the associate judge or judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the court found them to be.

Most often, appeals are based on:

- errors in the court's conclusions about the applicable law, or
- how the judge applied the law to the facts.

Either of these kinds of errors is called an *error of law*. In appeals like these, the argument is based on a claim that the court didn't apply the correct legal test or failed to properly apply the legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing an interim decision, you should seriously consider hiring a lawyer.

Because an interim order is only temporary, lasting until the trial, you should seriously consider whether an appeal is necessary, or you should just wait until the trial to have it changed.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Elham Jalilian, September 18, 2023.

References

[1] https://courtofappealbc.ca/civil-family

How Do I Appeal a Final Supreme Court Decision?

A final decision of the Supreme Court is made by a judge following trial or by the agreement of the parties without a trial. Orders made by the agreement of the parties are called *consent orders*.

A judge's final decision is appealed to the Court of Appeal. Because consent orders are made with everyone's agreement, they are almost impossible to appeal. Nevertheless, if an appeal can be made, it will be made to the Court of Appeal, just like a judge's final order.

It's worth noting that the Court of Appeal revised its procedures and changed its forms in July 2023. As a result, you will want to make sure that you're following the new procedures. If you're reading guides about the Court of Appeal process written before July 2023, which might talk about a special form for seeking leave to appeal (which is no longer applicable), you should stop and read up on the changes that were made. A good resource is the New Court Forms, Completion Instructions and Templates [1] information page from the Court of Appeal itself.

Is an appeal appropriate?

You should think twice before you decide that you want to appeal a decision, as appeals can be surprisingly expensive. They're usually not as expensive as trials are, but the cost is still substantial. As well, it isn't always necessary to appeal a decision. This is especially important to consider unless the decision is about division of property or debt. Orders, even final orders, which deal with children, child support, and spousal support can often be varied following the decision. Of course to vary an order, there must have been a significant change in circumstances since the original decision was made. Read the section on Changing Supreme Court Family Law Orders in the chapter Family Law Litigation in Supreme Court in the online edition of this wikibook to learn about what a *change in circumstances* means and how this might permit variation of an order.

The person bringing an appeal is called the *appellant*. The other party is called the *respondent* because that party is *responding* to the appeal. The trial court, the Supreme Court, is called the *lower court* or *the court below*, and the judge who heard the trial is called the *trial judge*.

Appeals to the Court of Appeal are governed by two things: the *Court of Appeal Act* [12] and the Court of Appeal Rules [13]. You should be familiar with both the Act and the Rules because both contain guidelines and deadlines for the conduct of an appeal. Reading the Rules is not enough!

Finding the forms

The forms referred to below can be found on the Court of Appeal's website [23], as well as through the very helpful Justice Education Society's Court of Appeal BC Online Help Guide [1]. Forms are available as both MS Word templates and PDF files. The files marked as "PDF fillable" should be downloaded and saved locally to your computer, then opened directly using a PDF reader rather than your web browser. The PDF fillable forms usually do not work in your web browser's PDF reader.

Making your appeal

To appeal a decision, you must fill out a Notice of Appeal in Form 1 of the Court of Appeal Rules. File it in the registry of the Court of Appeal and serve it on the other side. The Notice of Appeal is a set form that you must fill out. In it you will have to say:

1. the parties to the appeal,
2. the order you are appealing,
3. the relief you are seeking,
4. additional information, including whether the action in which the order under appeal originates has a sealing order or anonymous/publication ban, and
5. information related to service.

The registry of the Court of Appeal will charge you a fee for filing the form, and you'll notice that all of the fees charged by the Court of Appeal are higher than those of the Supreme Court. The registry will stamp your Notice of Appeal with the seal of the court, a date stamp, and the file number of your action. You must then serve the Notice of Appeal on the other side.

Be aware that you have 30 days from the day after the was made to file your Notice of Appeal. The date the order is made is what's important, not the date you receive a judge's reasons. Once the 30 days have run out, you will not be able to make your appeal unless you make a special application to the court for an extension of time. In general, the Court of Appeal is very strict and will demand that you obey the deadlines and rules exactly.

Reasons for appealing a decision

When a judge makes a decision following a hearing, the judge does three things. First, the judge makes a decision about the evidence and what the facts of the case are; this is called making a *finding of fact*. Second, the judge decides what the law applicable to the case is. Third, the judge applies the law to the facts. These last two steps are called *findings of law*.

You cannot appeal a decision simply because you don't like it, and you cannot appeal a decision just to stall its consequences. You must have a proper legal reason for bringing the appeal.

In most cases, you will not be able to appeal a decision because of a mistake in the judge's findings of fact, called an *error of fact*. As the appeal court does not hear the evidence all over again, unless the trial judge made an enormous error in deciding the facts of the case, the facts that you will rely on at your appeal are the facts as the trial judge found them to be.

Most often, appeals are based on errors in the judge's conclusions about the applicable law or how the judge applied the law to the facts, called an *error of law*. In appeals like these, the argument is based on a claim that the judge didn't apply the correct legal test or failed to properly apply the correct legal test.

Since appeals normally deal with legal issues rather than factual issues, they can be quite complex and involve a lot of technical arguments. If you are appealing a judge's decision, you should seriously consider hiring a lawyer.

Deadlines and procedures

Notice of Appeal

You have 30 days from the day after the order was made (not the date the order is formally written up and entered in the court registry, but the date the order is issued by the judge) to file your Notice of Appeal and serve it on the other side.

Notice of Appearance

After the respondent has been served with your Notice of Appeal, they will have 10 days to file a Notice of Appearance in Form 2 and serve it on you, acknowledging your appeal. At this point, the respondent may choose to serve a Notice of Cross Appeal in Form 2 against you. This is the respondent's own separate appeal from the trial decision.

Preparing the appeal record, appeal book and transcripts

This is where things start to get expensive. Within 60 days of filing your Form 1 Notice of Appeal, you must obtain a transcript of the testimony in the court appealed from, file the transcript with the court, and serve a copy on the respondent.

The transcript you must obtain is a transcript of all the oral evidence given at trial. You will have to contact a court reporting company and make arrangements for them to transcribe what was said during the court proceedings. Transcripts are produced by private companies under agreement with the Ministry of Attorney General. You can learn more about these transcription companies, their fees, and the regions and types of court proceedings each is able to serve by visiting the BC Government's website's court transcripts information page [1]. A court reporter employed by the company retrieves the audio of the hearing from the court and painstakingly transcribes each and every word. J.C. Word Assist Ltd., one of the larger companies that provides this service, charges around $10 to $14 per page (depending on the turnaround time you need) to produce transcripts of court hearings. The rule of thumb is that each hour of a hearing is about 30 pages of transcript. So a typical day in court, which is around four hours of actual court time after the breaks are accounted for, will easily cost over $1,200 to transcribe, plus extra fees for copies.

Also within 60 days after bringing an appeal, under Rule 23 of the Court of Appeal Rules you must prepare an *appeal record*, file it with the court, and serve a copy on the respondent. The appeal record must contain the following:

1. The pleadings that were filed in the original court proceeding (the Notice of Family Claim, the Response to Family Claim, and the Counterclaim). If any of them were amended, use the last amended version.
2. A copy of the entered order under appeal, if available, or, if no copy of the entered order is available, a blank page with an envelope attached in which the copy of the entered order can be inserted once available.
3. A copy of the reasons for judgment.
4. A copy of the Form 1 Notice of Appeal.

Under Rule 26 of the Court of Appeal Rules, within 30 days after filing the appeal record, you must prepare an *appeal book*. You need to file it with the court, and serve a copy on the respondent. The appeal book contains the documentary exhibits that were entered at the trial that are relevant to the appeal. For example, if the appeal is only about parenting time, you would not need to include all of the financial documents that were put in evidence at trial, just the documents that relate to parenting time.

When preparing your appeal book, pay close attention to the Rules and the form and format they require. There are a couple of companies that will prepare your appeal book for you. You can look for these companies' brochures at the Court of Appeal Registry or search for them online (hint "appeal book preparation" or "appeal book services" along

with "British Columbia" will produce some results).

You will need a total of six copies of each of these documents — the transcript, the appeal record, and the appeal book — since the court gets four, you'll need one, and the respondent gets one as well.

Since transcripts can often run to several hundred pages, as can appeal books, the cost of this step can be quite high.

After you've filed your appeal book and received the transcripts, you must deliver a copy to the respondent.

Filing your factum

You have 30 days from the time you filed your appeal record to file your factum. A factum, which iis your written argument as to why the appeal court should make the order you want. You can also explore the Justice Education Society's Court of Appeal BC Online Help Guide [1], and in particular the pages on preparing specific appeal-related documents. This online resource uses plain language, and links to the Court of Appeal's own updated document examples, templates, and instructions.

Factums contain standard elements:

1. **Cover page**
2. **Table of contents**: Listing each part and its page number.
3. **Chronology**: A brief, point-form list or table of critical events that are relevant to the issue on appeal.
4. **Opening statement**: A concise, one-page statement identifying yourself (as appellant or respondent), the lower court being appealed from, the result of the case before, and the essential point of the appeal (why it should succeed or fail).
5. **Part 1 - Statement of facts**: A statement of the facts of the appeal, as the trial judge found them to be.
6. **Part 2 - Errors in judgment**: A statement as to how you think the trial judge erred in law.
7. **Part 3 - Argument**: Your formal argument, about the law, how the judge applied the law to the facts, and how the judge should have applied the law.
8. **Part 4 - Nature of order sought**: A statement of the order you'd like the Court of Appeal to make.
9. **Appendices: List of authorities**: A list of the case law you rely on in your argument.
10. **Appendices: Enactments**: A list of the acts and regulations you rely on in your argument.

Again, factums are extremely formal, and there are all sorts of rules you must follow in preparing your factum, among which are the following:

- there is a limit on how many pages long your factum can be,
- the cover of your factum must be in a buff or beige colour (the respondent's must be green),
- all pages in your factum except for the index have to be printed on the back side of the page (so that when your factum is open, the text appears on the left page and the right page is blank),
- each line of your factum must be numbered, and
- each page must be numbered.

Like I said, factums are extremely formal.

Make a total of six copies of your factum and file them in court. The court will keep four copies, you will keep one, and you must serve the sixth on the respondent.

The respondent's factum

The respondent has 30 days from their receipt of your factum to file and serve you with their own factum. The respondent's factum is their argument against your position, and will also contain any additional arguments the respondent wants to make in support of their cross appeal.

Filing the Notice of Hearing

When an appeal is ready for hearing, you must file and serve a Form 5 Notice of Hearing of Appeal under Rule 33 of the Court of Appeal Rules.

Preparing your book of authorities

Under Rule 27 of the Court of Appeal Rules, you must prepare a book of authorities. This is a binder containing all of the case law and statutes that you are relying on in the argument you've set out in your factum. You should arrange the cases in the order that you set them out in the list of authorities in your factum. Make five copies. One copy is for you, another is for the respondent, and the court will get the remaining three. You must file these three copies with the registry at least three days before the hearing of the appeal.

More information

For more information on process, see:

1. *Justice Education Society's Court of Appeal BC Online Help Guide* [1], with specific guides for both the appellant and the respondent, as well as flowcharts, and links to forms
2. *The CanLII Manual to British Columbia Civil Litigation* [26], with a good breakdown of the Court of Appeal Rules
3. The Court of Appeal's website [13], in particular:
    1. New Court Forms, Completion Instructions and Templates [1] information page, with lots of official links, document templates, and lists of forms.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Justin Werb, October 12, 2023.

References

[1] https://perma.cc/AN3Q-7JFK

How Do I Appeal a Court of Appeal Decision?

Once the BC Court of Appeal has made a decision about your family law matter, applying for leave appeal to the Supreme Court of Canada is your last resort. Statistically speaking, very few family law appeals make it before the Supreme Court of Canada, however. You will need to consider that:

- The Supreme Court of Canada does not have the capacity to hear every appeal brought before it.
- There is no automatic right to have your family law appeal heard by the Supreme Court of Canada.
- You must first apply for leave to appeal to the Supreme Court of Canada.
- Historically speaking only 5% to 10% of application for leave to appeal are allowed.

Leave to appeal is at complete discretion of the Court

The Supreme Court of Canada has discretion in deciding which cases it will hear, and it uses specific criteria to determine if it is in the public interest to grant leave to appeal. When a family law decision of the BC Court of Appeal is appealed to the Supreme Court of Canada, the party seeking appeal must submit an application for leave to appeal which outlines the legal issues at stake, and why it is important for the Supreme Court to hear the case.

The Supreme Court of Canada considers several factors in determining whether to grant leave to appeal a BC Court of Appeal decision about a family law matter:

- Does the case involve a question of public importance?
- Does the case raise new or important issues?
- Does the case conflict with previous decisions of the Supreme Court of Canada or other appellate courts in other provinces?

The Supreme Court of Canada also considers whether the case is within its jurisdiction and whether hearing the appeal would be of value to the parties involved and to the legal system as a whole. If the Supreme Court of Canada grants leave to appeal, it means they have agreed to hear the case and will review the decision of the BC Court of Appeal. The Court will then consider the arguments presented by both parties and make a final decision on the matter. This decision becomes binding and sets a precedent for future cases.

However, if the Supreme Court denies leave to appeal, it means they have decided not to hear the case. This could be for a variety of reasons, including a determination that the case does not raise a significant legal issue or that it is not in the public interest to consider the appeal.

Again, the Supreme Court of Canada's decision to grant or deny leave to appeal is discretionary. Even if a case meets the criteria for leave, the Court may still choose not to hear it. This means that not all family law decisions of the BC Court of Appeal will be reviewed by the Supreme Court of Canada, and the decision of the BC Court of Appeal may be the final decision in the case.

How Supreme Court of Canada leave applications work

When considering applications for leave, the Supreme Court of Canada does not hear evidence and does not hold a formal hearing. Only rarely will the highest court in Canada issue reasons explaining why it granted or denied leave in a particular case. In family law cases, leave is denied much more often than it's allowed.

In general, the court is more likely to grant leave where a case raises an issue that should be decided for the benefit of everyone in the country, not just the couple involved in the Court of Appeal decision.

Information for self-represented litigants

Appeals to the Supreme Court of Canada are far more complicated than appeals to the Court of Appeal, not least because of the requirement of applying for permission to bring the appeal. As a result, it is highly important that you get legal advice from a lawyer to bring an appeal to that court. This wikibook cannot say much more about the matter than that. *Get a lawyer.*

If you cannot hire a lawyer on your own, you can apply for assistance through Pro Bono Ontario [1], which has a program specifically designed to deal with potential leave applications to the Supreme Court of Canada, even if you are in British Columbia.

The website of the Supreme Court of Canada [2] does give an overview of the court's role, the rules of court, and the court's special forms. It has a helpful FAQ section with resources for self-represented litigants [3], including a whole section on applying for leave to appeal, and when you have been named as a respondent on an application for leave to appeal.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Justice Werb, October 12, 2023.

References

[1] https://www.probonoontario.org/scc-csc/
[2] https://www.scc-csc.gc.ca
[3] https://www.scc-csc.ca/unrep-nonrep/index-eng.aspx

How Do I Schedule a Family Management Conference for Hearing?

Once the Form 6 Reply to an Application About a Family Law Matter is received by the registry, the court will normally work with the parties to find a convenient date for a *family management conference* (FMC). The idea is that it's better to work with people's schedules to find a convenient time, rather than risk people being unavailable because a date was set without consultation. In certain registries there may be other requirements before the FMC can be held. For example, you may be required to take the Parenting After Separation course or the Parenting After Separation for Indigenous Families course. The registry will let you know what steps you have to take.

After the first FMC, additional FMCs may be scheduled, for example to monitor compliance with orders made at the first one, or to continue negotiations after the exchange of necessary information.

Understanding Family Management Conferences

The FMC is a special type of hearing in the Provincial Court involving the parties, their lawyers, and either a judge or a *family justice manager*. It is intended to explore the issues in a court proceeding with the hope of finding a way to settle all or part of the proceeding. FMCs are private and held off the record.

Prior to May 2021, the BC Provincial Court would hold *first appearances* where the parties would show up to court in front of other people for their first experience in court. The judge would have little time for them except to direct them to come back again for what used to be called a *family case conference*. This impersonal first encounter has now been done away with. The parties' first in-court meeting occurs in a FMC.

What can happen at a Family Management Conference

FMCs are designed to help the parties identify and resolve issues without the need for a formal hearing. At these conferences, the judge or family justice manager may encourage the parties to reach agreements on some or all issues. Affidavits can be a part of the FMC, if they are particularly long and contain lots of evidence the judge or family justice manager may not have had time to fully read them.

Procedural orders

FMCs are instrumental in narrowing down the contested *substantive issues*, where possible, and setting *procedural orders* that the court thinks will help move the case along efficiently and reduce unnecessary conflict. Some of these procedural orders are called *case management orders*, and these vary somewhat depending on whether a judge or family justice manager is running the FMC:

- If the FMC is with a judge, the powers under Rule 62 of the Provincial Court Family Rules applies.
- If the FMC is with a family justice manager, Rule 63 applies.

Another type of procedural order that the court may issue at an FMC are *conduct orders* under Part 10, Division 5 of the *Family Law Act*. Conduct orders are court directives in family law proceedings that manage the behaviour of parties and aid in resolving disputes. These orders serve to:

- Encourage settlements and reduce the need for trial.
- Manage behaviors that obstruct dispute resolution.
- Prevent misuse of the court process.
- Facilitate temporary arrangements until final decisions are made.

For instance, a conduct order might require parties to participate in dispute resolution, attend counseling, or follow specific communication guidelines to prevent conflict. The court can mandate payment for related expenses and enforce compliance with further orders, fines, or penalties if a party disobeys. Strategically, conduct orders can be instrumental in managing the legal process and safeguarding your interests throughout the resolution of your family law matter.

Substantive orders by consent

Aside from procedural orders, interim orders about *substantive issues* are achievable at an FMC if the court can get the parties to consent. These *consent orders* might relate to parental responsibilities, parenting time, contact with a child, child support, spousal support, and to a limited degree guardianship. Specific rules around consent orders can be found at Rule 52.

Practically speaking, a substantive order will only be made with consent at an FMC. Remember that these are informal hearings, and the judge or family justice manager is not there to force or impose a resolution. Exceptions might be if there is an urgent matter such as denied parenting time, safety concerns, or urgent medical decisions that need to be made for a child. Otherwise do not expect the FMC to result in substantive orders about contested issues. The court will probably schedule those issues for a future hearing date.

Use the FMC strategically

FMCs are a good opportunity, and people who prepare for them and take them seriously can really benefit from them. FMCs can be very helpful, especially if the judge is prepared to be pushy with the parties and their lawyers. It's fairly common for proceedings to settle at FMCs, and where a settlement is reached, the judge will make a consent order on the spot, at the end of the hearing.

More information

See Rules 35-37 of the Provincial Court Family Rules [2] to learn more about how the FMC process works.

There is also good information about FMCs online, including:

- Legal Aid BC's Family Law website's information page on FMCs [1]
- Legal Aid BC's Family Law website's tips on preparing your own script to follow in an FMC [2]
- BC Provincial Court's announcement about what to expect at an FMC [3]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Matthew Ostrow, September 19, 2023.

References

[1] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/fcc-provincial-court
[2] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/family-management-conferences-provincial-court/preparing
[3] https://www.provincialcourt.bc.ca/enews/enews-11-05-2021

How Do I Schedule a Judicial Case Conference for Hearing?

Once a family law proceeding has commenced in the Supreme Court, the parties are usually required to participate in a *judicial case conference* (JCC). This informal meeting is facilitated by a judge or associate judge and is designed to help the parties resolve their claim, either in part or in full, through agreement.

Understanding Judicial Case Conferences

A JCC is a collaborative process aimed at dispute resolution without the need for formal court intervention. It is conducted in a private setting, off the record, and involves the parties, their lawyers (if they have them), and a judge or associate judge. The goal is to identify issues, explore settlement options, and, if necessary, establish procedural steps towards trial.

Mandatory JCCs

Except in urgent or specific circumstances outlined under Rule 7(3), a JCC must occur before any applications can be set. If an urgent matter arises, parties must seek the court's permission to hear an application before a JCC has taken place.

Before the JCC

Prior to the JCC, parties are expected to exchange financial statements as per Rules 7-1(8) to (11). This preparation is crucial for the productive discussion of issues and potential resolutions.

Initiating a JCC

To initiate a JCC, parties must:

- File a Notice of Judicial Case Conference using Form F19.
- Pay the applicable filing fee (currently $80).
- Serve the notice at least 30 days before the JCC date.

What Happens at a Judicial Case Conference

A Judicial Case Conference (JCC) is a collaborative process where the judge or associate judge facilitates discussions between the parties to identify and resolve issues. The focus is on achieving a resolution through consent orders or setting the stage for trial if necessary. The JCC may result in:

- Consent orders on matters where the parties agree.
- Procedural orders to organize the case moving forward.
- Non-binding judicial opinions on potential outcomes for contested issues.

Procedural orders

The judge or associate judge may issue procedural orders for:

- Discovery processes, including setting deadlines for completion.
- Filing and service of documents, providing clear directions for both.
- Interim applications, scheduling dates and outlining required steps.

Trial preparation

In preparation for a possible trial, orders may include:

- Trial management, such as witness lists and expert reports.
- Evidence exchange, setting timelines for the submission of evidence and trial briefs.
- Conferences, ordering pre-trial or settlement conferences to attempt resolution.

Substantive orders by consent

When parties reach an agreement, the judge or associate judge can make substantive orders on:

- Parenting arrangements, including guardianship, parenting time, or contact with a child.
- Support orders, detailing child or spousal support arrangements.
- Property and debt division, outlining the agreed division of assets and liabilities.
- Other agreements, formalizing any other substantive matters agreed upon by the parties.

Case Management Plan

The *case management plan* is a structured form used to guide the JCC, kind of like an agenda. It includes:

- Issue identification: Clarifying disputed matters such as guardianship, parenting arrangements, support, and property division.
- Resolution discussion: Exploring settlement options, mediation, reports under the Family Law Act, and the possibility of a summary trial.
- Trial management: Reserving trial dates, setting trial management conferences, and discussing pre-trial procedures.

This plan is pivotal in ensuring the JCC is directed and effective. Parties new to the JCC should review the Case Management Plan form template [1] beforehand for a better understanding of the process.

Confidentiality is paramount in a JCC, with the understanding that discussions and outcomes are not to be disclosed externally.

After the JCC

If the parties reach an agreement on some or all issues, the judge or associate judge may make a consent order. If no agreement is reached, the judge or associate judge will set out the next steps to move the case forward, which may include further JCCs, mediation, or preparation for trial.

Strategic Use of JCCs

JCCs can be a strategic tool in the litigation process. They offer a chance for settlement and can significantly reduce the time and cost associated with going to trial. Additional JCCs can be scheduled if needed, and in some cases, it may be possible to finalize a divorce during the JCC if the appropriate documentation is filed in advance.

More Information

For a comprehensive understanding of JCCs, refer to Rule 7-1 of the Supreme Court Family Rules [9] and the following resources:

- BC Supreme Court's Litigants' Guide to Judicial Case Conferences [2]
- Legal Aid BC's Family Law website's information page on JCCs in Supreme Court [3]
- Legal Aid BC's guide for requesting a JCC [4]
- Justice Education Society's information page on JCCs [2]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Maryam Sodagar, September 19, 2023.

References

[1] https://perma.cc/84A9-PXTZ
[2] https://bit.ly/BCSC-JCC
[3] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/jcc-supreme-court
[4] https://family.legalaid.bc.ca/bc-legal-system/if-you-have-go-court/jcc-supreme-court/request-jcc

How Do I Get a Needs of the Child Assessment?

Needs of the child assessments

Under section 37(1) of the *Family Law Act*, when the court or the parties are making orders or agreements about guardianship, parenting arrangements, or contact with a child, the parties and the court must consider the best interests of the child only. Disagreements often arise around what's *best* when it comes to these decisions. In some cases, it can help to get the opinion of a neutral third party. Under section 211 of the act, the court can appoint a person, typically a psychologist, clinical counsellor, or social worker, to assess one or more of:

- the needs of a child in relation to a family law dispute,
- the views of a child in relation to a family law dispute, or
- the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

The report itself is called a *needs of the child assessment*. You might also hear the report called a *section 211 report*. It will provide a summary of what the professional has learned about the family, as well as the professional's opinion about what is in the best interests of the children. (Under the old *Family Relations Act* [5], these reports were called *section 15 reports* or *custody and access reports*.)

The professional appointed to prepare the report will usually:

- interview the child's parents or guardians
- interview the children, depending on their age and maturity,
- observe each parent or guardian interacting with and parenting the children;
- administer personality and parenting tests to the parents,
- read any reports that are available about the children's medical and mental health, and
- interview a few people who know the family and the children.

Needs of the child assessments are intended to be neutral and are generally done by a professional who has no previous connection with the parties. They are *evaluative* because the professional is providing their expert opinion about the parents or guardians, the children, and the arrangements that are best for the children.

What the professional does in each individual case will depend on the circumstances and the sort of report they have been asked to write. There is no fixed protocol or explicit checklist that must be followed, and the author is expected to use their education and experience when deciding what tests, interviews, or studies to conduct. These reports are not expected to be exhaustive. Whatever conclusions the author arrives at are for the purpose of helping the court decide what is in a child's best interests.

Needs of the child assessments can be very helpful in resolving a dispute about the care of children. The court will usually give a great deal of weight to the assessor's opinion and recommendations.

Picking the assessor

Needs of the child assessments are routinely prepared by family justice counsellors, social workers, registered clinical counsellors, and psychologists.

Family justice counsellor reports

Family justice counsellors are public employees. Their reports are free as part of the Family Justice Report Service, but they are in very high demand and there is usually a long delay. The only way to be referred to the service is by court order. Once the Family Justice Report Service receives both a copy of the court order and the referral form from the court registry, the report will be placed on a list for assignment to a qualified family justice counsellor. FYou cannot pick the family justice counsellor who will prepare your report.

Not all family justice counsellors are trained to prepare full *needs of the child assessments*, so the delay between requesting a report to getting it done might be up to a year. You can call the Family Justice Report Service at 778-360-2052 or find a Family Justice Centre [22] near you to learn more about the service. Typically, it takes anywhere from 5-9 months to have a report writer assigned, and this is from the time the office receives the court ordered request for a needs of the child assessment. It can take another two or three months after that for the report writer to conduct the report.

Private reports

As an alternative, you can pay for a report to be prepared by a social worker, clinical counsellor, or psychologist. These can generally be done much faster, but they come at a higher cost. The fees for a full report prepared by a psychologist typically costs $15,000 or even $30,000, depending on the number of children involved, where the children and the parents or guardians live, and the amount of work that needs to be done (including whether the writer needs to come to court).

To find a professional to prepare a needs of the child assessment, you can:

- ask for a referral from a psychologist or counsellor you know,
- get a recommendation from your lawyer,
- read through some of these cases on CanLII [1] which contain the names of professionals who have prepared these reports for court, or
- contact the Canadian Register of Health Service Psychologists [2] for a referral.

The private assessor either needs to be agreed upon by all parties or appointed by court order if the parties cannot agree.

Arranging for the assessment

The parties can agree that a needs of the child assessment will be prepared. They then need to pick someone to prepare it.

If they can't agree, either party can apply to court for an order that an assessment be prepared. If you have to apply to court for such an order, make sure that you do your homework before going to court so that you can tell the judge what kind of assessment you want, who you think should prepare it, how much the cost will be, and when it can be completed. The order will usually specify who is being retained to prepare the assessment as well as how the assessment will be paid for.

Once an assessment is ordered or agreed to, you should get in touch with the person who will be performing the assessment. The assessor will tell you what happens next, when the interviewing process will begin, and when the completed assessment will likely be ready.

More information

You can find more information about needs of the child assessments in the chapter Children in Family Law Matters. For more information about family justice counsellors and the Family Justice Report Service, contact a Family Justice Centre close to you. The Clicklaw website maintains an online list of locations [22].

Rise Women's Legal Centre publishes informative resources about s. 211 reports:

- See their Section 211 Toolkit [3] for an overview of issues around requesting or responding to psychological reports under s. 211 of the *Family Law Act*.
- See "Understanding Section 211 Reports: A Guide for Women [4]" for very helpful information (in multiple languages) on how to prepare yourself for dealing with the section 211 report process.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Julie Brown, September 21, 2023.

References

[1] http://bit.ly/s211reports
[2] https://www.crhsp.ca/public-profile/
[3] https://www.clicklaw.bc.ca/resource/4878
[4] https://www.clicklaw.bc.ca/resource/4979

How Do I Get a Child's Views in a Report for the Court?

Children's views before the court

Under section 37(1) of the *Family Law Act*, when the court or the parties are making orders or agreements about guardianship, parenting arrangements, or contact with a child, the parties and the court must consider the best interests of the child only. Under section 37(2), this means that all of the child's needs and circumstances must be considered, including the child's views unless inappropriate to do so.

How do you get evidence of a child's views in front of a judge? The child's views can be presented to the court in a number of ways:

- the parties' (i.e. the parents or guardians) can provide evidence,
- the child might write a letter to the court,
- the judge might interview the child, or
- a lawyer might be appointed to represent the child (e.g. sections 202 and 203 of the *Family Law Act*).

There are plenty of advantages and disadvantages to each.

Another option is to obtain a report about the child's views, so the report can be put before the court. Such a report can take the form of either:

- a *Hear the child report*, or
- a *Views of the child report*

These terms are often used interchangeably, but there are differences.

Hear the Child Reports

A *hear the child report* is a non-evaluative report. This means it does not offer an assessment or an opinion about the child's views. They are are prepared by a trained, neutral professional, usually a mental health professional, lawyer, mediator, or someone else with special training. The professional will interview the child, sometimes more than once, and then write a report summarizing what the child has said, using the child's own words as much as possible. These reports are different than other reports because all they talk about is what the child has said, and they don't provide the professional's assessment of the child's best interests, or even an opinion about what the child has said, although they sometimes include an assessment of whether or not a child is being influenced to say things by one or both of the parties.

Cost and time

Family justice counsellors are public employees who can prepare *hear the child reports* for free. Because there is such a demand for these reports and so few family justice counsellors trained to prepare them, it can take three to six months to get a report.

Some lawyers and privately employed mental health professionals can also prepare these reports, but for a cost. They can be prepared as quickly as the report writer's calendar allows. Sometimes they can be done the very same day, and more typically within about a week. The cost of these reports can range from $500 to $3,000, depending on the number of children involved and the reporter's hourly rate. The website of the BC Hear the Child Society [1] lists the society's roster of trained lawyers and mental health professionals who do these non-evaluative reports, and indicates where they practice.

Views of the Child Report

As noted, *hear the child reports* are *non-evaluative* because they don't offer an assessment or opinion. As a result, they may not be appropriate in cases where an assessment is needed. This might be the case when the parents are concerned about the child's mental health or are worried that the child might be alienated or estranged from a parent. In these cases parents or guardians may want to get a *view of the child report*.

Where a more in-depth evaluation of a child's views is needed, section 211(1)(b) of the *Family Law Act* allows the court to go a step further and appoint someone to listen to a child and assess the views of a child in relation to a family law dispute. The court can also make orders about how the report will be paid for. When a mental health professional is asked to *assess* the child's views, the professional will do a lot more than simply speak to the child (which is what a *'hear the child report* often involves). The assessor may give the child a test to complete and speak to the child's parents and the other important people in the child's life.

An *evaluative* report like this will present the child's views to the court, along with the professional's evaluation of the child's maturity and ability to express themselves, the strength and consistency of the child's views, and the extent to which the child's statements really reflect the child's actual preferences.

Evaluative *views of the child reports* like this are still cheaper to get than the more comprehensive *needs of the child assessments* (see the page How Do I Get a Needs of the Child Assessment? for more information on that process). Nevertheless, views of the child reports can still cost somewhere between $2,500 and $5,000. They can usually be completed in two to three months.

Arranging for one of these reports

The parties can agree that one of these types of reports will be prepared. They need to agree on whether the report will be evaluative, like a hear the child report, or non-evaluative, like a voice of the child report, pick someone to prepare it, and decide how it will be paid for.

If they can't agree, either party can apply to court for an order that a report be prepared. If you have to apply to court for such an order, make sure that you do your homework before going to court so that you can tell the judge:

- what kind of report you want,
- who you think should prepare it and whether they are available,
- how much the cost will be, and
- when it can be completed.

The order will usually specify who is being retained to prepare the report and can also say how the report will be paid for.

Once the report is ordered or agreed upon, the parties should get in touch with the professional who will be preparing the report. The professional will tell you what happens next, when the interviewing process will begin, and when the completed report will likely be ready. Be prepared to pay the professional a retainer for the report and sign an agreement with that professional setting out the costs, and the scope of their work. The professional can also give you some tips on how to explain the interview to your children.

You can find more information about *hear the child reports* (non-evaluative) and *views of the child reports* (evaluative) in the chapter Children in Family Law Matters.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Mark Norton, September 14, 2023.

References

[1] http://hearthechild.ca/roster/

How Do I Find an Order or Another Court Document?

Introduction

This information is for people who have already been to court and need to find a copy of a document prepared in that court proceeding, such as a court order or an affidavit.

Locating court documents

There is no central registry for court records and documents. To get a copy of a court document you must go to the particular court that dealt with your proceeding, since that's the court registry that will have your file. The BC Government has an online directory of courthouse locations with contact information [1].

Restrictions on accessing family law files

Overall, the Chief Judge of the Provincial Court and the Chief Justice of the Supreme Court have the primary responsibility for establishing policies on access to court records for their respective courts. The Court Services Branch of the Ministry of Attorney General, which runs the registries, is responsible for maintaining court records and following these policies. In general, these court records access policies aim to strike a balance between sometimes conflicting objectives:

- promoting transparency and the established rule that courts be open to the public,
- ensuring compliance with legislation that restricts disclosure in certain cases, and
- curtailing access as necessary:
  - to protect social values of critical importance (for example the privacy of children),
  - where the ends of justice would be subverted by disclosure, or
  - where documents in the court file might be used for an improper purpose.

Due to their nature, family law proceedings are among the more restricted types of court files. Generally speaking, a family law proceeding is any case that involves:

- the *Divorce Act*
- the *Family Law Act*
- the *Family Maintenance Enforcement Act*
- adoption proceedings,
- child protection proceedings, or anything under the *Child, Family & Community Service Act* (*CFCSA*), and
- *Adult Guardianship Act* proceedings.

For most family law proceedings, with the exception of adoption, child protection, or adult guardianship proceedings which are more tightly restricted, the public can learn basic *docket information* about a proceeding. Basic docket information includes the names of the parties, the file number, and where and when it was filed, but nothing more.

To read actual court files in a family law proceeding, you must be a party or a lawyer. And even then, there are limits and exceptions:

- In adoption proceedings, only the Director of Adoptions can search the file without an order of the court.
- For *CFCSA* proceedings, only the parties and their lawyers (not just any lawyer) can search the file without a court order.
- For any family law proceeding, only the parties and their lawyers (not just any lawyer) may search for *court exhibits* (things entered as evidence at trial or a hearing, but not things attached to an affidavit) without a court order.

- For transcripts of informal hearings (e.g. *judicial case conferences*, *case planning conferences*, and *settlement conferences, as opposed to trials or chambers hearings), no one can get access without a court order.*

Be sure to read the relevant records access policy for the court you're in. And make sure you bring some photo ID if you are a party and want to go to the registry to see your court file.

Requesting copies and costs

When visiting a court registry to request court documents, please be aware that you can look at the file without charge, but there is a fee for the registry staff to produce copies of documents in the court file. They usually accept payment in cash or debit card only. Credit cards are not typically accepted.

Authorization for third-party document retrieval

If you no longer live near the court that dealt with your proceeding, or if it is difficult for you to appear in person at the registry, it may be possible to have someone else pick it up for you. That person will need, at a minimum, a letter from you to show they are a "person authorized in writing by a party" so that they can search the court file and get copies of documents on your behalf. Check with the court registry to find out exactly what the registry staff need to see before they release your file to someone other than you.

Understanding document availability

There are a few other things that are good to know:

- the court will not let you take your file out of the courthouse,
- the court will not let you take a document from your file, but you can get photocopies made (be warned, copying is $1 per page in the Supreme Court),
- the court will only have files that are less than three or so years old available at hand,
- files that are three to seven years old may be in on-site storage, and there will be a delay of a few hours before the court can get the file for you, and
- files older than seven or so years are usually stored off-site, and there will be a delay of a few days while the file is retrieved.

Also note that court files older than 15 years are generally destroyed, with the exception of certain materials like court orders which are sent to BC Archives. For information about archived court documents read the handy online information page from Courthouse Libraries BC's *Our Legal Knowledge Base*: Court Documents at the Provincial Archives [2]

More information

For more information refer to:

- BC Supreme Court's policy:Policy on Access to the Court Record [3]
- BC Provincial Court's policy: Access to Court Records [4]
- Courthouse Libraries BC's information pages on:
  - Can I Access Court Files? [5]
  - Court Documents at the Provincial Archives [2]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Negin Saberi, September 15, 2023.

References

[1] https://bit.ly/3QSrp7y
[2] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/court-documents-provincial-archives
[3] https://perma.cc/R29F-RYSE
[4] https://perma.cc/BRE8-P23X
[5] https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/can-i-access-court-files

How Do I Fix an Error in an Order?

If you've found a mistake in an order that has been entered in court, whether an order of the Provincial Court or of the Supreme Court, you must apply to court to correct the order. Applications like these are limited to clerical errors or omissions; applying to correct an order is not a short cut to an appeal of the order!

Applications to correct orders are usually limited to things such as misspellings, incorrect dates, or bits of the oral order that were left out of the written order.

Provincial Court

You will have to prepare an Application for Case Management Order in Form 10, which will be used to bring an application to correct the terms of an order made under the Provincial Court Family Rules. See Legal Aid BC's Family Law website's online list of forms [1], or use the online Apply for a Family Law Act Order [25] tool which will lead you through the steps and prepare a form you can then print out and file.

Filling out Form 10

In section 8 of the Form 10 Application for Case Management Order, select the option "settling or correcting the terms of an order made under the rules".

In section 9 of the form, use the wording suggested in the BC Provincial Court's *Family Law Act Orders Picklist* [20], which contains standard wording for orders of the Provincial Court. The standard language for correction of an order reads:

> Pursuant to Rule 62(q), the Order of the Honourable Judge (name) dated (date) is amended as follows:
>
> (a) The following term is deleted: (insert the term to be deleted)
>
> (b) The following term is added: (insert the new term)

The application must be made with notice to the other party. If the other party agrees to the order, you can apply by consent and you can choose to have the application reviewed by a judge with or without attending a court appearance. To give notice, serve each party with a copy of the application.

The application will be made under Rule 170 of the Provincial Court Family Rules, which gives a judge the authority to correct "a clerical mistake or omission in an order."

Supreme Court

You will have to prepare two forms to apply to correct an order in the Supreme Court:

1. a Notice of Application in Form F31, and
2. an Affidavit in Form F30.

The notice of application will simply say that you're applying to correct the order of judge or associate judge so-and-so, made on such-and-such a date. The affidavit will simply discuss the problem in the order and provide some proof about what the order ought to say, such as the court clerk's notes from the original hearing. Ask the registry to see the clerk's notes.

The Slip Rule

The application will be made under Rule 15-1(18) of the Supreme Court Family Rules, also called the *slip rule*, which gives the court the authority to:

1. Correct a "clerical mistake" in an order resulting from "an accidental slip or omission."
2. Amend an order to decide an issue that should have been decided but wasn't.

The scope of the Supreme Court rule is a bit broader than its counterpart in the Provincial Court Family Rules.

These applications are normally brought before the same judge that made the order being reviewed, but if that's not possible or convenient, another judge of that court can hear it and make necessary changes.

A useful case to read is *O.K. v. I.C.M.* [1], 2023 BCSC 1893, which illustrates the application of the "slip rule" under Rule 15-1(18) to do two different things:

- The court corrected a mathematical error in the awarded amounts for spousal support.
- The judge also addressed an oversight concerning a child's passport issue in the original order. The judge added a term for the surrender of the passport, since not doing so was an oversight, and to do so served the court's original intention.

More information

You can find more information about how the *slip rule* is applied in BC Supreme Court by reviewing the brief notes about Supreme Court Civil Rule 13-1(17) in The CanLII Manual to British Columbia Civil Litigation [2], which is freely available online. The Supreme Court uses the slip rule in both family law and civil proceedings, and you can learn how Rule 15-1(18) of BC's Supreme Court Family Rules is used by seeing how its counterpart in the Supreme Court Civil Rules (Rule 13-1(17)) has been used.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Maryam Sodagar, September 21, 2023.

References

[1] https://canlii.ca/t/k0vl1
[2] https://canlii.ca/t/srvn#Rule_13_1___Orders

How Do I Tell Everyone That I'm Representing Myself?

It often happens that someone who was represented by a lawyer winds up representing themselves. When this happens, you must notify the other parties and the court of the change.

In cases before the Provincial Court, a Notice of Removal of Lawyer for Party in Form 43 is filled out and filed in court. You or your soon-to-be-former lawyer can take that step. Copies of the filed form then need to be served on the other parties. You don't have to personally serve the other parties; you can send the form by mail (or if applicable, email) to their addresses for service.

In cases before the Supreme Court, you have to fill out a Notice of Intention to Act in Person in Form F88, file it in court, and serve copies on the other parties by ordinary service to their official address for service, which could be by email or mail (or fax if they did not list an email address).

The forms are available online. See Legal Aid BC's Family Law website's online list of forms [1].

You can find more information about the procedure for serving documents from Legal Aid BC's Family Law website and the information page on *Serving Documents* [1].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Elham Jalilian, September 18, 2023.

References

[1] https://family.legalaid.bc.ca/forms/

How Do I Change My Address for Service?

An *address for service* is the address at which a party to a court proceeding agrees to receive correspondence in connection with the proceeding.

This address is very important, because the other parties are able to officially deliver or serve most documents on you just by popping them in the mail to that address, or attaching them in an email. If you move and don't change your address for service, you risk not finding out about important events in your case.

Supreme Court

In the Supreme Court, addresses for service are established by the claimant in their Notice of Family Claim and by the respondent in their Response to Family Claim. To change this address later, you must fill out a Notice of Address for Service in Form F10, file it in court, and send copies to the other parties at their addresses for service.

Starting September 1, 2023, all parties to a BC Supreme Court action, whether represented by a lawyer or not, must provide an email as well as a mailing address to allow ordinary service of materials. You can insist that the other side also file their Notice of Address for Service in Form F10 with an email address if they have not yet agreed to receive materials by email.

Provincial Court

In cases before the Provincial Court, almost every court form allows you to specify your address for service, and the most recent address for service will be considered your proper address for service.

However, as best practice, if you need to change your address for service, fill out a Notice of Address Change in Form 46, file it in court and serve copies on the other parties to ensure your most updated address is on the record. You don't have to personally serve the other parties; you can mail or email the form to their addresses for service.

Forms and more information

The forms are available online. See Legal Aid BC's Family Law website's online list of forms [1].

You can find more information about the procedure for serving documents from Legal Aid BC's Family Law website and the information page on *Serving Documents* [1].

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Negin Saberi, September 15, 2023.

How Do I Prepare for My First Meeting with a Lawyer?

Information

The lawyer will need to know certain basic facts about you and your relationship with your spouse, particularly if there is a chance the lawyer will be starting a court proceeding on your behalf. So make sure you either have this information at the tips of your fingers or have it written down.

Basic information

The lawyer will need to know this basic information:

- your address, occupation, annual income, and date of birth,
- your spouse's full name, address, occupation, annual income, and date of birth,
- the date each of you began living in British Columbia,
- citizenships,
- the date the two of you started to live together,
- if you're married, the date of your marriage and the name of the city or town where you got married,
- the date of your separation, if you're separated,
- the full names and birthdates of any children,
- the care arrangements that are presently in place for the children,
- your surname at birth and your surname before you got married, if you are married,
- your spouse's surname at birth and their surname before you got married, if you are married,
- whether you were unmarried, divorced, or widowed when you married, if you are married, and
- whether your spouse was unmarried, divorced, or widowed when you married, if you are married, and
- whether you and your spouse have signed any prenuptial or other agreements.

Financial information

The lawyer will need to know this financial information:

- the approximate balance of all financial accounts, including savings, RRSP, and investment accounts, and the names of the financial institutions holding the accounts,
- approximate credit card balances, and the names of the credit card companies,
- the balances of any loans and lines of credit,
- the full details about any personal and family debts,
- basic information about any stock or bond portfolios,
- whether either of you has a pension and, if so, the name of the pension plan,
- the addresses of any real estate either of you might own and information about how those properties are owned,
- the approximate market value of any real estate and the amount of any mortgages, and
- the full details about any assets or property that either of you own that is located outside British Columbia.

Concerns and risks

The lawyer will also need to know:

- any health concerns about you, your spouse, and the children,
- any pending financial risks, like bankruptcy or a loss of employment,
- any history of family violence,
- any pending personal risks, such as risk of abuse or the abduction of the children, and
- the basic reasons why your relationship came to an end.

Don't worry if you don't have all this information available right away. There is almost always time to collect this information afterwards, and the lawyer you meet will most likely have a list of other information that you'll have to gather in any event.

Documents

You will need to bring a piece of government ID to your first meeting since the Law Society of British Columbia requires that lawyers ensure they properly identify who their clients are.

You will need to have your marriage certificate to start a court proceeding.

You really only need to worry about other documents if you're already in the middle of a court proceeding or negotiations between you and your ex have started.

If litigation is under way, the lawyer will want to see all the legal documents (also called "pleadings") that have been produced thus far. If you can't truck the whole file down to the lawyer's office, at least make sure you bring:

Supreme Court

- the Notice of Family Claim,
- the Response to Family Claim,
- the Counterclaim, if any,
- any agreements,
- any Financial Statements that may have been prepared,
- a copy of all orders made so far, and
- if you're seeing the lawyer about an interim application, a copy of the Notice of Application and the supporting affidavits.

Provincial Court

- the Application About a Family Law Matter,
- the Reply to an Application About a Family Law Matter (and any Reply to a Counter Application, also),
- any agreements,
- any Financial Statements that may have been prepared, and
- a copy of all orders made so far.

If you're in the midst of negotiations, you will want to bring:

- a copy of any offers made so far, and
- any Financial Statements that may have been prepared.

If you're planning on starting a divorce proceeding, you'll definitely need to bring:

- your original certificate of marriage (the ugly brown government document, not the flowery document you might have received from whomever performed the marriage), and
- a photograph of your spouse.

Payment

Before you even darken the lawyer's door, make sure you know whether or not the lawyer is going to be charging for your first appointment.

Some lawyers offer an initial consultation for free; if so, they will usually advertise that first meetings are free. Other lawyers will offer an initial consultation for a reduced fee.

Most lawyers charge for initial meetings at their usual hourly rate. Do not assume that there will be no charge for your initial appointment. If you must make an assumption, assume that the lawyer will be charging you at the lawyer's normal hourly rate.

If the lawyer is going to be charging for your first visit, they will usually expect payment once the meeting is done. All lawyers will take cash and cheques, and many will also take credit cards. Make sure you are able to pay for your first meeting when you book it.

For more information

You can find more information about choosing a lawyer in the chapter Introduction to the Legal System for Family Matters within the section Lawyers & the Law Society.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Become a Lawyer?

In a nutshell, to become a lawyer you must graduate law school, complete a kind of year-long apprenticeship called articles, and be called to the bar.

Getting into law school

There are two things you need to get into law school: post-secondary schooling and the LSAT.

Previous schooling

Academically, you need an undergraduate university degree. It doesn't matter whether the focus of your undergrad was on mathematics, music, or media studies. You just need to have a degree. Some law schools will also accept students with a minimum of two years of an undergraduate program; however, this will depend on the university you're applying to, how many applicants they have and, of course, your marks.

The LSAT

LSAT stands for Law School Admission Test. All North American law schools require that you write this test before you apply for admission. The LSAT is run by a private testing company, not by any particular school, and tests are offered on a quarterly basis in cities across the continent. On a test weekend, the test is written by thousands of people across Canada and the US. Your score is not a percentage, but a weighted score. In other words, the result you get is a statement of how you ranked compared to other test-takers. If you ranked in the 50th percentile, for example, you did as well as half the people that wrote the test. If you ranked in the 80th percentile, you did better than 80% of the people that wrote the test.

At this point you're probably wondering what the LSAT is. Put simply, the LSAT tests your vocabulary, language skills, and inductive and deductive reasoning. There are fill-in-the-blank questions, questions testing your understanding of a brief essay, and logical reasoning tests. There's also an unscored essay section.

Companies like Kaplan sell study guides and past LSAT exams that you can test yourself on; you can also find study guides, video tutorials, and LSAT discussion forums online. Some people choose to invest in working with a tutor or attending an LSAT prep course before they take the exam. Alternatively, for a cost-effective option, Khan Academy offers a comprehensive and free set of modules to help you succeed, which you can access on the Khan Academy website [1].

The LSAT, your grades and law school admissions

Do your undergraduate marks count? Yes. However, some universities look at a combination of your marks and your life experience, while others look at just your marks. The sort of marks you'll need depends very much on the university you're applying to. Some law schools are in high demand and, as a result, their mark expectations are higher; other law schools are not as sought after and have lesser grade expectations. In general, you should have an undergraduate average of no less than, say, 75% before you even think of applying to law school.

Of course, your LSAT ranking is important too. Some universities look at your undergraduate grades and your LSAT score independently, and factor in your life experience. Some, like UBC, apply the numbers strictly and look only at a mathematical combination of the two. Given the competitive nature of law school admissions, it's advisable to consult individual law school websites for the most current and specific criteria.

Law school

Law school in Canada is three years long. If you've graduated, you get an LL.B., a "Bachelor of Laws," or a J.D., a "Juris Doctor" or doctor of laws. The first year is generally the toughest, since that's when you realize that law school is entirely unlike the learning format in undergrad. In law school, the first-year curriculum is standardized. Everyone takes the same set of courses, ranging from Criminal Law to Property Law. You choose your own courses in your second and third year, so use your first year to get a sense of what areas of the law interest you. Law schools are generally fairly uptight about how they process their students. In your undergrad you probably asked for or knew someone who asked for academic exemptions and leaves of absence. In law school you are expected to be career-focused and have your mental and personal house in order before you start, and as a result, this sort of academic leeway is rarely given.

Is law school fun? Not always. Is it as hard as you've heard? No, not at all. Once you've figured out how law school works, it'll be smooth sailing for you, as long as you know how to apply yourself and have halfway decent work habits. Remember, the study of a thing is a lot different than the practice of a thing.

One last point about law school. Give your first year a good go. Try your best, but don't be devastated by the difference between your undergrad marks and your law school marks. Do your best to apply what you learned in first year to your studies in second year. Your second year marks are critical, for the reasons that follow. In general, you can relax a bit in your third year.

Articling

Articling is the second-last hurdle you have to pass before you become a lawyer. Articles are a kind of year-long apprenticeship, just the way masons, fabric dyers, and carpenters apprenticed to master crafters in the middle ages. The point of articles is to give you a hands-on introduction to the practice of law under the tutelage of a senior lawyer, your *principal*. As an articled student, you are insured by your principal and are permitted to practise law in a certain limited capacity. You are also subject to certain restrictions and requirements of the provincial law society and its rules of conduct and practice.

The law school doesn't hand out articles, however. You have to find them yourself. Articling is a job; an articled student is an employee of their principal, and you've got to apply for the position.

The vast majority of law students apply for articles at the end of their second year of law school, after the marks have been released. The articles will start almost immediately after third year ends, so people usually spend the summer after second year searching for employment.

However, some students will aim to secure summer articles with a law firm or apply to a clinical program with a legal clinic for the summer after second year, in preparation for their articling search in third year. Summer articles allow law school students to get an introduction to the type of work that articling students and lawyers do in certain practice areas. It can be a helpful stepping stone to articles, as you will obtain hands-on experience that can inform your decision on what kind of articling position you are looking for. Students who are interested in working with a law firm or legal clinic between their second and third years usually start their search early in their second year, as many law firms will attend career fairs at this time to indicate their intention of taking on summer students. This also provides them with the time to research the law firms they want to summer at, and prepare for the intensive *on-campus interviews* (OCI) used by large law firms to recruit students.

Ultimately, your second year marks are critical to your ability to obtain articles. For the same reason, your third year marks are less important, since you have, hopefully, already found articles. However, this isn't to say that you can party for your entire third year, as your law school transcript can be a deal-breaker for some future employers early in your career. Additionally, having more flexibility in your third year means that you can attend the student clubs and networking events that you may not have had time for in your first year.

No matter what, you must have articled before you can become a lawyer. As a result, it is critical that you find an articling position if you want to practise law.

PLTC: The bar admission course

All provincial law societies require law school graduates to complete both their articles and a bar admission course before allowing them to practise law. In British Columbia, the bar admission course is a three-month course called PLTC, the *Professional Legal Training Course*, and it's completed during your articling year. Sometimes your principal will pay for the cost of the course. Sometimes you'll have to pay the course tuition yourself.

PLTC is an academic introduction to the basics of practising law in the real world, from client interview techniques to professional ethics to common trust account errors. Throughout the course, you will need to attend mandatory classes and complete and pass several assignments. At the end, you will need to complete and pass both the barrister and solicitor exams. If you fail one of the assignments or exams, you can rewrite that component at the next PLTC session. However, you only have a limited number of opportunities to rewrite a failed component, and your call date may need to be postponed if you are taking PLTC at the end of your articles and need a rewrite.

Admission to the bar

When you've completed PLTC and your articles are complete or almost complete, your principal will have to furnish the law society with a sworn declaration stating that you are ready and competent to practise as a lawyer. You must ensure the law society gets your principal's declaration or you will not be *called to the bar*, which is a term for the formal ceremony admitting you as a lawyer. PLTC will forward your marks to the law society for you.

Summary

Here's what you need to do to become a lawyer in the order you need to do it:

1. complete all or most of one undergraduate university degree,
2. write the LSAT,

3. send your undergraduate transcripts plus your LSAT test scores to the law schools you'd like to go to,
4. complete first year law school without having a breakdown or dropping out,
5. once you've finished second year, look for and obtain your articles,
6. complete third year without doing too much damage to your liver,
7. start your articles and, at some point during that year, complete PLTC,
8. apply for admission to the bar with your articling report (PLTC will forward your grades to the law society on its own), and
9. be called and sworn in to the bar; the Law Society of BC will provide you with a schedule of call ceremonies.

Good luck!

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Yun Chen, September 25, 2023.

References

[1] https://www.khanacademy.org/prep/lsat

How Do I Divide Our CPP Pensions after We're Divorced?

In Canada, the process of dividing Canada Pension Plan (CPP) credits between spouses upon divorce or separation is known as *credit splitting*.

CPP credits are accumulated through mandatory CPP payroll deductions from employment income. These credits accumulate over time and are used to calculate the amount of monthly CPP benefit payments each person will begin to receive when they reach the age of 65, or earlier if they choose, or later if they defer their pension.

Both divorced married spouses and separated unmarried spouses may apply for a credit split. British Columbia is one of the provinces where couples can opt *not* to split their CPP credits, and some people do opt out because of how CPP benefits are calculated when *child rearing drop out* years are factored in. In some cases the amount that one person loses in the split is actually more than what the other person gains. In other words, the split may cause an overall loss in the value of the pension (for example, $100 per month that neither person is getting that would have been there for one of them if the credits had not been split). It's worth getting financial advice for this reason. If you do decide to opt out of credit splitting, you must have either a court order or a separation agreement that explicitly states that the credits will not be split. In the absence of such documentation, either former spouse can apply for a credit split without the other's consent.

The amount of CPP credits to be split is calculated based on each spouse's accumulated credits during the relationship, adjusted for factors such as periods of parental leave and the child rearing drop out years mentioned above. The total amount is then divided between the spouses. For those who have had lower income than their former spouse, credit splitting can increase the amount of CPP pension they will eventually receive.

There is no time limit to apply for a credit split, unless your spouse dies, in which case you must apply within 36 months of the date of death. Given that some people don't have ongoing relationships with their spouses following separation, it's advisable to make the application for the equalization of your CPP credits sooner rather than later.

To apply for a credit split, you can either apply online or use a paper form available from Service Canada. Legal representatives, such as lawyers, can also act on a client's behalf in this process.

1-800-277-9914

https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-split-credits.html

For more information on property division when spouses separate, you may wish to review the chapter Property and Debt in Family Law Matters.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Trudy Hopman, September 22, 2023.

How Do I Change My Name after Marriage or Divorce?

Issues about names mostly come up when:

- a child is born,
- people enter into marriage or are in a longer term committed relationship,
- people divorce or separate,
- someone wants to change the name of a child following separation,
- a name change is important for gender identity,
- someone wishes to reclaim an Indigenous name, and
- someone wants to change their name just because they feel like it.

The vast majority of the time in a family law context, name changes are connected to marriage and divorce events.

This guide provides an introduction to changes of name on marriage and divorce, and briefly addresses changes of name under the *Name Act* [20] .

Naming children after birth

The provincial Vital Statistics Agency [1] is the government organization that keeps track of people's births, deaths, wills, and names. Under section 3(1) of the *Vital Statistics Act* [4], both of the parents must complete a Registration of Live Birth [2] unless one or both of the parents is incapable or deceased, or unless the father is unacknowledged or unknown to the mother. The registration must be delivered to the agency within 30 days of the birth of a child. This process is commonly handled online through the Vital Statistics Agency's Electronic Birth Registration System [3]. Registration must be completed before the child's birth certificate can be issued, but the electronic process is now streamlined to let you also register for Canada Child Benefits (CCB), Social Insurance Number (SIN), and Medial Services Plan (MSP). If the situation is more complicated, however, like when registering a child is already over 1 year old, multiple parents are being recorded, or a surrogacy arrangement has been made, or if you don't have access to an internet-connected computer, you need to contact Vital Statistics directly. They will send you a registration package along with questions to complete.

The basic birth registration information includes:

- the name of the mother and father (if known and acknowledged),
- the gender of the child,
- the date of birth, and
- the name given to the child.

Under section 4 of the *Vital Statistics Act*, the child's surname can be:

- the name of either of the natural parents,
- the name of one of the parents,
- a combination of the parents' names, or
- another name entirely.

If both parents are acknowledged but cannot agree on a surname, the *Vital Statistics Act* mandates that the child's surname must be a combination of both parents' surnames, either hyphenated or combined in alphabetical order.

In cases where only one parent registers the birth, the law allows for the other parent to be included on the birth certificate and have a say in the child's surname, provided there is no justifiable reason to exclude them. This reflects the principle that both parents should have an opportunity to be involved in naming their child, as established by the Supreme Court of Canada in *Trociuk v. British Columbia* [4], 2003 1 S.C.R. 835.

Section 4.1 of the *Vital Statistics Act* also empowers the courts of British Columbia to change a child's surname when making a declaration of paternity, taking into consideration the best interests of the child.

Now, while you're free to name your child as you wish, there are some limits. You might have heard of Moon Unit Zappa or X Æ A-12 Musk. Under section 9 of the *Act*, the agency's registrar general has the authority to refuse to register the birth — and consequently to refuse to issue a birth certificate — for children where the registrar general believes:

> (a) that the name that the applicant seeks to adopt might reasonably cause mistake or confusion or be a cause of embarrassment or confusion to any other person, or
>
> (b) that the change of name is sought for an improper purpose or is on any other ground objectionable.

While it seems that the registrar general rarely rejects a name, and while such a rejection could be appealed to the Supreme Court, you should still be aware that this power exists.

Changing names

It is not illegal to use an *alias* in British Columbia, although you will not be allowed to obtain government identification or to make certain legal transactions, like the transfer of property, using an alias. An alias is a name other than your legal, registered name.

People often use aliases just because that's how people have come to know them, like a nickname, or because their real name is too hard for English-speakers to pronounce or spell easily. Most people who want to legally change their names do so because they were adopted, married, or divorced. Others do so for purely personal reasons. I remember reading a change of name notice for a fellow with the unfortunate name of Donald Duck.

You can apply to have a legal, registered name that differs from your birth or married name under the provincial *Name Act*. This is a purely paper process and a hearing before a judge won't be necessary in most cases. Section 4 of the act sets out who may apply for a change of name:

> (1) Subject to this section, a person who has attained the age of majority or, if the age of majority has not been attained, is a parent having guardianship or custody of his or her child and who is domiciled in British Columbia for at least 3 months, or has resided in British Columbia for at least 3 months immediately before the date of the application, may, unless prohibited by this or another Act, change his or her name on complying with this Act.
>
> (2) If the minister is satisfied that it is in the public interest to do so, the minister may waive the residency requirements of subsection (1).

> (3) Subject to subsection (4), a parent having guardianship or custody of an unmarried minor child may, with the consent of all other parents having guardianship and other guardians of the child, apply to change the child's name, but, if the application is to change the child's surname to that of the applicant's spouse, the consent of the spouse is required.
>
> (4) If a person applies to change the name of an unmarried minor child who has attained the age of 12 years, he or she must first obtain the consent in writing of the child.
>
> (5) If a person whose consent is required under this Act
>
> (a) is deceased or mentally disordered or cannot after reasonable, diligent and adequate search be located, or
>
> (b) is, in the opinion of the registrar general, unreasonably withholding his or her consent,
>
> the applicant may, with the approval of the registrar general, proceed with the application without the consent of that person.
>
> (6) If, in the opinion of the registrar general, exceptional circumstances make it unreasonable to seek the consent of a person as required under this Act, the applicant may, with the approval of the registrar general, proceed with the application without the consent of that person.

When your name has been legally changed, the registrar general of the Ministry of Health's Vital Statistics Agency is required to make a notation on your birth certificate and on the registration of any current marriage. After the notation has been made, any future birth, marriage, or death certificates will show the new name. A Certificate of Change of Name will be issued that will allow you to obtain new identification, such as drivers' licences or BC Identification cards, in the new name.

Change of name on marriage

Many people change their names when they marry. Out of custom, wives often take their husbands' surnames, but there's no requirement that they do so, and there's nothing stopping a husband from taking his wife's surname. The options are wide open for same sex couples.

Choice of name

On marriage, section 3 of the *Name Act* allows a spouse to:

> (a) use the surname he or she had immediately before the marriage,
>
> (b) use the surname he or she had at birth or by adoption, or
>
> (c) use the surname of his or her spouse by marriage.

This applies to both men and women, and to same sex and opposite sex couples, and no court application is required; the newly-married spouse simply starts using that name. To get identification in the new name, you will have to produce proof of your marriage (the government-issued marriage certificate) and proof of your old name (a driver's licence or BC ID).

The sort of marriage the act is referring to is a legal marriage solemnized by a marriage commissioner or licensed religious official; the rules about change of name on marriage do not apply to common-law relationships, i.e. unmarried spouses.

Hyphenated names

The *Name Act* does not deal with situations where spouses wish to take each other's surnames and use a hyphenated name, like Smith-Jones. Spouses who want to adopt a hyphenated name as their legal name will have to follow the *Name Act* process for obtaining a change of name, described below, to make their new name their registered, legal name.

On the other hand, the new hyphenated name can be used as an alias, the day-to-day name by which most people know you, without a formal change of name. It is not illegal to go by an alias in British Columbia. Note, however, that if you do not apply to have the new name registered as your legal name, you cannot use the alias for legal transactions, such as the transfer of property or obtaining a loan.

Change of name on divorce

Once an order for divorce or an order declaring the marriage to be a nullity has been made, a former spouse may begin using any legal name they had before marriage. No court application is necessary. Where identification was obtained in the married name or assets were purchased in the married name, a legal change of name will be required.

Orders for change of name

Where a spouse needs a legal change of name, the spouse may seek an order to this effect in the divorce proceeding and simply claim the change of name as part of what they are asking for in the Notice of Family Claim or Counterclaim.

An application for a change of name can also be dealt with in a separate proceeding altogether, usually by Petition and likely without an oral hearing. An application for a change of both given and last names may be dealt with by a hearing before a judge.

Children's names

An application for a change of name of the children of the marriage must be made with the consent of the other guardians, even when the person making the application may have *custody* of the children. (As of writing, the *Name Act* still used the term *custody* and had not yet been amended to use the less loaded term *decision-making responsibility*.) The consent of the affected children must also be obtained where they are 12 or more years old.

Change of name under the *Name Act*

If you don't qualify for an automatic change of name, you will have to follow the process outlined in the *Name Act* to change your name. The Vital Statistics Agency offers an Online Services [5] feature that allows you to apply for a change of name online. It still requires you to print off documents in paper copy and submit them to Vital Statistics. The paper form called an Application for Change of Name [6] can also be completed, and is necessary in cases where, for instance, you are changing the name of a child and your own name. It's not necessary to put an ad in the newspaper to change your name, but you will have to get your fingerprints taken, submit to a criminal records check, and get your statutory declaration properly sworn. Expect a fee to be charged by the police department that takes your fingerprints, and by whomever takes your statutory declaration (could be a notary, lawyer, or Service BC representative).

The process is fairly straightforward and a hearing before a judge is usually not necessary. The steps for most people are as follows:

1. get the change of name package from the Vital Statistics Agency,
2. if you're seeking to also change the name of a child, you must obtain the consents of the other guardians, the child (if the child is 12 or more years old), and your present spouse (if you are seeking to change the child's name to that of your spouse),

3. gather proof of identity, like birth certificates, for everyone affected by the change of name (usually, yourself and any children),
4. get your statutory declaration sworn before an authorized individual,
5. go to your local police detachment and submit to fingerprinting (you have to pay a fee for this service, but keep the receipt to submit to the Vital Statistics Agency),
6. the police will send in all the required information — the identification, the consents, your fingerprints, and so forth — to the agency, along with payment of the agency's fee, and
7. once your name change has been registered, the fingerprints will be returned to the police for a criminal records check.

Once the agency receives all of this information with their fee, they will begin processing the request. (Bear in mind that the agency's chief executive officer has the authority to refuse to register objectionable names — discussed earlier in this section.) If all is well, the chief executive officer will make the required changes to the birth certificates of the people affected by the application and, if applicable, to any current marriage certificate, and will issue a Certificate of Change of Name.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by Nate Russell, October 19, 2023.

References

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