


# Ministry of Attorney General
# Justice Services Branch
## Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 1

# Background and Context for the Family Relations Act Review

**Prepared by the Civil and Family Law Policy Office**

**February 2007**

# BACKGROUND AND CONTEXT FOR THE FAMILY RELATIONS ACT REVIEW

## GOAL:

To create a simple, integrated and effective family justice system that promotes the wellbeing of children and families and enables families to resolve disputes quickly, fairly, effectively and affordably. In support of that goal, the Ministry of Attorney General is reviewing the *Family Relations Act* (FRA) as part of its justice reform and law reform strategy.

## CONTEXT:

**Societal context:** The FRA was enacted in 1978 and has been amended as needed over the years. As a result, the organization of the FRA has suffered, making it harder for British Columbians to find and understand the law that affects them. Perhaps more importantly, there have been significant shifts in Canadian society that are not reflected in the law. Society's attitudes towards issues like same-sex relationships, parenting arrangements, family violence and other issues have changed considerably; furthermore, Canadian families are changing – fewer couples are getting married, more are breaking up and children are experiencing more transitions in their family makeup.[1] More people are using collaborative processes, such as mediation, to resolve family law disputes outside of court. The FRA has not kept pace with these changes.

**Justice Reform Context:** Programs and services are one essential component of the family justice system; legislation is another, often enabling those programs and services. A major review of family justice services and programs in BC was completed in 2005 by the Family Justice Reform Working Group. It was appointed by British Columbia's Justice Review Task Force, an ongoing collaboration between government, the judiciary, lawyers, and the mediation community, working together to help make the justice system more responsive, accessible and cost-effective. The Working Group explored options for fundamental change in the family justice system that would:

- make the system more accessible,
- serve the needs of children and families first and foremost,
- use available resources efficiently and effectively,
- integrate service planning and delivery,
- promote early resolution of disputes, and
- minimize conflict by encouraging early cooperative settlement, refining and enhancing non-adversarial settlement processes, and supporting trials as an appropriate recourse only when other means are not appropriate or effective.

[1] "Highlights and top 10 Trends for Canadian Families", Profiling Canada's Families III, The Vanier Institute of the Family, 2004

The Attorney General has endorsed the Working Group's report and has published an update on implementation of the report's recommendations, available online: http://www.bcjusticereview.org/working_groups/family_justice/family_justice.asp. The Working Group makes some recommendations regarding the FRA but its focus was mainly on programs and services. The FRA review focuses on the legislative framework.

Legislation is only one aspect of reforming the family justice system. Programs and services are also an important part of the solution. For more information about programs and services, please refer to Chapter 5 which describes programs and services and will be posted on this website soon.

**OBJECTIVES:**

In undertaking this review, the Ministry of Attorney General aims to modernize the FRA so as to:

- reflect current social values, as well as family law research and policy developed over the last 25 years;
- support the use of out-of-court dispute resolution processes;
- encourage parents, where appropriate, to work together to reduce the effect of conflict on children;
- minimize the emotional and financial costs of family breakup;
- ensure consistency with observations of the Family Justice Reform Working Group that:
    - the family justice system should be founded on the values of family autonomy, cooperation and the best interests of children,
    - processes to resolve family issues should match the nature of the dispute, be proportionate to what is at stake, and be flexible enough to meet the unique requirements of each case, and
    - the family justice system needs better ways to discover children's best interests and to make them a meaningful part of family justice processes
- clarify the law so that it is more understandable and results are more predictable;
- consolidate the law pertaining to families in one statute, where possible, and improve the organization of the FRA; and
- ensure that public resources are used wisely and efficiently.

The review will not address: child welfare, adoption, child support, and divorce under the federal *Divorce Act*.

**PROCESS:**

The Ministry of Attorney General will be posting a series of discussion papers on this website and inviting feedback from the public. To participate, please read these papers and use the feedback form to provide your feedback.

The Ministry of Attorney General will also be conducting a series of consultations with the legal community. Please contact Stuart Rennie, the Legislation and Law Reform Officer at the Canadian Bar Association (British Columbia Branch) by e-mail at srennie@bccba.org to find out more about these consultations.

The Social Planning and Research Council, with the support of the Law Foundation, is planning community consultations for late spring. For further details on these consultations, please refer to the SPARC BC website at www.sparc.bc.ca.

The discussion papers will be posted and the consultations conducted in three phases:

Phase 1: February - May 2007
- division of property
- division of pensions
- judicial separation

Phase 2: April - August 2007
- parenting after separation
- children's participation
- access responsibilities
- family violence

Phase 3: August – November 2007
- child status (legal parentage)
- spousal and parental support
- co-operative approaches to resolving disputes
- other topics, including any that arise in the consultations




# Ministry of Attorney General
# Justice Services Branch
## Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 2
# Division of Family Property

# Discussion Paper

**Prepared by the Civil and Family Law Policy Office**

**February 2007**

**This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.**

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## RECONSIDERING SOME ASPECTS OF FAMILY PROPERTY LAW

Ever since the *Family Relations Act* ("FRA") provisions for dividing family property were introduced in 1979, they have been debated and studied by lawyers and researchers. From 1985 to 1998, the British Columbia Law Reform Commission and its successor, the British Columbia Law Institute, published several papers[1] recommending changes. Most recently, the British Columbia Family Justice Reform Working Group[2] suggested changes to the Act to support a shift away from using courts to settle disputes. Similar discussions have taken place outside of British Columbia and other governments have tried different approaches.[3]

Everyone wants rules that are simple, fair and certain. The challenge is to find a way to achieve each of these goals without sacrificing the others. For example, the simplest and most certain rules are those that have no exceptions. When the rules are clear, people are encouraged to make their own agreements because they know what the result would be if they were to go to court. But it is impossible to design a set of rules that will be fair in every situation, so most people agree that some flexibility is important.

The goal of this review is to find the right balance between flexibility and certainty. This paper is guided by the work that has been done in British Columbia and elsewhere and the many suggestions that have been made for making the FRA rules for dividing family property simpler, fairer and more certain.

The paper is divided into five sections. The first four discuss why family property is divided, who the family property provisions apply to, what family property is divided, and how, and when family property is divided. The final section asks you to identify any issues we have not covered in this paper and to say which you think are the most important. Once you have read the paper, use the feedback form to send us your feedback. The feedback form contains all of the questions included in this paper.

### *Family Property Division under the Family Relations Act*

Many separating and divorcing spouses[4] are able to agree on how to divide their property. For those who cannot agree, Part 5 of the FRA provides the rules that will apply if they go to court. (Part 6 covers division of pensions and is discussed in a separate paper.)

The general rule is that each spouse has a right to half of the family assets, unless that would be unfair. A family asset is property owned by one or both spouses that is used for a family purpose. To decide if a 50-50 split would be unfair, a judge will consider several factors, including how long the relationship lasted and whether any of the property was a gift or inheritance received by one spouse.

If spouses do agree about how to divide their property but then run into problems later, they can go to court and a judge will use the FRA to decide if their agreement was unfair.

### *Two Models for Family Property Division in Canada*

Two different models are used for dividing family property in Canada:

- the proprietary model – used in British Columbia and six other provinces and territories[5] – and
- the compensation model – used in five provinces and territories.[6]

The proprietary model is more flexible, but offers less certainty about how a judge would divide family property in each case. Sometimes, certain types of property are excluded from division even if used for a family purpose, but a judge might be able to divide this property—or even property that was not used for a family purpose—if it would be unfair not to. A judge is also allowed to order an unequal division of family property if, for certain reasons, a 50-50 split would be unfair.

The compensation model offers more predictable outcomes because judges are given less leeway. Under this model, when a relationship ends it is only the value of property that the spouses built up while they were together that is split 50-50. The value of property that each brought into the relationship, and often certain types of property received by either of them during the relationship, like gifts and inheritances, are excluded. In other words, spouses are "compensated" equally for the wealth they acquired as a couple. A judge is allowed to order an unequal division only in limited circumstances.

The FRA has been criticized for being so flexible that outcomes are too difficult to predict. Over a decade ago, the British Columbia Law Reform Commission proposed adopting a compensation model in British Columbia,[7] but there was little support from lawyers for this change.[8] Lawyers preferred the flexibility of the British Columbia model, even if it meant less certainty, because it allows for consideration of each couple's individual circumstances in deciding what is fair. Also, they were concerned that under a compensation model even "easy" cases could become more complicated and expensive because spouses may have to go to court to resolve disagreements about what their property was worth, both at the start and end of the relationship. They preferred the idea of building on the current model rather than replacing it.

### *QUESTIONS*

1. Is there any benefit to changing the family property division model currently used in British Columbia?

   1.1. If yes, what would that benefit be?

Each model has its pros and cons and it is hard to say whether one or the other results in fairer decisions. The rest of this paper looks at ways to achieve fairness in the division of family property, through the right balance of flexibility and certainty, without abandoning the proprietary model now used in BC.

## DISCUSSION

## PART A – WHY IS FAMILY PROPERTY DIVIDED?

### Discussion Point (1) – Reason for Dividing Family Property 50-50

The law assumes that each spouse equally contributes to the family's wellbeing, whether by taking care of the children or the home, or by earning money and paying the family's bills. This assumption is not spelled out in the FRA, but the British Columbia Law Reform Commission said in its 1990 report on family property division[9] that a statement in the Act about this basis for the division of family assets might help judges make more consistent decisions about what to divide and how.[10] Most of those who commented on that suggestion agreed.

Many provinces and territories have such statements in their family laws.[11] For example, s.20 of Saskatchewan's *Family Property Act* says:

> The purpose of this Act, and in particular of this Part, is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses, and that inherent in the spousal relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the family property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.[12]

### *QUESTIONS*

2. Should the FRA include a statement about why each spouse is entitled to an equal share in the family's assets?

## PART B – WHO SHOULD FRA RULES APPLY TO?

### Discussion Point (2) – Married and Unmarried Spouses

For purposes of spousal support and child custody and access, the FRA applies in the same way to both married and unmarried spouses. An unmarried spouse, for purposes of spousal support, is someone who has lived with another person in a marriage-like relationship for at least two years, as long as a claim under the Act is made within one year after separation.[13] But for the purposes of division of family assets, generally speaking, the FRA does not apply to unmarried couples.[14]

However, s.120.1 says that if an unmarried couple makes an agreement that would, if they were married, be a marriage agreement or a separation agreement under the FRA, the FRA does apply to that agreement and to any family assets covered by the agreement.[15] This means that if an unmarried couple makes such an agreement, each of them then has the same right that a married person has, to apply to court to change the agreed division on the grounds that it is unfair.[16]

The intention of s.120.1 is to allow unmarried spouses to "opt in" to the family property division provisions by making an agreement. Some lawyers feel that this section can be interpreted to mean that the FRA property division rules apply to any agreement between

unmarried spouses, even if the agreement specifically says the FRA does not apply.[17] This interpretation may discourage unmarried spouses from settling their disputes out of court because if they make an agreement they take the risk that the other person could someday ask a court to apply the FRA rules to say that their agreement was unfair. (If an unmarried spouse without an agreement wants to take a property division dispute to court, the claim must be based on common law principles of unjust enrichment, which can be difficult to prove.)

How unmarried spouses are treated under family property law differs across Canada. Other provinces and territories either:

- apply the same rules to married and unmarried couples;
- exclude unmarried couples from property division provisions (as used to be the case in BC); or
- allow unmarried couples to opt in (as intended by s.120.1 of the FRA).

Each approach takes a different view of the relationship between married and unmarried couples. Each is discussed here, in turn.

### *Applying the Same Rules to Married and Unmarried Couples*

This approach has several logical bases:

- It recognizes the similarities between married and unmarried relationships.
- It promotes committed family relationships regardless of marital status.
- It recognizes that not everyone has a choice about whether or not to marry: for example, a couple might stay together even though one spouse wants to marry and the other does not.

Even spouses who choose not to marry may do so for reasons that are unrelated to whether or not the family property provisions will apply to their relationship. Or, they may (wrongly) believe that even if they do not marry, they have the same rights to family property as married spouses. This confusion can easily arise in British Columbia because the FRA does treat unmarried couples the same as married couples with respect to spousal support, child custody and access.

Saskatchewan, Manitoba, the Northwest Territories and Nunavut treat married and unmarried spouses the same. All spouses, married or not, have a right to an equal share of family property. As well, like married couples, unmarried couples can agree to opt out of the family property provisions, but a judge can interfere with the agreement in certain circumstances.[18] The family property provisions apply to an unmarried couple once their relationship has lasted for a specified period of time or they have a child together.[19]

### *Excluding Unmarried Spouses from Family Property Provisions*

Not including unmarried spouses under the family property provisions assumes that married and unmarried couples are more different than alike. This approach supports the view that everyone has a choice of whether or not to marry and respects the choice not to marry and to avoid the legal consequences of marriage. However, it means that unmarried spouses who need to resort to the court to resolve disputes over property division must rely on common law principles of unjust enrichment, which are often difficult to prove.

This is the approach taken by Alberta, Ontario, New Brunswick and Prince Edward Island. If unmarried couples cannot agree on how to split their property, they cannot use the family property provisions to help them.

### *Allowing Unmarried Spouses to Opt In to Family Property Provisions*

Letting unmarried couples choose to have the family property division provisions apply to them is a middle ground approach. It recognizes that both married and unmarried couples share similarities that are not based on their legal status, while respecting a person's choice to not marry and to avoid the legal consequences of marriage.

In some provinces and territories, unmarried couples can opt in by agreeing to have the family property provisions apply to them, as long as the agreement meets certain formal requirements, such as being in writing, signed, and witnessed.[20] Or, spouses can make an agreement not to opt in to the family property provisions, but to divide their property in some other way.

Unmarried spouses in British Columbia can opt in by making a marriage agreement, if it meets certain requirements,[21]or a separation agreement. (As mentioned earlier, it is unclear whether an agreement between spouses in British Columbia about how to divide their property may be viewed as opting in, even if the agreement specifies that the FRA does not apply.)[22] Manitoba and Nova Scotia use another opt in approach involving registration as domestic partners.[23]

### *QUESTIONS*

3. Do you think the FRA provisions for division of family assets should apply to unmarried spouses (as defined by the Act):
    a) automatically, unless they agree that the FRA provisions should *not* apply;
    b) only if they make an agreement about how to divide their property, and even if the agreement says that the FRA provisions should not apply;
    c) only if they make an agreement about how to divide their property and clearly state that the FRA *should* apply to part or all of their property;
    d) never.

### Discussion Point (3) – Family Property on Reserve Land

For most families, their home is their most significant asset, and one that has particular importance. The FRA recognizes this and gives the court power to intervene when the family home is in dispute. Under the FRA, a judge may let one spouse temporarily live in the family home and exclude the other, in certain circumstances.[24] A judge may also stop one spouse from selling the family home, or delay the sale for a time.[25]

But these protections are not available when the family home is on reserve land.[26] This is because the FRA is provincial legislation, whereas under the *Constitution Act, 1867*[27], the federal government is responsible for reserve lands.

Various provisions can apply to real property on reserve lands, including the federal *Indian Act*[28], self-government or land claims agreements, and agreements under the federal *First Nations Land Management Act*[29]. The result is that the legal situation of First Nations people in British Columbia, and across Canada, varies depending on which provisions apply to real property in their communities and whether those provisions say anything about how to deal with the family home when spouses break up.[30]

Most First Nations communities in British Columbia are governed by the *Indian Act*, which does not deal with this issue. In these communities, land is commonly held under a Certificate of Possession. A spouse who holds a Certificate of Possession for land on which the family home is built has the right to use, live in and transfer the property without court interference or the consent of the other spouse. A spouse without a Certificate of Possession has no right to the family home. When a relationship ends, the spouse who is not named on the Certificate of Possession (and any children under that spouse's care) usually must leave the family home. Due to housing shortages on reserves, often they must leave the reserve as well.[31]

The hardship faced by spouses and children on reserves because of the failure of the *Indian Act* to address the issue of family real property on reserves has been the subject of a number of recent papers and reports, both in Canada and internationally.[32] The federal government is working with First Nations representatives and provincial governments to resolve this problem. You can find more information about this work at the Indian and Northern Affairs Canada web site.

## PART C – WHAT FAMILY PROPERTY SHOULD BE DIVIDED, AND HOW?

### Discussion Point (4) – Family Assets and Judicial Discretion

For the purposes of the FRA, a family asset is anything owned by one or both spouses that is ordinarily used for a family purpose.[33] It does not matter how the family got the asset or when: if it was used for a family purpose it is a family asset and should be shared by the spouses. The most common family assets are the family home, furniture and car. The FRA lists other types of property that are family assets as well, including bank accounts and investments such as term deposits, bonds, and RRSPs. A business owned by one spouse may be a family asset if the non-owning spouse contributed to buying or operating it, either directly—such as by working in the business or investing money in it,

or indirectly—such as by taking care of the children or the house to allow the owning spouse to focus on the business.[34]

The FRA allows a judge to depart from the general rule and order an unequal division of family assets if he or she decides that a 50-50 split would be unfair, based on certain factors.[35] (This power given to judges to make decisions based on the law and their good judgment is referred to as "judicial discretion.") These factors include:

- how long the marriage lasted,
- how long the spouses were separated,
- when the assets came into the family,
- whether any of the assets were received by a spouse as an inheritance or gift, and
- the needs of each spouse for economic independence.

However, as the British Columbia Law Reform Commission has pointed out, the Act does not say anything about how the judge should apply or rank these factors.[36] And the Act gives the court still further discretion: a judge can order that property that is not a family asset be transferred from one spouse to the other in order to make a fairer property division.[37]

The concern expressed by the Law Reform Commission is that, in British Columbia, what property will be divided between spouses, and how, is an open question.[38] Judges decide what the family assets are based primarily on how they were used, and then have the discretion to divide those assets unequally—and to order the transfer of other assets as well—if a 50-50 split is considered unfair. This flexibility allows the judge to take particular circumstances into account, but makes it harder to predict outcomes.

Most other jurisdictions in Canada use a slightly different approach[39] and have provisions for determining what property to divide. Certain types of property, called "excluded property", are left out from what is equally shared by the spouses. Examples are gifts or inheritances received by one spouse, and property that a spouse owned before the relationship began. In some provinces and territories excluded property is not divided.[40] In others, excluded property may be divided if fairness requires it.[41]

In its 1990 report, the British Columbia Law Reform Commission suggested that outcomes would be more predictable under the FRA if certain types of property were excluded from division at the start.[42] Then spouses would have a clearer understanding of what property would be split between them if they went to court. This could encourage them to agree on how to divide their property without having to resort to court.

The greatest degree of predictability is achieved if certain property is absolutely excluded from division between the spouses, but by allowing for some exceptions, certainty can be balanced against flexibility. The Law Reform Commission recommended that the FRA allow a judge to divide excluded property but only if it would be unfair not to, and suggested factors to guide judges in exercising this discretion.[43]

### *Gifts and Inheritances*

Under the FRA, a gift or inheritance received by one spouse is a family asset if it was ordinarily used for a family purpose.[44] If it meets that test a judge will take into account the fact that it was a gift or inheritance when deciding if a 50-50 split of family assets would be unfair.[45] Even if a gift or inheritance is not a family asset, it could still be ordered to be shared with the other spouse if the judge decides that fairness requires it.[46] This approach provides flexibility but by reducing predictability it can result in fewer agreements and more court applications.

In other provinces and territories, property that one spouse receives as a gift or inheritance is excluded from division.[47] Some do not allow a judge to split an excluded gift or inheritance no matter what the circumstances.[48] This is simpler and more certain than the FRA, but it might not always be fair. For example, if a gift or inheritance increases in worth during the relationship and the other spouse contributed to that increased value, it might be unfair if it was excluded from division.[49] Other jurisdictions allow a judge to split an excluded gift or inheritance to reach a fair result, having regard to certain listed factors.[50] Some of those factors include: whether the other spouse contributed to the property;[51] whether the spouses agreed that the family could use the property without affecting the owning spouse's right to the property;[52] whether the property was supposed to benefit only the spouse who received it;[53] whether the property was an heirloom or had more than a money value to the spouse who received it;[54] whether the gift or inheritance was used to acquire, operate or use other family property;[55] and whether the spouses believed or relied on the belief that the gift or inheritance was family property.[56]

### *QUESTIONS*

4. Should the FRA continue to define a family asset as property that was ordinarily used for a family purpose?
5. Would it be helpful if the FRA also said that certain types of property are *not* family assets, even if they were ordinarily used for a family purpose? In other words, should certain types of assets be considered excluded property?

    5.1. If yes, should excluded property be defined as property that a spouse received:

    a) before the relationship began;

    b) after separation;

    c) as a gift or inheritance from someone else;

    d) as a damage award or legal settlement;

    e) as proceeds from an insurance policy;

    f) under the terms of a spousal agreement;

    g) as a gift from the other spouse;

    h) as a result of selling or trading excluded property;

    i) other _____.

6. Should a judge be allowed to divide excluded property between the spouses in some cases if it would be unfair not to?

    6.1. If yes, when deciding if it would be unfair not to divide excluded property should a judge consider:

        a) the factors currently listed in s.65 of the FRA to help judges decide if a 50-50 split of family assets would be unfair, that is:

            i. how long the marriage lasted,

            ii. how long the spouses have been separated,

            iii. when the property was acquired or disposed of,

            iv. the extent to which the property was acquired by one spouse as a gift or inheritance,

            v. the needs of each spouse for economic independence, and

            vi. any other circumstances relating to how the property was acquired, preserved, maintained, improved, or used; or to the capacity or liabilities of either spouse;

        b) whether the other spouse contributed to the excluded property;

        c) whether the excluded property is the family home;

        d) whether the spouses agreed that the family could use the property without affecting the owning spouse's right to the property;

        e) whether the person who gave the gift or inheritance wanted the property to benefit only the one spouse;

        f) whether the property is an heirloom or has more than a money value to the spouse who received it;

        g) whether the property increased in value during the relationship;

        h) whether the property was used to acquire, operate or use other family assets;

        i) whether the other spouse believed or relied on the belief that the property was a family asset;

        j) other _____.

**Discussion Point (5) – Family Debts**

Most families have debts, yet the FRA says nothing about dividing debt between the spouses.

This can be remedied if the family has more assets than debt: a judge can consider what a spouse still owes on a family asset when calculating its value, or when ordering an unequal division. Some judges have tried to use the FRA property provisions in this way to produce a sharing of debts[57] but, because the Act does not address this specifically, it is difficult to predict the result in any particular case. And this is no help to the many families who have debts but no assets. In its 1990 report, the British Columbia Law Reform Commission said it is important to look at how debts should be dealt with under the FRA.[58]

Of the provinces and territories that use a property division model similar to British Columbia's, New Brunswick's is the only one that addresses the division of debts between spouses.[59]

By contrast, the provinces and territories that use a compensation model of property division do deal specifically with the division of debt.[60] Under the compensation model, each spouse calculates the value of the property he or she built up during the relationship and then subtracts any debts he or she had when the relationship began or has when the property is valued. The result is called a spouse's "net family property". The difference between the net family property of each spouse is split 50-50. In some jurisdictions, a spouse's net family property cannot be less than zero except in certain circumstances.[61] This means that debts might not be shared equally by the spouses, particularly if one spouse incurs more debt for the family than the other.[62]

Changing the FRA to deal with the division of family debts might encourage spouses to reach their own agreements, rather than go to court. It would also be fairer and would address the reality of the many families who have more debts than assets at separation.

Family debts could be dealt with in the same way that family assets are, under the FRA. The Act could define family debt and say that it will be shared equally when a relationship ends. In developing a definition, it might be helpful to look at the factors that judges have used in considering debts in the division of family assets, including:[63]

- how much each spouse benefited from the one spouse going into debt, or from the slow repayment of the debt, before or after separation;
- who they thought would be responsible for repayment when the debt was incurred;
- whether the debt was incurred before or after separation;
- if the debt is income tax, when the income was earned.

The FRA could also allow a judge to determine that an equal division of the family debt would be unfair. The FRA could list the factors to be considered in making such a decision,[64] just as it does with respect to an unequal division of assets. Or, it could be more specific. For example, the FRA could say that an equal split of a family debt would

be unfair if the family debts are more than the family assets and one spouse had more benefit from the property or service the debt was incurred for.[65]

***QUESTIONS***

7. Should the FRA say that each spouse is equally responsible for family debts unless a judge decides that it would be unfair?
8. What should be considered in a definition of family debt?
    a) whether the debt was incurred for a family purpose;
    b) whether the debt was incurred to acquire, manage, maintain, operate or improve other family assets;
    c) when the debt was incurred (whether before or during the relationship, or after separation);
    d) when the debt was paid off (whether before or during the relationship, or after separation); or
    e) other _____.
9. What should a judge consider when deciding whether equal responsibility for family debts would be unfair?
    a) factors similar to those listed in s.65 for the division of family assets:
        i. how long the marriage lasted,
        ii. how long the spouses have been separated,
        iii. when the debt was incurred or paid off,
        iv. whether the debt was inherited by one spouse,
        v. the needs of each spouse for economic independence, and
        vi. any other circumstances relating to how the debt was incurred, maintained, paid off, or used, or to the capacity or liabilities of either spouse;
    b) whether family debts exceed family assets;
    c) whether one spouse benefited more from the property or service the debt was incurred for;
    d) whether one spouse ran up the debt without the consent of the other;
    e) whether a spouse believed, and then relied on the belief, that one or both of them would be responsible for the debt;
    f) whether the spouses agreed that one or both of them would be responsible for the family debt;
    g) other _____.

**Discussion Point (6) – Spousal Agreements**

Spouses can decide how to split their property by making an agreement. The FRA talks about four types of agreements:

- marriage agreements;
- separation agreements;
- ante nuptial (before marriage) settlements; and
- post nuptial (after marriage) settlements.

The FRA does not talk about prenuptial agreements, but most prenuptial agreements would qualify as marriage agreements under the FRA. Having four different types of agreements makes the FRA complicated.

The FRA also allows a judge to change an agreed division, in certain circumstances. There are two different tests to determine whether a judge can interfere with a property division agreement, depending on which type of agreement it is. This can result in different decisions for couples in similar circumstances. And both tests give judges a lot of discretion to change what spouses have agreed to, which creates uncertainty: spouses do not know whether a judge will order a property division different from what they agreed to, if one of them later applies to court for a change.[66]

***Spousal Agreements under the FRA***

Of the four types of agreements included in the FRA, only a marriage agreement is defined.[67] It is an agreement made by two people, before or during their marriage, that deals with family property and is in writing, signed, and witnessed.

A separation agreement is not defined, but it triggers each spouse's right to a division of family property under the FRA.[68] To make a separation agreement spouses only have to agree, orally or in writing, and intend to create a legal relationship.[69] If it meets the requirements of a marriage agreement then it is a marriage agreement under the FRA, whatever the spouses may call it.[70]

If spouses have a marriage agreement or a separation agreement, and one of them later asks a court to find that it is unfair, a judge can change the agreed property division, based on the factors set out in s.65.[71]

Spouses can make other agreements dealing with property that do not meet the requirements of a marriage agreement but are based on the belief that the relationship will last. These are called ante nuptial or post nuptial settlements. When a relationship ends, these arrangements no longer make sense. They are mentioned in the FRA so that a judge can change the agreed upon arrangements if the judge thinks they should be changed.[72]

There are some small steps that could be taken to make the FRA fairer, simpler and more certain:

- The FRA could make it clear that "marriage agreement" includes a separation agreement in some circumstances. The FRA does not define separation agreement, but judges have made decisions about separation agreements that

could be incorporated into the FRA: for example, a separation agreement does not have to meet the formal requirements of a marriage agreement before a judge can change the agreed property division because it is unfair.[73]

- FRA terminology could be changed to reflect language more commonly used today: for example, "prenuptial agreements" and "cohabitation agreements" could replace "ante nuptial" and "post nuptial settlements."
- The same test for when a court can interfere with agreed property divisions could be applied to all four types of spousal agreements.

In a 1986 report, the British Columbia Law Reform Commission recommended using one term to cover all types of agreements.[74] Some provinces and territories use an umbrella term such as "agreement" or "domestic contract" for all spousal agreements that meet certain requirements.[75] One requirement might be that the spouses independently declare in writing in front of a lawyer that they understand the agreement, that they intend to give up the right to have a court change the agreement, and that neither was forced into making the agreement.

For agreements that meet these requirements, judges could be authorized to interfere only in limited circumstances such as where one spouse forced the other to make the agreement, or the agreement was unconscionable or grossly unfair.[76]

For agreements that do not meet these requirements, judges could be given more discretion to change the agreed property division, while bearing in mind what the spouses agreed.[77]

### *Judicial Discretion to Vary Spousal Agreements*

The FRA gives judges a lot of discretion to interfere with how spouses agreed to split their property.

In the case of marriage agreements and separation agreements—the most common types of spousal agreements—a judge considers the six factors set out in s. 65 when deciding whether the agreement is unfair, but the FRA does not say what "unfair" means.[78] This creates uncertainty.[79] If spouses know that even if they agree on a division of their property, a judge may later find their agreement "unfair" and order a different division, they may prefer to use the court in the first place. (The fairness test does not apply to other spousal agreements such as ante and post nuptial settlements: judges can change those agreements simply if they think they should be changed.[80])

In most of the rest of Canada, applications to court are seen as a last resort for spouses who cannot agree. In some provinces, judges may interfere with an agreement only if it can be shown to be "unconscionable," "unduly harsh on one party," or "fraudulent."[81] In other jurisdictions, judges are not allowed to interfere with an agreement unless it was not made in accordance with the law; or one spouse did not tell the other about certain property he or she had when the agreement was made; or a spouse did not understand what the agreement said when it was made.[82]

It is important to encourage spouses to try to settle their own issues. In 1986 the British Columbia Law Reform Commission suggested that the FRA allow judges to interfere

with spousal agreements about property division only if the agreement was not made in accordance with the law or is unconscionable.[83] The Commission thought "unconscionable" should mean an agreement that:

- was substantially unfair at the time it was made, and
- was also unfair in how it was made: for example, if one spouse forced the other to agree.

If an agreement was unfair in how it divided property, but the agreement was made fairly, a judge should not be able to interfere.[84]

### *QUESTIONS*

10. What types of agreements should the FRA address?
    a) marriage agreements;
    b) separation agreements;
    c) ante nuptial settlements;
    d) post nuptial settlements;
    e) prenuptial agreements;
    f) cohabitation agreements;
    g) other _____.
11. Should the FRA use one term to cover all types of spousal agreements?
12. Do you think there should be a more stringent test for allowing a judge to interfere with spouses' property division agreements than "unfairness"?
    12.1. If yes, should judges be limited to interfering with agreements about property division only:
    a) if the agreement is:
        i. unconscionable;
        ii. grossly unfair;
        iii. unduly harsh;
        iv. other _____.
    b) if how the spouses made the agreement was:
        i. not in accordance with the law;
        ii. unconscionable;
        iii. grossly unfair;
        iv. unduly harsh;
        v. other _____.

12.2. Do you think it would be helpful if a more stringent test limiting the ability to vary an agreement was applied only if:

a) the agreement is in writing;

b) the agreement is signed by each spouse without the other spouse present;

c) the agreement is signed by each spouse, without the other spouse present, and witnessed by another person;

d) the spouses independently declare to a lawyer that they understand the agreement and that they intend to give up the right to have a court impose different terms;

e) other _____.

**Discussion Point (7) –Family Property Division and Spousal Support**

Property division and spousal support are separate issues. The British Columbia Court of Appeal has said that property division should be decided first and then spousal support.[85] But property division and spousal support overlap in both provincial and federal laws. The FRA and the federal *Divorce Act* tell judges to look at some of the same things when deciding whether a 50-50 property split would be unfair[86] and whether one spouse should pay spousal support to the other.[87]

This overlap can give the flexibility needed to reach fair outcomes in some cases.[88] For example, an unequal split of family assets may give one spouse enough income so that spousal support is not needed.

However, the overlap also makes outcomes less predictable because it can lead to over- or under-compensation. For example, a spouse might receive more than half of the family assets then a lump sum spousal support award as well.[89] On the other hand, a judge might wrongly think that giving a spouse more than half of the family assets is plenty, and not make a spousal support award.[90] Before deciding that a spouse should not get support, it is important to make sure that the division of family assets properly addresses the economic disadvantages that may have been caused to a spouse as a result of the marriage or its breakdown.[91] For example, if one spouse has been out of the workforce for many years while taking primary responsibility for child rearing, that person may need spousal support as well as an unequal division of assets. There might be more certainty if the FRA clearly said that family assets must be divided before deciding whether a spouse should get spousal support.

In other parts of Canada, family property and spousal support also overlap, but Newfoundland is the only province whose family property law says something about what to do about that overlap. It says that property should be divided before spousal support is ordered, and it cautions about the dangers of giving a spouse too much or too little. Specifically, the law says that spousal support is meant to satisfy certain goals (e.g., lessen a spouse's financial problems), but only to the point that these goals are not already satisfied by how the family property was split.[92]

### *QUESTIONS*

13. Would it be helpful if the FRA said that a judge should first split family assets, before deciding whether to order spousal support?

### Discussion Point (8) – Conflict of Laws

If a spouse lives or owns property outside British Columbia, the division of family property can raise conflict of laws issues. There are two types of conflict of laws issues:

- "Court jurisdiction" refers to whether or not a court in a particular place has the power to decide a case.
- "Choice of law" refers to situations where the laws of more than one place might apply.

Conflict of laws issues must be resolved before decisions can be made about how family property should be divided.

Most provinces and territories address conflict of laws issues in their family property law, but British Columbia does not.[93] In British Columbia, the court jurisdiction issue is dealt with in the *Court Jurisdiction and Proceedings Transfer Act*. That Act sets out when a British Columbia court has the power to hear a case and lists the factors a judge must consider when making that decision.[94] Basically, it reflects the rules developed by courts on this issue.[95] Saskatchewan and the Yukon Territory have similar Acts.[96] British Columbia's Court Rules are also used to deal with the court jurisdiction issue.[97]

To deal with choice of law issues, judges in British Columbia rely on case law, which says that there are several factors that will determine which jurisdiction's laws will apply. For example, whether the property in question is immoveable (such as land) or movable (such as furniture) is relevant to the choice of laws,[98] whereas the FRA does not make this distinction. The result is that the laws of two or more places might be applied to different items of family property. This uncertainty can make it hard for spouses to reach agreements, and yet asking a court to resolve a conflict of laws issue can be expensive.[99]

Some other provinces and territories address choice of law issues[100] while others address both choice of law and court jurisdiction.[101] Some have laws that clearly say what the court can do if the family has immoveable property in another place.[102] This kind of property can be a problem because a British Columbia judge cannot order a spouse to transfer ownership of land outside of British Columbia. Only a judge in the place where the land is located can make that order. A British Columbia judge dividing family property can do a number of things to take into account the value of the land, but these options could be clearer and more certain if they were expressly set out in the FRA.[103]

In 1997, the Uniform Law Conference of Canada created a draft uniform act ("*Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*") that deals with both court jurisdiction and choice of law in family property cases.[104] On the court jurisdiction issue the *Uniform Act* is similar to the *Court Jurisdiction and Proceedings Transfer Act*[105] but on the choice of law issue, it differs from the approach developed by our courts: it bases the choice of law on where the spouses lived together as a couple rather than whether the property is immoveable or moveable and applies the same law to

all of the family property.[106] Also, the *Uniform Act* clearly says what the court can do if immoveable property is located in another place, and even lets the court make an order that would affect the ownership rights of that property in certain circumstances.[107]

To date, no province or territory has adopted the draft *Uniform Act*. In 1998, the British Columbia Law Institute published a report on conflict of laws issues in family property cases, recommending that the province adopt the *Uniform Act*.[108]

### *QUESTIONS*

14. Should the FRA deal with choice of law issues?
15. Should the FRA deal with both court jurisdiction and choice of law?
16. Should the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* be adopted by British Columbia?

## PART D – WHEN SHOULD FAMILY PROPERTY BE DIVIDED?

### Discussion Point (9) – When Family Property Rights Arise ("Triggering Events")

Generally speaking, during a relationship spouses are free to deal with their own property as they wish, and neither one has rights to the property of the other. The concept of family property, and the right of each spouse to share in that property, does not arise until a "triggering event" occurs. At present, the only way to "trigger" the right to family property is to either:

- make a separation agreement, or
- go to court and get a divorce (or a judicial separation, which is rarely, if ever, requested nowadays); or a declaration that there is no possibility of reconciliation; or an annulment (a declaration by a judge that the marriage was never legal in the first place).[109]

Even if they might eventually agree, spouses often feel compelled to apply to court for a declaration of no possibility of reconciliation just to establish the date on which the right to family property arises.

BC's Family Justice Reform Working Group recommended that the FRA should define "separation agreement" to include a written agreement between spouses about what is or will be their triggering event.[110] This would allow spouses to set the date when their family property rights arise, without having to go to court. Then they could take the time they need to try to agree on how to divide that property.

Other provinces and territories also provide for various triggering events, including going to court to apply for a divorce, or applying for a division of family property.[111] But unlike British Columbia, most other provinces and territories also include separation as a triggering event.[112] British Columbia is the only place in Canada that lists a separation agreement – not the separation itself - as a triggering event.[113]

Including the separation date as a triggering event in the FRA would give spouses another way to trigger their interest in family property without having to go to court. It also could solve problems caused when one spouse gets rid of assets after the separation but before a triggering event occurs that would give the other spouse a right to a share in those assets.

Still, even the date of separation is often in dispute: sometimes spouses break up several times, or they may continue to share a home but on terms that at least one of them considers to be a separation.[114] Judges are sometimes called on to decide the actual date of separation under the *Divorce Act*[115] or under the FRA, and they have identified factors to help them make that determination. If the FRA were changed to include separation of the spouses as a triggering event, it could also include a specific reference to those factors that judges already use in other situations to determine when the spouses separated, for the purpose of establishing the date of the triggering event.

The British Columbia Law Institute has suggested that the FRA's list of triggering events should reflect the *Divorce Act's* approach to determining that a marriage has ended: that is, the right to family property would be triggered when the spouses have lived apart for more than a year and at least one of them does not want to get back together.[116]

In Alberta, the right to a division of family assets arises when the spouses have been "living separate and apart," generally, for one year.[117] The Alberta law offers some clarification about what it means to be "living separate and apart:" for example, spouses may be found to be "living separate and apart" even if they are living together or doing household tasks for each other.[118] Also, separated spouses who get back together to try to make the relationship work do not have to "restart the clock." If they are together again for less than three months, the year continues to run from the date of the original separation, although the time they were together is not counted as a period of separation.[119] Prince Edward Island's law also provides some help in figuring out what it means to "live separate and apart."[120]

In Manitoba and Saskatchewan, separation does not trigger a right to division of family property: a spouse has to apply to court for a division.[121] This means that one spouse can act alone to trigger family property rights, and can do it without first having to separate. This avoids any problems related to figuring out when spouses separated or were "living separate and apart,"[122] but the spouse does have to go to court.

### *QUESTIONS*

17. What events should trigger the right to a division of family property?

    a) the spouses make a separation agreement;
    b) the spouses separate;
    c) the spouses are separated for at least one year;
    d) a judge says that the spouses have no possibility of reconciling (that is, no chance of getting back together);
    e) a divorce (or judicial separation or annulment);
    f) one spouse applies to court to divide the family assets;
    g) other _____.

18. If a separation agreement is a triggering event, should the FRA make it clear that a separation agreement can be a written agreement between the spouses about what is or will be their triggering event (even if they have not yet agreed about how their family property will be divided)?
19. If separation is a triggering event, should the FRA include the factors a judge would look at to decide the date of separation?
20. Do you have any other comments about triggering events?

**Discussion Point (10) – Property Rights of Surviving Spouses (Death as a Triggering Event)**

In British Columbia, a surviving spouse in a marriage that was coming to an end can sometimes be entitled to a greater share of the deceased spouse's assets than the spouse whose marriage was intact.

This is because the FRA property division rules do not apply if a spouse dies and no triggering event has occurred.[123] The surviving spouse in that case does not have the right to apply under the Act for a share in the family's assets, but may be entitled to a share in the deceased spouse's property under succession law – by inheriting under the terms of a will; or by successfully challenging the will; or, if there is no will, under the intestacy rules.[124]

But if there has been a triggering event, in some cases the surviving spouse will not only receive a share of the deceased spouse's property under succession law, but will also be entitled to a division of family assets under the FRA.

In many parts of Canada, a person can use the family property division provisions on the death of a spouse, whether or not a triggering event has occurred.[125] Either the death of a spouse is a triggering event[126] or surviving spouses are allowed to apply for a division of the family property after the death of a spouse.[127]

In B.C., if spouses separate before one spouse dies, the surviving spouse can only use the FRA family property division provisions if a triggering event occurred before the spouse died. If the spouses are living together, with no intention of separating when one spouse dies, the surviving spouse cannot use the FRA.[128] Some examples may help illustrate what that can mean. The scenarios assume that the couples were together for the same length of time and that the surviving spouses were financially dependent on their spouses at the time their spouses died.

**A.** These couples were separated before the death of one spouse.

Example 1

A and B separate. A starts a court action and gets a court order saying that A and B have no prospect of reconciling. This is a triggering event under the FRA. A now has the right to half of the family assets and also to ask the court to give her more than half by finding that a 50-50 split of the family assets would be unfair. After the triggering event, B dies without a will (intestate) and leaves two young children (under 19) from a previous relationship.

*Result* – A has a right to half of the family assets under the FRA, and maybe more if a judge decides that a 50-50 split would be unfair. Also, because A and B were married and B died without a will, under the *Estate Administration Act*, A has the right to the first $65,000 of B's estate (the other half of the family assets) plus 1/3 of any of his estate over and above the $65,000.

Example 2

C and D separate. C plans to consult a lawyer about getting an order saying that C and D have no prospect of reconciling (which would be a triggering event), but D dies before this is done. Before his death, D makes a new will that leaves his entire estate to his two young children (under 19) from a previous relationship and says that C is left out because of the separation.

*Result* – C has no right to half of the family assets under the FRA. C also has no clear right to a share of D's estate. C can start a court action under the *Wills Variation Act* to claim a share of D's estate, but the process is expensive and how much of the property C would get is uncertain.

**B.** These couples were married and had no intention of separating at the time one spouse dies.

Example 3

A and B are married, with no intention of separating. Because no triggering event has occurred, neither of them has a right to half the family assets under the FRA. B dies and in his will leaves his entire estate to his two young children (under 19) from a previous relationship.

*Result* – A has no right to half of the family assets under the FRA. A also has no clear right to a share of B's estate. A can start a court action under the *Wills Variation Act* to claim a share of B's estate, but the process is expensive and how much of the property A would get is uncertain.

Example 4

> C and D are married, with no intention of separating. Because no triggering event has occurred, neither of them has a right to half of the family assets under the FRA. D has two young children (under 19) from a previous relationship. D dies and does not leave a will.
>
> *Result* – Under the *Estate Administration Act*, C has the right to the first $65,000 of D's estate plus 1/3 of any of his estate over and above that. This means that if the estate is worth more than $180,000, C's share is less than what she would have received had the couple separated and created a triggering event before D died and each had received half of the family assets under the FRA. C cannot file a claim for a share of D's estate under the *Wills Variation Act* because there is no will.

In spring 2005, a subcommittee of the Succession Law Reform Project looked at amending the FRA to make the death of a spouse a triggering event. The subcommittee proposed that on the death of a spouse, a surviving spouse would have to choose between using the FRA property division provisions, or using succession law, unless the deceased spouse indicated by will that the surviving spouse should be able to use both.

However, the general feedback from lawyers practising in the areas of family law and wills and estates was not positive. A key reason was that the FRA gives judges a lot of discretion to decide what property to divide and how to divide it. This makes it hard for spouses to predict what share of the family assets they will get under the FRA. If death were added as a triggering event, the choice between the FRA and succession law could be difficult because of uncertainty about what a spouse would get under the FRA. However, discussion points 4, 5, 6, 7, 8 and 11 in this paper suggest ways to amend the FRA that might make outcomes under the FRA more predictable.

Another concern is that the goals and underlying assumptions of family property law and succession law are different.[129] The FRA property division provisions are based on the presumption that each spouse equally contributed to the family and its property, and they focus on the rights of the spouses. They do not attempt to balance the rights of spouses with those of children or other dependents of the deceased spouse. And, they do not place such importance on which spouse owns a particular family asset. By contrast, succession law is concerned with dividing the property that a spouse owns at death, among that person's surviving spouse, children and other dependents. The goal is to provide for the financial needs of all of these dependents, while respecting any wishes of the deceased person about how the property should be divided.

It is not easy to reconcile these different goals. Making the death of a spouse a triggering event would give all surviving spouses access to the FRA family property provisions on the death of a spouse and so would address the unfairness of limiting this option to only those cases where a triggering event had occurred before the death. It also addresses the apparent unfairness of a surviving spouse from a broken down relationship getting half of the family property under the FRA and a surviving spouse from an intact relationship receiving less than half under succession law. But it may raise other concerns about

fairness to the deceased spouse's children and other dependents; about following the wishes expressed in the deceased spouse's will; about the need to settle estates in a timely way; and about the consequences of death on other financial arrangements including life insurance, pensions, taxation, and jointly held property. Ways to ease these concerns can be explored if a policy decision is made to give all surviving spouses the right to use the FRA family property provisions.

### *QUESTIONS*

21. Is it unfair that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?

22. Do you know anyone who has been affected by the fact that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?

    22.1. If yes, how frequently do you encounter this situation?

23. Do you think the FRA should be amended to allow all surviving spouses to claim a share of a deceased spouse's property under its family property division provisions:

    a) always

    b) only if other changes are made to the FRA family property division provisions;

        i. if so, what other changes should be made to the FRA family property division provisions?

    c) never

    d) other _____.

24. If all surviving spouses are allowed to use the FRA family property provisions when their spouses die, should a surviving spouse be:

    a) required to choose between the FRA and succession law

    b) allowed to use both the FRA and succession law

    c) other _____.

    24.1. Would your answer to question 24 apply:

    a) always;

    b) unless the deceased spouse's will says otherwise; or

    c) other_____.

**Discussion Point (11) – Date for Valuing Family Property**

Before spouses—or a judge—can make decisions about dividing family assets, they need to know how much the property is worth. The worth of property can change over time, so it is important to know the date on which the value is to be established. This date is known as the valuation date.

Like the laws in several other provinces and territories, the FRA does not say anything about valuation dates so judges have developed rules through case law to help determine valuation dates.[130] Generally, the valuation date is the trial date, but in some circumstances another date can be used.[131] Lawyers know these rules, but the law might be clearer to everyone if the FRA included provisions about valuation dates. The British Columbia Law Reform Commission said that setting out the valuation date in the FRA could create more certainty, encourage consistency in court decisions, and decrease the need for spouses to go to court to resolve disputes about the valuation date.[132]

Of the provinces and territories that use a family property division model like British Columbia's, Saskatchewan and the Yukon Territory have provisions about valuation dates in their laws. In Saskatchewan, a judge can choose between the triggering event and the trial date, depending on which the judge thinks is more appropriate.[133] In the Yukon Territory, the judge does not have a choice: the valuation date is the earliest of four possible triggering events: separation with no chance of resuming cohabitation; divorce; annulment; or an application for division of family assets.[134] The valuation date will be taken into account when the judge considers whether a 50-50 split of the family property would be unfair.[135]

The provinces and territories that use a compensation model of family property division generally have fixed valuation dates.[136] In most, the valuation date is the earliest of: separation; divorce; annulment; or a successful application to court based on the other spouse's dealings with the family property.

When the Law Reform Commission recommended that British Columbia switch to a compensation model of property division, it also recommended a fixed valuation date, but with some flexibility in cases where increases or decreases in value might lead to unfairness.[137] The suggestion was that a judge be allowed to consider these changes when deciding whether an equal division would be unconscionable.[138]

In Manitoba, the valuation date is either the date when the couple last cohabited or, if they are still cohabiting, the date when either applies for an accounting of assets. But spouses are also expressly allowed to agree to a date for valuing assets and debts.[139]

The FRA could be changed to address the issue of a valuation date in any of several ways:

- The Act could incorporate the rules that have been developed by our courts through case law to allow judges, when determining a fair division of property, to take into account changes in property values between the valuation date and trial. Care would have to be taken to make it clear that this is not a change in the law, so as not to cause confusion and promote needless applications to court for clarification.

- Using the trial date as the generally appropriate date to value family assets might not encourage spouses to settle their disputes out of court.
- The law might be more certain if the FRA provided for a fixed valuation date. This would sacrifice a degree of flexibility, but judges could still order an unequal division of family assets if a 50-50 split would be unfair.[140]
- The FRA could balance certainty with flexibility if it said that spouses might share in changes in property values between a fixed valuation date and trial, depending on what caused the value to go up or down (for example, the efforts of one spouse, the misconduct of the other, or market forces).[141]

***QUESTIONS***

25. Would it be helpful if the FRA said something about when to value family assets?

25.1. If yes, what do you think the FRA should say about valuation dates?

a) Let the spouses agree to a valuation date:
   i. in all circumstances;
   ii. in some circumstances;
   iii. for certain types of property;
   iv. other _____.

b) Let the judge choose any valuation date.

c) Let the judge choose among certain specified valuation dates, and:
   i. do not let the judge pick another date;
   ii. let the judge pick another date
      1. in some circumstances,
      2. for certain types of property,
      3. if there is a change in property value between the valuation date and trial (if the choices for a valuation date do not include the trial date),
      4. other _____.

d) Set out a fixed valuation date, and:
   i. do not let the judge pick another date;
   ii. require the judge to consider that the valuation date is fixed in deciding whether a 50-50 split of family assets would be unfair;
   iii. let the judge pick another date;
      1. in some circumstances,
      2. for certain types of property,
      3. if there is a change in property value between the valuation date and trial (if the trial date is not the valuation date),
      4. other _____.

26. If the FRA does set out when family assets should be valued, what should be the valuation date(s)?
    a) the trial date;
    b) the date the spouses make a separation agreement;
    c) the date of separation;
    d) the date when the spouses have been separated for a year;
    e) the date of a court declaration that the spouses have no chance of reconciling;
    f) the date of divorce (or judicial separation or annulment);
    g) the date one spouse applies to court to divide the family assets;
    h) other _____.

## PART E – GENERAL FEEDBACK

### *QUESTIONS*

27. Are there issues related to the division of family property not covered in this paper that you would like to raise?

    27.1. If yes, please describe.

28. In your opinion, what are the three most pressing issues related to the division of family property?

29. It is widely recognized that a barrier to access to justice is excessive process and procedures. Can you think of anything with respect to division of property that could be done to streamline the resolution of issues?

Please provide your feedback.

## ENDNOTES

[1] T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), "Study Paper on Family Property" (1985); British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986); British Columbia Law Reform Commission, "Working Paper No.63: Property Rights on Marriage Breakdown" (1989); British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990); British Columbia Law Institute, "Report on Recognition of Spousal and Family Status" (1998); British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (1998)

[2] Family Justice Reform Working Group, "A New Justice System for Families and Children", presented to the BC Justice Review Task Force (May 2005), available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last accessed: November 17, 2006)

[3] This paper does not consider the family property provisions in Quebec.

[4] In this paper, "spouse" refers to married persons and, to the extent that family property provisions include them, unmarried persons. Because the FRA family property provisions generally exclude unmarried persons, issues in this paper focus on the FRA as it applies to married persons. The application of the FRA to unmarried persons is explored as a separate issue in this paper.

[5] See: *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *Marital Property Act*, S.N.B. 1980, c.M-1.1; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Property and Support Act*, R.S.Y. 2002, c.83

[6] See: *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18

[7] British Columbia Law Reform Commission, "Working Paper No.63: Property Rights on Marriage Breakdown" (1989)

[8] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at Appendix B

[9] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.IV (Part B, section 2) and Appendix B (Part B)

[10] *Ibid,* at c.IV (Part B, section 2)

[11] *The Family Property Act*, S.S. 1997, c.F-6.3 at s.20; *Family Law Act*, R.S.O. 1990, c.F.3 at s.5; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.2; *Matrimonial Property Act*, R.S.N.S. 1989, c.275, preamble; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.6; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.19; *Family Property and Support Act*, R.S.Y. 2002, c.83 at s.5; *Family Law Act*, S.N.W.T. 1997, c.18 at s.36; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36

[12] *The Family Property Act*, S.S. 1997, c.F-6.3 at s.20

[13] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 ("spouse"). For example, the FRA provisions on spousal support and child custody and access apply to unmarried couples in the same way as married couples.

[14] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 ("spouse")

[15] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1, and see e.g.: *Wiest v. Middelkamp*, 2003 BCCA 437 at paras.26-30 and *Johnstone v. Wright*, 2002 BCCA 406, leave to appeal to SCC refused [2002] SCCA 369

[16] *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.61, 65 & 120.1

[17] See e.g., *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1 and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.5

[18] *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24, Pt.IV & Pt.VII; *The Family Property Act*, C.C.S.M. c.F25 at s.5; *Family Law Act*, S.N.W.T. 1997, c.18 at Pt.I and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at Pt.I

[19] *The Family Property Act*, S.S. 1997, c.F-6.3 at s.2 ("spouse"); *The Family Property Act*, C.C.S.M. c.F25 at s.1 ("common-law partner"); *Family Law Act*, S.N.W.T. 1997, c.18 at s.1 ("spouse") and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.1 ("spouse")
[20] See e.g., *Family Law Act*, R.S.N.L. 1990, c.F-2 at ss.2, 63 & 65 and *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.1, 37, 60 & 61
[21] *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.61 & 120.1
[22] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1 and see e.g., Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.5
[23] Registration as domestic partners gives them a legal status that is similar to but not the same as marriage. (See: *The Family Property Act*, C.C.S.M. c.F25 at s.1 ("common-law partner"); *Vital Statistics Act*, R.S.N.S. 1989, c.494, Pt.II) Once registered, the same family property provisions that apply to married couples automatically apply to them. Before same-sex couples had the legal right to marry, both the former Ontario Law Reform Commission and the BCLI recommended the use of registered domestic partnerships. (See: Ontario Law Reform Commission, "Report on the Rights and Responsibilities of Cohabitants under the *Family Law Act*" (1993); British Columbia Law Institute, "Report on Recognition of Spousal and Family Status" (1998); T.G. Anderson, "Comment on the Report of the British Columbia Law Institute on Recognition of Spousal and Family Status", (2000) 12 Can. J. Women & L. 439; T.G. Anderson, "Models of Registered Partnership and Their Rationale: The British Columbia Law Institute's Proposed Domestic Partner Act", (2000) 17 Can. J. Fam. L. 89) Registered domestic partnerships were a way to give same-sex couples the same rights and obligations as married spouses. (See e.g.: K. Kuffner, "Common-Law and Same-Sex Relationships under the *Matrimonial Property Act*", (2000) 63 Sask. L. Rev. 237 and T.G. Anderson, "Models of Registered Partnership and Their Rationale: The British Columbia Law Institute's Proposed Domestic Partner Act", (2000) 17 Can. J. Fam. L. 89) Now that same-sex couples can legally marry, registered domestic partnerships have much more limited appeal.

[24] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.124
[25] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.67 and s.125
[26] See: Cornet, W. & A. Lender, "Matrimonial Real Property on Reserve" (Discussion Paper) (Ottawa: Department of Indian Affairs and Northern Development, November 2002) at pp.38-46; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at ch.4; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306
[27] *The Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II No.5
[28] *Indian Act*, R.S., 1985, c.I-5
[29] *First Nations Land Management Act*, 1999, c.24
[30] Canada, "Report of the Standing Committee on Aboriginal Affairs and Northern Development: Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property" (Ottawa: Communication Canada, June 2005) at pp.7-9, available online at: http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html (last accessed: November 17, 2006)
[31] Abbott, K., "Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime" (2003), available online at: http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html (last accessed: November 17, 2006)
[32] Manitoba, "Report of the Aboriginal Justice Inquiry of Manitoba" (November 1999) at c.13, available online at: http://www.ajic.mb.ca/volumel/chapter13.html; Canada, "Report of the Royal Commission on Aboriginal Peoples", vol.3 (Ottawa: Communications Canada, 1996), available online at: http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html; Abbott, K., "Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime" (2003), available online at: http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html; Canada, "Report of the Standing Committee on Aboriginal Affairs and Northern Development: Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property" (Ottawa: Communication Canada, June 2005) at Appendix A, available online at: http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html; Nova Scotia Law Reform Commission, "Final Report – Reform of the Law Dealing with Matrimonial Property in Nova Scotia" (1997) at p.13; also see: United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations (Canada), December 1998, available online at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.31.En?OpenDocument and United Nations

Human Rights Committee, Concluding Observations (Canada), April 2006, available online at: http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf (All websites last accessed: November 17, 2006)

[33] s. 58

[34] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.59

[35] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65

[36] T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), "Study Paper on Family Property" (1985) at pp.59 & 75

[37] Family Relations Act, R.S.B.C. 1996, c.128 at s.65(2)

[38] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.II (Part C)

[39] The Yukon Territory is the other place in Canada that uses the same approach as British Columbia. See: *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.4-6.

[40] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.37, and places using a compensation model: Manitoba, Ontario, Prince Edward Island, Northwest Territories, and Nunavut.

[41] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.23, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.8 and *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.13. As well, s.65(2) of the *Family Relations Act*, R.S.B.C. 1996, c.128 lets a court split property that is not a "family asset" if it needs to after it has found that it would be unfair to divide the family assets equally.

[42] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at ch.IV. Excluding a particular value of property is another way to do this. (See: *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.7) For example, an asset's value when a spouse gets it might be excluded, so that only the amount that it increases in worth during the relationship is included and shared. A downside of this option is that figuring out what an asset was worth in the past can be hard. (See: British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.IV (Part B, section 3))

[43] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.IV (Part B, section 4). The BC LRC recommended that a judge be able to divide an excluded asset if failure to do so would be unfair having regard to: (a) how much, if at all, the non-owning contributed to getting, managing, maintaining, operating or improving the asset; (b) how much, if at all, the excluded asset changed in value or form after the marriage or the asset was acquired; and (c) how long the marriage lasted.

[44] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.40. To decide if the property is a family asset, the court also may look at whether the other spouse contributed to the property (e.g., helped to get, maintain, operate or improve it) or whether the person who gave the gift or left the inheritance said who they wanted to benefit from the property (e.g., one spouse or both spouses).

[45] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65

[46] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65(2)

[47] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18. Sometimes, only part of the gift or inheritance is excluded – for example, the amount the property was worth when the spouse got it. (Alberta (s.7), Saskatchewan (s.23)) If the property made income or increased in worth during the relationship, this can be excluded also or shared by the spouses. (Saskatchewan (s.23), Manitoba (s.7), Ontario (s.4)) Whether or not a gift or inheritance is excluded can depend on different things: when the spouse got it (e.g., before or after the relationship began) (Saskatchewan (s.23)), if the property is a family home (Saskatchewan (s.23), Ontario (s.4)), or if the person who gave the gift or left the inheritance said who they wanted to benefit from the property (e.g., one spouse or both spouses) (Manitoba (s.7), Ontario (s.4)).

[48] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18.

[49] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.IV (Part B, section 3)

[50] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.23
[51] See e.g., *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.6
[52] See e.g., *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.6
[53] See e.g., Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996)
[54] See e.g., Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996)
[55] See e.g., Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996)
[56] See e.g., Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996)

[57] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.126-4.139
[58] British Columbia Law Reform Commission, "Report on Property Rights on Marriage Breakdown" (1990) at c.IV (Part C, section 3)
[59] *Marital Property Act*, S.N.B. 1980, c.M-1.1 at ss.1, 2 & 9
[60] See e.g., *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18
[61] See e.g., *The Family Property Act*, C.C.S.M. c.F25 at s.4(4); *Family Law Act*, R.S.O. 1990, c.F.3 at s.4(5); *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.4(6)
[62] British Columbia Law Reform Commission, "Working Paper No.63: Property Rights on Marriage Breakdown" (1989) at c.VI (Part F, section 6)
[63] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.133 and see e.g.: *Moore v. Moore*, [1988] B.C.J. No.740 (QL) (SC)
[64] See e.g., Nova Scotia Law Reform Commission, "Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia" (1997) at pp.28-29 and *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.9
[65] See e.g., American Law Institute , "Principles of the Law of Family Dissolution" (2002) at §4.09 (p.732), available on Lexis Nexis
[66] British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986)
[67] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.61
[68] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56
[69] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.4
[70] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.3
[71] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.17
[72] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.68 and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.21-7.22
[73] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.17
[74] British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.36-37
[75] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Property and Support Act*, R.S.Y. 2002, c.83
[76] See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.56(4) and *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24
[77] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.8 and *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24
[78] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.19; British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.9-11; and see: *Hartshorne v. Hartshorne*, 2004 SCC 22 ("Hartshorne")

[79] British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.9-11
[80] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.22
[81] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24 and *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.29
[82] See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.56; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.66; Family Law Act, R.S.P.E.I. 1988, c.F-2.1 at s.55); *Family Law Act*, S.N.W.T. 1997, c.18 at s.8; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.8
[83] British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.23-25 and pp.36-37
[84] British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.23-25
[85] See: *Slanz v. Slanz* (1984), 42 R.F.L. (2d) 390 (B.C.C.A.); *Loyva v. Loyva* (1985), 44 R.F.L. (2d) 398 (B.C.C.A.); *Tedham v. Tedham*, 2005 BCCA 502
[86] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65(1)(e) & (f)
[87] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.89(1) & s.93(4); *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.), s.15.2(4) & (6)
[88] See e.g., M. Gordon, "Spousal Support" (CLE Family Law Conference, Vancouver, British Columbia, July 15-16, 1999)
[89] *Toth v. Toth* (1995), 17 R.F.L. (4th) 55 (B.C.C.A.)
[90] *Tedham v. Tedham*, 2005 BCCA 502 at para.64
[91] *Tedham v. Tedham*, 2005 BCCA 502 at para.64
[92] *Family Law Act*, R.S.N.L. 1990, c.F-2 at ss.22 & 39(8)
[93] See e.g., In Saskatchewan, the value of family property situated outside of Saskatchewan is a factor for the court to consider in a proceeding to vary an equal division of family property (*The Family Property Act*, S.S. 1997, c.F-6.3 at s.21).
[94] Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c.28*
[95] Blom, J., "How Conflicts has Changed in the Last Fifteen Years" (CLE, Conflicts Issues, Vancouver, British Columbia, April 2006)
[96] Uniform Law Conference of Canada, *Court Jurisdiction and Proceedings Transfer Act* , available online at: http://www.ulcc.ca/en/us/
[97] See e.g., Peters, L., "Conflict of Laws Primer" (CLE, Conflicts Issues, Vancouver, British Columbia, April 2006) and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
[98] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
[99] British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998)
[100] P. Daltrop & F. Robin, "Dealing with Land in Faraway Places" (CLE, Family Law Conference, Vancouver, British Columbia, July 2003) See e.g., *Family Law Act*, R.S.O. 1990, c.F.3; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18; *Family Property and Support Act*, R.S.Y. 2002, c.83
[101] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, C.C.S.M. c.F25; *Marital Property Act*, S.N.B. 1980, c.M-1.1
[102] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.9; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.45
[103] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
[104] Uniform Law Conference of Canada, *Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*; available online at: http://www.ulcc.ca/en/us/
[105] British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998)
[106] British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998) at p.10

[107] British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998) at p.11
[108] British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998) at p.12
[109] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56
[110] Family Justice Reform Working Group, "A New Justice System for Families and Children", presented to the BC Justice Review Task Force (May 2005), available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last accessed: November 17, 2006)
[111] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.21 and *The Family Property Act*, C.C.S.M. c.F25 at s.13
[112] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-6; *Family Law Act*, R.S.O. 1990, c.F.3 at ss.5-7; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.3; *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at ss.2 & 12; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at ss.6-7; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21; *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.6 & 15; *Family Law Act*, S.N.W.T. 1997, c.18 at ss.36-38; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.36-38
[113] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56
[114] Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996) at c.I (Part 3, section (c))
[115] *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) at s.8(3)
[116] British Columbia Law Institute, "Report on Recognition of Spousal and Family Status" (1998) at pp.35-36
[117] *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5
[118] *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5(3)
[119] *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5(4)
[120] *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.1(3)
[121] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.21 and *The Family Property Act*, C.C.S.M. c.F25 at s.13
[122] Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996) at c.I (Part 3, section (c))
[123] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §13.7-13.11; *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56
[124] See: *Estate Administration Act*, R.S.B.C. 1996, c.122, *Wills Act*, R.S.B.C. 1996, c.489 at s.16 and *Wills Variation Act*, R.S.B.C. 1996, c.490. The British Columbia Law Institute recently recommended fixing the gap in the *Family Relations Act* and *Wills Act* or *Estate Administration Act* that lets some spouses use both the FRA family property provisions and succession law to get a share of their deceased spouse's property. Under the recommendations, if a surviving spouse has the right to use the FRA when the other spouse dies, the surviving spouse would have to use the FRA and would lose any rights to the deceased spouse's property under succession law, unless the deceased spouse's will indicated otherwise. No surviving spouse would be able to use both the FRA and succession law ("double dipping"). (See: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework" (2006) at pp.125 (s.19) & 148 (s.43))
[125] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at ss.30-37, *The Family Property Act*, C.C.S.M. c.F25 at Pt.IV, *Family Law Act*, R.S.O. 1990, c.F.3 at ss.5-7, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.4, *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.12, *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21, *Family Law Act*, S.N.W.T. 1997, c.18 at ss.36-38, and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.36-38
[126] See e.g., *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.12, *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21, *Family Law Act*, S.N.W.T. 1997, c.18 at s.36, and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36
[127] See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at ss.30-37, *The Family Property Act*, C.C.S.M. c.F25 at Pt.IV, *Family Law Act*, R.S.O. 1990, c.F.3 at s.5, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.4
[128] *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145 (S.C.C.). The Supreme Court of Canada has said that a surviving spouse who challenges the terms of her deceased spouse's will should be left no worse off financially then she would have been under the FRA had the spouses separated.

[129] See e.g., Alberta Law Reform Institute, "Final Report No. 83 – Division of Matrimonial Property on Death" (2000) at c.2

[130] See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *Marital Property Act*, S.N.B. 1980, c.M-1.1; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Law Act*, R.S.N.L. 1990, c.F-2. Also, the Alberta Law Reform Institute recently published a background paper on valuation dates in family property statutes. (Alberta Law Reform Institute, "Background Paper – Matrimonial Property Legislation: Valuation Dates" (2005))

[131] Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.69, for example: (a) the trial date is generally the appropriate valuation date for family assets, but the court can select another valuation date between the triggering event and the trial date to achieve fairness; (b) the value of assets at the triggering event should be considered when determining if an equal division is unfair under s.65, since the interests of each spouse come into existence on that date; (c) the value of assets on the trial date is generally appropriate when considering the mechanism under s.66 to achieve a division of family assets by, for example, vesting an asset in the name of one spouse in exchange for an order compensating the other for the divested interest; (d) the spouses generally will share any increase or decrease in value of an asset occurring after the triggering event, as their interests in the asset have vested; (e) the court may reapportion assets or make a compensation order in favour of a spouse having regard to certain events following the triggering event, such as the disposal or significant dissipation of a family asset by the other spouse.

[132] T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), "Study Paper on Family Property" (1985) at p.89

[133] *The Family Property Act*, S.S. 1997, c.F-6.3 at s.2 ("value") – The Saskatchewan Law Reform Commission has recommended giving the court more help in choosing between the two possible valuation dates – specifically, the valuation date should be the triggering date or, if the property value has changed since the triggering event because of any reason other than the efforts of the owning spouse, the trial date. (Saskatchewan Law Reform Commission, "*The Matrimonial Property Act*: Selected Topics – Report to the Minister" (1996))

[134] *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.6 & 15

[135] *Family Property and Support Act*, R.S.Y. 2002, c.83 at s.13

[136] See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.4; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.4; *Family Law Act*, S.N.W.T. 1997, c.18 at ss.33 & 35; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.33 & 35; and also see: *The Family Property Act*, C.C.S.M. c.F25 at s.16 for a provision that provides some choice to parties.

[137] British Columbia Law Reform Commission, "Working Paper No.63: Property Rights on Marriage Breakdown" (1989) at c.VII (Part D, section 45(5)(d))

[138] British Columbia Law Reform Commission, "Working Paper No.63: Property Rights on Marriage Breakdown" (1989) at c.VII Part D, section 45(5)(d)). This approach is used in the Northwest Territories (*Family Law Act*, S.N.W.T. 1997, c.18 at s.36) and Nunavut (*Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36), where the court must take into account any substantial change in the value of the net family property of either spouse that occurs after the valuation date and the cause of the change when it determines if it would be "unconscionable" to order an unequal division of the net family property.

[139] *The Family Property Act*, C.C.S.M. c.F25 at s.16

[140] *Family Relations Act*, R.S.B.C. 1996, c. 128 at s.65, and see: T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), "Study Paper on Family Property" (1985) at p.89

[141] See e.g., Ontario Law Reform Commission, "Report on Family Property Law" (1993) at c.4




# Ministry of Attorney General
# Justice Services Branch
## Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 3
# Division of Pensions

# Discussion Paper

**Prepared by Thomas G. Anderson, Q.C.**

**February 2007**

**This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.**

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## RECONSIDERING SOME ASPECTS OF DIVISION OF PENSION ENTITLEMENT

In 1995, British Columbia enacted pension division legislation. This law is contained in Part 6 of the *Family Relations Act* (FRA). On its 10th anniversary, the Attorney General asked the British Columbia Law Institute (BCLI) to review how Part 6 is working. The BCLI concluded that the legislation works well, but some amendments are called for. Many of these were technical, housekeeping changes. But there were also a few issues that the BCLI flagged as being extremely important.

This paper highlights some of the most important changes that the BCLI proposed in its report, *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*.

## DISCUSSION

### Background

When married spouses end their relationship, the FRA provides for the division of assets between them. Entitlement does not depend on whose name the asset is in. Legislation defines various assets to be "family assets" and the general rule is that each spouse has a right to half of the family assets, unless that would be unfair.

The definition of "family asset" includes pension benefits. In many cases, a pension will be one of the most valuable assets owned by the spouses.

Obviously, the rules for dealing with an asset this valuable must work for everyone involved. That means not only the spouses, but also the pension plan that must administer the pension division.

### What are the current rules?

Part 6 of the FRA has different rules for pension division depending on the kind of pension plan, and whether the pension is matured. (A pension that is being paid is said to be "matured". Until it is being paid, it is referred to as "unmatured.")

There are basically two types of plans.

- One type determines the benefits by a formula, usually tied to the pension plan member's years of service and often also based on salary levels. This type of plan is called a "defined benefit plan".
- The other type is similar to an RRSP. Its value is equal to the contributions made to the pension plan, plus investment returns on those contributions. When the member retires, the funds in the account are usually used to purchase an annuity for the member. This type of plan is called a "defined contribution plan".

**Summary of British Columbia's current pension division rules.**

| Type of Plan | Unmatured | Matured |
|---|---|---|
| Defined Benefit Plan | The division is deferred. The spouse becomes a kind of member of the pension plan (called a "limited member") and has two options:<br>(a) When the member is eligible to begin receiving pension payments, the spouse may take a lump sum. This is transferred to a prescribed plan, such as an RRSP, or<br>(b) When the member begins receiving pension payments, the spouse may take his or her share by a separate pension payable for his or her lifetime.<br>If the member dies before the pension is divided, the pension is replaced by a death benefit and the limited member receives a share of the death benefit instead of a share of the pension. | The spouse becomes a limited member of the pension plan.<br>The plan divides each monthly pension cheque between the limited member and member (after making separate withholdings for tax).<br>If the limited member dies first, the full amount of the pension payments are then made to the member.<br>If the member dies first, the limited member receives the survivorship benefits, if there are any.<br>There may not be any survivorship benefits. It depends on the form of pension that the member chose at retirement. |
| Defined Contribution Plan | The spouse's share is transferred immediately in a lump sum to a prescribed plan, such as an RRSP. | The rules set out above for a defined benefit plan also apply to a defined contribution plan. |

**What changes are proposed?**

This summary lists only some of the most important changes proposed, and the discussion of these changes focuses on the main issues. To review all of the recommendations in detail, see the BCLI report.

### *1. Protecting the pension plan administrator*

| Current law | Proposal |
|---|---|
| When their relationship ends, spouses don't always take the necessary steps to protect their rights to property.<br><br>Under B.C. law, the end of a relationship usually vests rights in pensions in the member's spouse.<br><br>What should pension plan administrators do if they receive a direction from the member after they know a member's marriage has ended, but have received no order or agreement formally recording the spouse's interest in the pension?<br><br>There is some concern that the plan administrator may be liable to the member's spouse because of "constructive notice" of the spouse's rights. | A plan administrator who thinks a former spouse may have acquired an interest in the pension should be able to protect the plan from liability.<br><br>Pension plan administrators should not be liable if they do one or more of the following:<br><br>(i) require the member to register the former spouse as a limited member,<br><br>(ii) require the member to produce satisfactory evidence that the spouse has no interest in the pension, or<br><br>(iii) send the spouse a notice with the reasonable expectation it will be received.<br><br>Recommendation 1 of the full report has more detail on this proposal. |

### *2. What part of the pension is divided?*

| Current law | Proposal |
|---|---|
| The spouse is entitled to a share of the pension that accrues between the date of marriage, and the spouse's "entitlement date".<br><br>(The "entitlement date" is usually the earliest of the date when the spouses make a separation agreement; or when a judge makes an order of divorce or annulment, or a declaration that the spouses have no possibility of reconciling.)<br><br>These dates can be changed by agreement or court order. | If part of the pension accrued during cohabitation before marriage that portion should also be divided (unless the spouses agree, or a judge orders, that it be excluded from division).<br><br>Recommendation 5 of the full report has more detail on this proposal. |

### *3. Unmarried spouses*

| Current law | Proposal |
|---|---|
| The FRA provides for the division of assets at the end of a relationship between married spouses only.<br><br>Unmarried spouses may agree to have the property division rules apply.<br><br>There is some question whether judges can order that the property division rules apply to unmarried spouses who do not agree. The discussion paper on division of family property looks at property division between unmarried spouses. | The FRA should clarify that a judge may order that, if a pension is to be divided between unmarried spouses, the pension division rules are available to them.<br><br>Recommendation 18 of the full report has more detail on this proposal. |

### *4. Death before retirement*

| Current law | Proposal |
|---|---|
| If the member dies before retirement, the pension is replaced by a death benefit.<br><br>The British Columbia *Pension Benefits Standards Act* says that the death benefit must be at least 60% of the value of the pension, but some plans provide a more generous death benefit.<br><br>If the pension has not yet been divided when the member dies, the limited member receives a share of the death benefit instead of the pension.<br><br>If the death benefit has the same value as the pension and the spouses are not aware of that, their agreement or court order may give the limited member more than if the pension were divided. Or, if the death benefit is worth substantially less than the pension, the limited member may get less than if the pension were divided. | When a member dies before retirement, the share the limited member receives should be the same, whether the pension or death benefit is divided.<br><br>Recommendation 6 of the full report has more detail on this proposal. |

### *5. Share of unmatured pension in a defined benefit plan*

| Current law | Proposal |
|---|---|
| If the pension is in a defined benefit plan, and not yet being paid, the limited member has two options:<br><br>(a) A lump sum may be transferred to a prescribed plan (such as an RRSP) at any time after the member becomes eligible to retire, even if the member decides to wait and retire later, or<br><br>(b) The limited member may wait until the member retires, and receive a separate pension, which would be payable for the limited member's lifetime. | As under the current law, the limited member should be able to choose to receive the share at any time after the member becomes eligible to retire.<br><br>The change would be to permit the limited member to receive a separate pension at that time, or choose among any of the other options available to the member.<br><br>The lump sum transfer option would be available only if that option is available to plan members.<br><br>Recommendation 7 of the full report has more detail on this proposal. |

### *6. Value of spouse's share of a defined benefit plan*

| Current law | Proposal |
|---|---|
| The limited member's share of a pension in a defined benefit plan is based on the value of the member's pension at the date of division. The valuation assumes the member chooses to have the pension begin at that date.<br><br>Plan administrators say that valuing the limited member's share on this basis is unfair to them, and substantially undercuts the pension funding assumptions they have made. This is because many plans subsidize early retirement pensions. This richer pension is offset by income the employer would otherwise have had to pay the member. | Pension division should be neutral from the plan's perspective and not cost the plan more than if the pension were not divided.<br><br>If the limited member chooses to take the pension before the member does, the share should be determined based on the value the pension would have if the member were the average age of retirement for plan members.<br><br>For example, if the member is 55, but the average age of retirement for the plan is 62, the limited member's share would be based on the value of the pension if it began when the member was 62.<br><br>This means the amount paid by the plan will be based directly on the plan's funding assumptions.<br><br>Recommendation 8 of the full report has more detail on this proposal. |

### *7. Beneficiary designation*

| Current law | Proposal |
|---|---|
| If the limited member is the designated beneficiary of the pension,<br>(i) the member cannot change that designation without the limited member's consent or a court order, and<br>(ii) the limited member is entitled to all of the death benefit, even the part that accrues after the relationship ended. | The member should be allowed to designate a new beneficiary (as permitted by law and the plan) for the portion of the death benefit above the limited member's share.<br>Recommendation 9 of the full report has more detail on this proposal. |

### *8. Supplementary pension plans*

| Current law | Proposal |
|---|---|
| The *Income Tax Act* sets a ceiling on the amount of pension that may be paid from a registered plan.<br>For high income earners, employers often provide supplementary plans to pay benefits over those permitted under the *Income Tax Act*.<br>Part 6 of the FRA provides that these plans are divided by the same rules that apply to all matured pensions (the plan must divide the monthly pension payment between the spouses). After the relationship ends, however, it is often impossible to protect a lifetime income for the former spouse. Usually the benefits will end when the member dies. | No division of a supplementary pension plan should take place until the member decides to begin receiving pension payments.<br>At that date, however, the former spouse should be able to receive a separate pension for his or her lifetime.<br>If other options are permitted plan members, those should also be available to the former spouse.<br>Recommendation 17 of the full report has more detail on this proposal. |

### *9. Rights under the Pension Benefits Standards Act and under Part 6 of the FRA*

| Current law | Proposal |
|---|---|
| The *Pension Benefits Standards Act* and the FRA both confer certain rights, with the result that in some cases, a spouse will qualify for benefits under both Acts.<br><br>For example, under the *Pension Benefits Standards Act*, if a member dies, the spouse is entitled to receive death benefits in preference to a designated beneficiary. And a member who begins receiving pension payments must choose a survivorship benefit for his or her spouse (unless the spouse waives it).<br><br>Part 6 of the FRA also confers rights on a former spouse. Sometimes, the spouse will qualify under both Acts. The *Pension Benefits Standards Act* provides that, in that case, rights under that Act cease in favour of those under Part 6.<br><br>There are some questions about whether the *Pension Benefits Standards Act* applies if, instead of dividing the pension, the spouses waive division of the pension or satisfy entitlement in some other way. Also, what is to happen before Part 6 rights vest? For example, should the spouse be able to choose between the *Pension Benefits Standards Act* and Part 6 of the FRA? | The *Pension Benefits Standards Act* should be revised to clarify that all rights that a spouse would enjoy under that Act end once<br><br>• the relationship ends, and<br><br>• there has been a division of the pension under Part 6 of the FRA.<br><br>This would include cases where the spouse's share of the pension is waived, or satisfied by other means, such as receiving a greater share of other assets.<br><br>Even if both Acts could apply, an application under Part 6 of the FRA would mean that Part 6 governs.<br><br>Recommendation 32 of the full report has more detail on this proposal. |

### *10. Forms*

| Current law | Proposal |
|---|---|
| If there is an agreement or order dividing a pension, specified forms must be sent to the plan administrator. | The forms should be revised to make them easier to use.<br><br>They should include a simple authorization to allow the plan administrator to communicate with the spouse's lawyer, and should warn about the importance of keeping contact information up to date.<br><br>Recommendation 27 of the full report has more detail on this proposal. |

### *11. Administrative fees*

| Current law | Proposal |
|---|---|
| The plan administrator can charge a fee for dividing a pension. In a defined benefit plan the fee is $500; in a defined contribution plan, it is $150.<br><br>These amounts have not changed since the fees were first set in 1995.<br><br>The fee is payable equally by the member and the spouse.<br><br>It is not clear whether the current law would allow the fee to be paid by installments from the pension itself. | The fees should be increased to a maximum of $750 for defined benefit plans and $175 for defined contribution plans.<br><br>The option of paying the fee by installments from the pension should be available.<br><br>Recommendation 28 of the full report has more detail on this proposal. |

### *12. Relationship between spousal support and pensions*

| Current law | Proposal |
|---|---|
| As a general principle, spousal support can be changed by a judge at a future date only if there is an unforeseen material change of circumstances.<br><br>Retirement is a material change of circumstances, but it is foreseeable. If the agreement or court order deals with this, there is no problem.<br><br>But if the agreement or court order has not addressed this situation, then in most cases judges can't intervene. | Legislation should specifically permit a judge to review support obligations when<br><br>(a) the person who pays support begins receiving a pension, and<br><br>(b) when a person receiving support becomes eligible to receive income from his or her share of the pension benefits. |

These are only some of the recommendations in the BCLI Report. The BCLI reviewed every aspect of pension division and made many suggestions for technical improvements. We welcome your comments on the recommendations discussed in this paper and on any of the other recommendations included in the full report.

Please provide your feedback.




# Ministry of Attorney General
# Justice Services Branch
## Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 4
# Judicial Separation

# Discussion Paper

**Prepared by the Civil and Family Law Policy Office**

**February 2007**

**This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.**

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## DISCUSSION

### Discussion Point (1) – Is Judicial Separation Still Needed in BC?

Judicial separation has its roots in England in the days when getting a divorce required proof of cruelty or adultery and a private act of Parliament. People could not get a divorce from the courts, but they could get a release from the obligation to live together and an order for property division and spousal support.[1] Eventually, this process became called an action for judicial separation and became part of our law in Canada.[2]

A judicial separation is a court order confirming that a marriage has broken down. It doesn't change the spouses' marital status —they are still married and are not free to marry anyone else. [3] In British Columbia, the BC Supreme Court can grant an application for judicial separation[4] on grounds of adultery, cruelty, or desertion without reasonable cause for at least two years.[5]

These days, when divorces are much easier to obtain[6], law reform bodies and provincial governments have looked at whether it makes sense to continue the concept of judicial separation.[7] Some favour retaining it because there are people who, for religious, cultural, or other reasons, do not believe in or wish to divorce. For these people, judicial separation provides a way to rearrange their affairs, including property division and spousal support, without divorce.[8] But these spouses have other options. They can either make an agreement,[9] or one of them can apply to court for an order for property division or spousal support, for example, without the need for a divorce or a judicial separation.[10]

In British Columbia, judicial separation also carries other consequences, similar to a divorce. For example, under the *Family Relations Act* (FRA), judicial separation:

- starts the 2-year limitation period in which a spouse may apply for a court order (because one of the definitions of "spouse" under that Act is a person who applies for a FRA order within two years of a judicial separation);
- means that a person who is granted custody as part of a judicial separation also becomes the child's sole guardian (s.27(4));
- triggers an equal division of the family assets between the spouses (s.56);
- starts the 2-year limitation period in which a judge may interfere with an ante nuptial (before marriage) or post nuptial (after marriage) agreement (s.68); and
- means that each former spouse is to be considered an unmarried person in relation to property, the right to contract, and rights and obligations in civil proceedings, and is not responsible for any future debts that the other spouse incurs (s.127).[11]

Judicial separation also triggers outcomes in other provincial acts[12] that refer to judicial separation.[13]

If judicial separation were no longer available in British Columbia, or no longer included in the FRA as an event with consequences similar to divorce, spouses who do not wish to divorce could decide to live separately and would be treated the same as all other

separated but still married spouses under the law. This is the case in other parts of Canada where judicial separation is not available as an alternative to divorce.[14]

Alberta recently replaced judicial separation with a declaration of irreconcilability – a court order that the spouses have no prospect of reconciling.[15] Such a declaration triggers a spouse's right to seek spousal support or an equal share of the family property.[16] In British Columbia, the FRA already allows a judge to make an order that the spouses have no reasonable prospect of reconciling and this triggers a spouse's right to an equal division of family property.[17]

In those parts of Canada where judicial separation is available as an alternative to divorce, it generally does not have the consequences that it does in British Columbia.[18]

Questions

1. Are there reasons why judicial separation should continue to be available as an alternative to divorce?
2. If judicial separation continues to be available in British Columbia, should it continue to carry rights and obligations and other consequences under the FRA? Or should married couples who wish to separate without divorcing be treated like other separated but still married spouses, under the FRA?
3. If all references to judicial separation are removed from the FRA, should they be replaced with references to a declaratory judgment– a court order that the spouses have no reasonable prospect of reconciling? This would expand the use of a declaratory judgment beyond its current use which is to trigger a spouse's right to an equal division of family property.

Please provide your feedback.

## ENDNOTES

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[1] See e.g., J.T. Irvine, "*The Queen's Bench Act, 1998*: Old Wine in New Bottles" (2003), 66 Sask. L. Rev. 63 at paras.137-143.

[2] Before 1857, the power of the court to excuse spouses from living together was called divorce *a mensa et thoro*. The *Divorce and Matrimonial Causes Act, 1857* replaced this power with a similar action – judicial separation. In addition to releasing spouses from the duty of cohabiting with each other, judicial separation under the *Divorce and Matrimonial Causes Act, 1857* allowed wives to own their own property and to enter into contracts and be a party to a legal action, independently of their husbands. Married spouses in British Columbia can own property and enter into contracts independently of each other (see: *Law and Equity Act*, R.S.B.C. 1996, c.253 at s.60). See e.g., J.T. Irvine, "*The Queen's Bench Act, 1998*: Old Wine in New Bottles" (2003), 66 Sask. L. Rev. 63 at paras.137-143.

[3] See e.g., *Tatlock v. Tatlock*, 71 B.C.L.R. (2d) 194 (S.C.), affirmed [1994] B.C.J. No. 403 (C.A.); *Farwell v. Farwell* (1979), 17 B.C.L.R. 97 (S.C.); C. Davies, Family Law in Canada (Toronto: Carswell, 1984) at p.123; J.G. McLeod, The Conflict of Laws (Calgary: Carswell, 1983) at p.702.

[4] British Columbia, *Rules of Court (Supreme Court)*, R.1; *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.1 and 5; *Divorce Act*, R.S., 1985, c.3 (2nd Supp.) at ss.1 and 3.

[5] *Divorce and Matrimonial Causes Act, 1857* (20 & 21 Vict., c.85) [England] and see e.g., *Tatlock v. Tatlock*, 71 B.C.L.R. (2d) 194 (S.C.), affirmed [1994] B.C.J. No. 403 (C.A.); C. Davies, Family Law in Canada (Toronto: Carswell, 1984) at 126.

[6] For example, in Canada, a spouse can get a divorce if the other spouse committed adultery or treated him or her with cruelty during the marriage, but also simply if the spouses lived separate and apart for one year (*Divorce Act*, R.S., 1985, c.3 (2nd Supp.) at s.8).

[7] Alberta Law Reform Institute, "Report No.65 – *Domestic Relations Act* – Family Relationships: Obsolete Actions" (March 1993); Scottish Law Reform Commission, "No.135 – Report on Family Law" (January 1992); Law Commission (England), "No. 192 – Family Law – The Ground for Divorce" (October 1990); J.T. Irvine, "*The Queen's Bench Act, 1998*: Old Wine in New Bottles" (2003), 66 Sask. L. Rev. 63 at paras. 137-143.

[8] See e.g., J.T. Irvine, "*The Queen's Bench Act, 1998*: Old Wine in New Bottles" (2003), 66 Sask. L. Rev. 63 at fn 224.

[9] *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.28, 34, 61, 65, 68 and s. and see: Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia)

[10] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 ("spouse"), ss.56-57, s.89 and s.93.

[11] Other references to judicial separation in the *Family Relations Act*, R.S.B.C. 1996, c.128 include: s.5(1), s.61(2), s.93(1) and s.123(4).

[12] See e.g., *Land Titles Act*, R.S.B.C. 1996, c.250 at s.215(6); *Pension Benefits Standards Act*, R.S.B.C. 1996, c.352 at s.63(3); *Wills Act*, R.S.B.C. 1996, c.489 at s.16.

[13] For example, under s.16 of the *Wills Act*, R.S.B.C. 1996, c.489, judicial separation (as well as divorce or annulment) has the effect of canceling any gifts to a spouse left by the other spouse in their will. The British Columbia Law Institute has recently suggested amending this section to say that a gift will be canceled when a triggering event under the FRA [s.56] occurs (in the case of spouses covered by Part 5 [family property] of the FRA) or when the relationship ends (in any other case). (British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework" (Report No.45, June 2006) at p.148).

[14] See e.g., Alberta (*Family Law Act*, S.A. 2003, c.F-4.5 at s.83 & s.108) and Ontario, Northwest Territories and Nunavut (see: J.D. Payne and M.A. Payne, Canadian Family Law (Toronto: Irwin Law, 2001) at c.7).

[15] *Family Law Act*, S.A. 2003, c.F-4.5 at s.83 & s.108 – Alberta still lists judicial separation as a triggering event for family property division under its *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-7, but judicial separation is no longer available in the Alberta.

[16] *Family Law Act*, S.A. 2003, c.F-4.5 at s.57(2) and *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-7.

[17] *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56 & s.57.

[18] See e.g., Saskatchewan refers to judicial separation in defining what property is exempt from distribution when spouses break up – specifically, property that is acquired by one spouse after judicial separation (*The Family Property Act*, S.S. 1997, c.F-6.3 at s.23(3)).

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

## Chapter 5

## Family Justice Reform and Family Justice Services

Prepared by the Family Justice Services Division

April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

Legislation and programs and services are essential components of the family justice system. The Ministry of Attorney General is reviewing the *Family Relations Act*[1] as part of its justice reform and law reform strategy. At the same time, but separately, the Ministry of Attorney General is also examining its family justice programs and services.

The Family Justice Reform Working Group completed a major review of the family justice system in B.C. in 2005. The Working Group explored options for fundamental change in the family justice system that would:

- make the system more accessible,
- serve the needs of children and families first and foremost,
- use available resources efficiently and effectively,
- integrate service planning and delivery,
- promote early resolution of disputes, and
- minimize conflict by encouraging early cooperative settlement, refining and enhancing non-adversarial settlement processes, and supporting trials as an appropriate recourse only when other means are not appropriate or effective.

The Attorney General has endorsed the Working Group's report, *A New Justice System for Families and Children*.[2] In September 2006, the Ministry of Attorney General released an update on work being done to implement the Working Group's recommendations.

Some of the Working Group's recommendations require changes to the *Family Relations Act*; these will be examined during the *Family Relations Act* Review. Chapter 1 includes more information about the background and context for the review.

The Working Group's major focus was on programs and services. This paper describes family justice programs and services currently provided by the Ministry of Attorney General. It also highlights on-going work that is not part of the *Family Relations Act* Review, but which responds to some of the Working Group's key program and service recommendations.

## CURRENT PROGRAMS AND SERVICES

### Who Provides Them?

A network of people and organizations provide family justice programs and services in B.C. including

- government;
- the Legal Services Society, through legal aid, duty counsel, LawLINE;
- family lawyers;
- family mediators;
- non-profit organizations, such as:
  - the Law Courts Education Society, (Justice System Education Program, and School and Youth Program);
  - the People's Law School, (Speakers' Program and Law-related ESL Program);
  - British Columbia Mediator Roster Society, (family mediator roster); and
  - community groups.

This section of the paper focuses on family justice programs and services that are provided by the Justice Services Branch of the Ministry of Attorney General. Two divisions of Justice Services Branch are particularly involved in the delivery of family justice programs and services.

The Family Justice Services Division offers the following:

- **Dispute Resolution:** Family Justice Counsellors are accredited family mediators who provide mediation and other services such as information and referrals, primarily to people of modest means to help them resolve disputes about child custody and access, guardianship, and family support. Family Justice Counsellors also help their clients to prepare provincial court documents.
- **Assessment:** In Provincial Court Family Justice Registries at Kelowna, Vancouver (Robson Square), Surrey, and Nanaimo, people with disputes about child custody and access, guardianship, and family support must, with limited exceptions, meet with a Family Justice Counsellor before going to court.
- **Comprehensive Child Support Service:** This service, offered in Kelowna, Vancouver (Robson Square), Surrey, and Nanaimo, helps parents reach agreements on child support using the child support guidelines to determine the amount of support. Parents may also use the service to negotiate a change to an existing child support agreement or order.
- **Child Custody and Access Assessments:** In some cases, Family Justice Counsellors prepare full custody and access assessments or "views of the child" reports to assist judges in making decisions about custody and access.
- **Child Support Recalculation Service:** This is a pilot project in Kelowna Provincial Court that automatically recalculates child support amounts every year by applying the child support guidelines to updated income information. It will help parents keep their child support amounts current without going back to court.
- **Parenting After Separation (PAS) Program:** PAS is funded, but not delivered, by the Ministry of Attorney General. It is a free three-hour educational workshop that provides information about the impact of separation on children and adults, dispute resolution options and services, and child support guidelines. In 13 Provincial Court registries attendance is mandatory before a court appearance.

The Maintenance Enforcement and Locate Services Division manages the Family Maintenance Enforcement Program and related programs. Its purpose is to help families and children to receive the support to which they are entitled under a court order or agreement.

In addition to programs and services provided by the Justice Services Branch, both courts and judges have an important role to play in the early resolution of family law disputes. In Supreme Court, Rule 60E requires people to attend a "Judicial Case Conference" before they can go to court. The purpose of the conference is to help people reach agreements as soon as possible. Judges help by working with people to narrow the issues and consider out-of-court settlement options such as mediation. A case conference can also occur in the Provincial Court (a "Family Case Conference"), but a judge has to order it.[3]

## NEW DIRECTIONS

The Family Justice Reform Working Group envisioned a family justice system that gives people help to manage conflict early; focuses on the best interests of children and gives them a voice in decisions that affect them; acknowledges the emotional dimensions of family law disputes; and understands that family disputes are generally best resolved outside of a courtroom. Family justice services are seen as essential to this justice system, and should be available to people as early as possible.

The Working Group's report includes 37 recommendations. Some recommendations call for specific changes to the *Family Relations Act*. These are discussed in the papers that have been or will be posted for discussion and comment as part of the *Family Relations Act* Review. Most of the recommendations, however, call for changes to family justice programs and services. For example:

- establishing family justice information hubs as a front door to the family justice system;[4]
- requiring people to attend a mandatory dispute resolution session before taking a first contested step in court, unless exempted;[5]
- improving ways to discover children's best interests and make them a meaningful part of family justice processes;[6]
- developing more services for high conflict families;[7]
- making information on the family justice system accessible to all British Columbians, including those who live in remote locations;[8]
- developing a single set of family rules and forms for use in both Provincial and Supreme Court;[9]
- improving data collection to inform the development and evaluation of family justice programs and services;[10] and
- supporting changes in the role of family lawyers.[11]

The Attorney General stated in his letter in support of the Working Group's report that there are significant cost implications associated with many of the recommendations and signalled government interest in implementing the recommendations within the limits of available financial resources. The Attorney General also noted the need for more analysis and consultation about the report's recommendations.

Given the Attorney General's support for the Working Group's report, the Ministry of Attorney General is examining how the services it provides to families in B.C. can best meet the report's recommendations.

## Family Justice Services Centre

The Working Group recommended that family justice information hubs be established to provide a wide range of family justice services. On April 2, 2007, the Ministry of Attorney General, in partnership with the Legal Services Society and other organizations, implemented this recommendation and opened a Family Justice Services Centre in Nanaimo. This pilot project will run for one year and will be evaluated.

The Family Justice Services Centre builds on existing services and procedures, including:

- Family Justice Centres;
- Parenting After Separation sessions;
- mandatory pre-court meetings with a Family Justice Counsellor;
- services provided by the Legal Services Society (LSS) such as advice lawyers, duty counsel, and legal information available over the telephone (LawLINE); and
- the Supreme Court Self-Help Centre in Vancouver, a partnership between the Ministry of Attorney General and a number of non-governmental agencies, which provides legal information, education and referral services to people who do not have lawyers.

The Family Justice Services Centre is meant to be a "front door" to the family justice system. People can go to the centre to:

- ask questions of a lawyer or staff member;
- get basic legal information and referrals to legal advice;
- obtain printed materials and view informative videos;
- look up information on dedicated computer terminals;
- talk to a qualified and trained professional about services and options to meet their needs, including accessing resources available in the community;
- attend courses; and
- participate in mediation.

The centre's website provides information about the centre's services and also points to other important sources of information, such as the Legal Services Society's website (Family Law in British Columbia) and the Law Courts Education Society website.

The centre's website is a first step towards implementing the Working Group's recommendation that an Internet portal be developed to provide information about the law and family justice services. The Working Group suggested that an electronic gateway to the family justice system would make it simpler for people to find information. It pointed out that there is a lot of information available online from many sources but there is no one website that pulls it all together. A family justice portal is meant to address this by providing a single point of entry linking and organizing relevant family justice information on the Internet.[12]

## Mandatory Dispute Resolution

The Ministry of Attorney General has completed initial research on the Working Group's recommendation that people be required to attend one dispute resolution session before going to court. As a first step towards introducing mandatory dispute resolution, it is looking at expanding the Notice to Mediate to family cases in the Supreme Court in Nanaimo, in conjunction with the development of the Family Justice Services Centre.

The Notice to Mediate allows either person in a case to require the other to attend a mediation session. Attendance at the session is mandatory, but reaching an agreement is not. In the past, many people have suggested the Notice to Mediate would be very useful in family cases. In 2000, the B.C. Provincial Council of the Canadian Bar Association passed a resolution supporting the expansion of the Notice to Mediate to appropriate family cases.

Some of the policy issues involved in using the Notice to Mediate in family cases are:

- screening (ensuring only appropriate cases proceed to mediation);
- independent legal advice;
- timing of mediation; and
- exemptions.

The Working Group made a number of recommendations about mandatory dispute resolution, including that a roster be established for collaborative law practitioners, modelled on the B.C. Mediation Roster Society's family mediator roster.[13]

The Working Group saw a roster as a way of ensuring that mandatory dispute resolution services are provided by qualified practitioners who meet recognized standards of practice.[14] The Ministry of Attorney General provided funding to determine practitioners' interest in, and the viability of,

establishing a roster of collaborative law practitioners. The outcome of these consultations is expected to be known in spring 2007.

## Children's Participation

Currently, the main way for children to participate in family cases is through reports prepared by Family Justice Counsellors. One kind of report focuses on the views of the child and addresses one or two issues, such as the child's views on where he or she wishes to live, but places the child's views in the context of the family by also including comments from parents, where appropriate. The other, a full custody and access report, is more comprehensive, involving interviews with parents, children and others, such as teachers. Both kinds of reports are useful. Preparation of custody and access reports is resource intensive, and for this reason, the number of reports prepared is limited. Judges have expressed a high degree of satisfaction with the reports, and find their recommendations valuable. However, they have expressed concern with the difficulty in obtaining a report in a timely fashion.[15] The Ministry of Attorney General is exploring ways to manage its resources to increase its ability to supply reports to the courts.

In May 2007, the Family Justice Services Division of the Ministry of Attorney General plans to pilot child-inclusive mediation as another way for children to participate. This will mean either actually involving children in mediation, or having the mediator interview the child to bring the child's voice to the mediation table. This pilot program will take place in a number of Family Justice Centres around B.C. including Prince George, Terrace, Nanaimo, Surrey, Langley, Abbotsford, Kamloops, New Westminster, Vancouver, North Vancouver, and the Tri-Cities.

## Services for High Conflict Families

A high conflict case may involve violence or abuse, or it may be a case involving a highly contentious issue, such as relocation. Currently, there are very few services available to help families experiencing high conflict. The Working Group report refers to the need for more services for these families.

Options being considered are specially designed Parenting after Separation sessions for high conflict families, such as those provided elsewhere in Canada and the United States, and a more efficient way to provide supervised access and safe exchange services.

Also under consideration is the Working Group's recommendation about parenting co-ordinators. A parenting co-ordinator is a highly trained mental health professional, mediator or family law lawyer who is appointed by a judge to help parents resolve parenting disputes. Generally speaking, parenting co-ordinators have a dual role. They try to mediate disputes within the scope of their appointment, but, if mediation is unsuccessful, they can arbitrate (make the decision).

While Ministry of Attorney General Family Justice Counsellors are trained mediators, they do not arbitrate disputes. Parenting co-ordination could, therefore, be an awkward fit with the existing service.

As well, the Ministry of Attorney General is supporting work at the community level in Nanaimo and the surrounding area to look at a number of issues, including: defining what constitutes "high conflict;" identifying existing community resources for high conflict families, as well as gaps and limitations in existing services; and identifying training and education requirements for people working with high conflict families. The information gathered will help government and others in the family justice system to design better programs for families experiencing higher levels of conflict. It could also inform the design of Family Justice Services Centres.

## A More Accessible Court System

The Working Group recommended changes to the court process to make it more accessible, simpler, and less costly. A single set of family rules and forms for use in both the Supreme and Provincial Courts was a key recommendation. A Family Rules Committee that includes

representatives from both courts and the Ministry of Attorney General as well as family lawyers has been established to look more closely at the feasibility of this recommendation.

The Working Group also recommended looking at a "one judge, one family" policy, noting that judicial management of the court process is much easier if one judge has responsibility for all matters concerning a particular family.[16] The Family Rules Committee is also likely to consider this issue in its consultation on the family rules starting in the fall of 2007.

## Measuring Family Breakdown: Better Data Collection

One of the Working Group's findings is that there is a lack of management data in the family justice system. In 2006, the Justice Services Branch of the Ministry of Attorney General began to fund research about:

- how many families separate;
- how many children are involved;
- what happens to the approximately 97% of cases that enter the court system but do not go to trial; and
- the impact separating families have on the rest of the social system.

Focus Consultants prepared a report on two main questions:

1. How many children, adults and families are affected by separation and divorce in B.C.?
2. What does the family justice literature tell us about the impacts of separation and divorce on children, parents, families, and society?

A second report is underway. It is intended to better the understanding of how well the flow of family law cases in the Provincial and Supreme courts in British Columbia can be documented or described. It is expected to be completed in spring 2007.

Research that provides more data and information about the family justice system will help government, and others, in the development of services for B.C.'s families.

## Legal Services for Families

The Working Group's recommendations are being considered by others who provide services to separating and divorcing families, including family lawyers. For example, in February 2005, the Law Society of British Columbia began a study on the "unbundling of legal services" which it defined as: "lawyers offering clients the option of discrete or limited scope legal assistance, instead of full legal representation on all aspects of a transaction, dispute or process."[17] The Law Society also indicated its intention to establish a small working group to explore the implications of a voluntary code of practice for family lawyers.[18]

In November 2006, the Legal Services Society expanded services for eligible families, which promote the use of consensual dispute resolution, including mediation and collaborative law.[19]

## ENDNOTES

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[1] *Family Relations Act*, R.S.B.C. 1996, c.128.

[2] See: Letter from Attorney General to Co-chairs of the Justice Review Task Force, dated October 19, 2005, online: Ministry of Attorney General < http://www.ag.gov.bc.ca/justice-services/publications/fjsd/jrtf/letter.pdf> (last accessed: March 9, 2007).

[3] British Columbia, *Provincial Court (Family) Rules*, R. 7.

[4] Family Justice Reform Working Group Report, *A New Justice System for Families and Children* (2005), recommendation 1 at 111, available online: B.C. Justice Review Task Force <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> (last accessed: March 9, 2007).

[5] *Ibid.*, recommendation 6 at 112.

[6] *Ibid.*, recommendation 16 at 115.

[7] *Ibid.*, recommendation 19 at 115.

[8] *Ibid.*, recommendation 3 at 112.

[9] *Ibid.*, recommendations 12 & 14 at 114.

[10] *Ibid.*, recommendation 37 at 120.

[11] *Ibid.*, recommendation 36 at 119.

[12] *Ibid.,* at 28.

[13] *Ibid.*, recommendation 9 at 113.

[14] *Ibid.,* at 49.

[15] Ministry of Attorney General, Family Justice Services Division, "Judges' Satisfaction with Custody and Access Reports: A Survey of B.C. Supreme and Provincial Court Judges," online: Ministry of Attorney General <http://www.ag.gov.bc.ca/justice-services/publications/fjsd/survey/JudgeSurvey.pdf> (last accessed: March 23, 2007).

[16] Family Justice Reform Working Group Report*, supra* note 4 at 67.

[17] Law Society of British Columbia, "Unbundling Legal Services Task Force," online: http://www.lawsociety.bc.ca/about/TF-Unbundling.html (last accessed: March 12, 2007).

[18] Legal Services Society of British Columbia, "Benchers Form Family Law Task Force," Benchers' Bulletin (2007) No. 1 March, online: Law Society of British Columbia <http://www.lawsociety.bc.ca/publications_forms/bulletin/2007/07-03-09_family-law.html?h=+voluntary%20code%20of%20practice%20working%20group> (last accessed: March 23, 2007).

[19] Legal Services Society of British Columbia, "Legal aid to give more help to families," News Release (October 30, 2006), online: Legal Services Society <http://www.lss.bc.ca/assets/newsroom/news_releases/Legal-aid-to-give-more-help-to-more-families.pdf> (last accessed: March 12, 2007).

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 6

# Parenting Apart

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## April 2007

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## SETTING THE SCENE

When parents separate, they have to decide how they will continue to be parents to their children when they are living in separate households. Most parents are able to agree on these arrangements, often with the help of a lawyer or mediator. If they can't agree, they may go to court and ask a judge to make decisions about custody, access and guardianship. The *Family Relations Act*[1] allows judges to make these orders and sets out what they must take into account.

Some people feel that these words – "custody," "access," and "guardianship"—are not helpful to parents because they tend to foster notions of winning and losing. In its 2005 report, the Family Justice Reform Working Group criticized the *Family Relations Act* for framing parenting issues in language that tends to polarize parents.[2]

This discussion paper looks for ways that the *Family Relations Act* could promote child-focused decision-making that would help parents to meet their children's needs after separation. Programs and services do have an important role to play, but this paper focuses on what the *Family Relations Act* can do to help separating couples make decisions about how they will continue to fulfill their roles as parents. Chapter 5 discusses family justice programs and services.

This paper is divided into four sections. The first three discuss parents' roles and responsibilities, children's interests, and parenting arrangements. The final section asks you to tell us which issues you believe are the most important, and to identify any issues not covered in the paper that you feel should be discussed. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

Other papers cover related topics. Chapter 7 discusses ways for parents to deal with problems that come up in meeting access responsibilities or enforcing an access order or agreement. Chapter 8 discusses ways for children to participate in decisions that affect them when their parents separate. Chapter 9 discusses family violence.

If you wish to see any of the laws in this paper please refer to the following link to Legislation.

## DISCUSSION

### PART A –PARENTS' ROLES AND RESPONSIBILITIES

#### *Discussion Point (1) – Describing Parents' Roles and Responsibilities*

**Definitions are unclear**

The *Family Relations Act* uses the words "guardianship", "custody," and "access" to describe parents' roles and responsibilities. The *Divorce Act*[3] uses only "custody" and "access." But neither law offers much help to anyone who is trying to figure out what these words mean. The *Family Relations Act* does not define "custody" or "access" and its definition of guardianship relates back to old English law.[4] The *Divorce Act* does not define "access" and it provides a circular definition of "custody," saying that custody "includes care, upbringing and any other incident of custody."[5]

Over the years, judges have interpreted the law so that now "guardianship" consists of all the rights and responsibilities associated with raising a child, including responsibility for the child's physical custody and long-term well-being.[6]

Two types of guardians are described in the *Family Relations Act*: a guardian of the person (who is responsible for a child's long-term physical, emotional and psychological well-being); and a guardian of the estate (who is responsible for protecting a child's legal and financial interests). Usually the same person plays both roles.

The authority of a guardian of a child's estate is generally considered to be quite limited, but the *Family Relations Act* does not make this clear. A guardian of a child's estate is not automatically a trustee of the child's property. The responsibilities of a guardian of the estate involve identifying and protecting a child's legal and financial interests. This includes giving consent in relation to a child's legal or financial affairs, where consent is required by law; starting or defending legal claims involving the child; and settling legal claims on the child's behalf, subject to other laws that may apply. A guardian of a child's estate probably has authority to receive and act as custodian of money or property that belongs to the child, but the guardian cannot give a valid receipt on the child's behalf, unless a specific law allows it or a judge approves it. Nor can a guardian of the estate sell a child's property without a judge's approval.[7]

"Custody" was once interpreted narrowly to mean only physical custody or day-to-day care, but over the years it has taken on a much broader meaning—basically the same as guardianship of the person—and includes responsibility for making decisions affecting a child's general well-being, such as decisions about education, health care and religion, as well as physical custody.[8]

"Access" has come to mean temporary physical care of a child, including the authority to do what is needed to ensure the child's well-being at that time.

The overlap among these concepts, especially between guardianship and custody, can be confusing. Other provinces and territories have minimized this confusion by combining the concepts of both guardianship of the person and custody under the term, "custody;" and using "guardianship of property" (or similar wording) to cover what the *Family Relations Act* calls "guardianship of the estate." In Ontario and some other provinces, a "guardian of property" has broader powers than does a guardian of a child's estate in British Columbia, but in those places, parents are not automatically guardians of their child's estate as they are in B.C.: they must apply to court for that designation.

Several provinces and territories[9] have provisions similar to Ontario's, where:

- a person with custody has the rights and responsibilities of a parent in respect of the person of the child; and
- a guardian of the child's property has charge of and is responsible for the care and management of that property.[10]

Saskatchewan uses the term "legal custodian" to describe the person who has "personal guardianship of a child" including "care, upbringing and any other incident of custody having regard to the child's age and maturity." A guardian of a child's property in Saskatchewan is responsible for the care and management of that property, may give a valid receipt for money received on a child's behalf and may appear in court to pursue or defend any action affecting a child's property.[11]

While most provinces and territories use "custody" to refer to both "guardianship of the person" and custody, as used in the *Family Relations Act*, Alberta uses "guardianship." Alberta's *Family Law Act*, which came into effect in October 2005, has a detailed definition that describes a guardian's roles and responsibilities. They include:[12]

- nurturing the child's physical, emotional and psychological development;
- making sure the child has basic necessities, such as medical care, food, clothing, and shelter;
- making day-to-day decisions about the child's care and well-being;
- deciding where the child lives;
- making decisions about the child's education; and cultural, linguistic, and spiritual upbringing;

- consenting to medical treatment for the child;
- naming someone to act on the child's behalf in case of emergency; and
- settling legal claims related to the child.

Most other provinces and territories have general, rather than detailed definitions. Elsewhere, England and Australia define "parental responsibility" (akin to guardianship under the *Family Relations Act*) in a general way as the "duties, powers, responsibilities and authority" (and in England, "the rights") that a child's parent has by law.[13]

The British Columbia Law Reform Commission has described the *Family Relations Act*'s statement of a guardian's authority as "unhelpful" and recommended replacing it with a general statement of what a guardian's role is, rather than a detailed list of powers and responsibilities.[14] In 1987, the British Columbia Legislature passed an amendment based on this recommendation but the change was never brought into effect because of concerns raised about whether it accurately described the authority of a guardian of a child's estate. It described the roles and responsibilities of a guardian as follows:[15]

> (2) A guardian of the person of a child, who is not the parent of the child, has the same powers and duties in respect of the child as a parent having care and control of a child, except the power to appoint a guardian of the child.
>
> (3) Subject to the *Infants Act* and this *Act*, a guardian of the estate of a child has all the powers and duties the guardian would have if he or she were a trustee with respect to the property of a child, including
>
> > (a) the power to assume charge of and the duty of being responsible for the care and management of the property of the child, and
> >
> > (b) the power to deal with the property and apply the property or the income from the property, or both, for the maintenance and education of the child and for any other purpose for the benefit of the child.

### *Words can promote conflict*

People have criticized the words "custody" and "access" for promoting the idea of parents as "winners" and "losers." The result, they say, is that parents focus on their "rights" rather than their responsibilities. The words themselves, many feel, undermine efforts to shift towards co-operative parenting arrangements.[16]

Other countries have moved away from the words "custody" and "access." England, Australia, and some American states use terms such as "parental responsibility," "parenting functions," "residence," and "parenting time" to describe parents' roles and responsibilities after separation.

The Canadian Special Joint Committee on Custody and Access, in its 1998 report, "For the Sake of the Children," recommended replacing the terms "custody" and "access" in the *Divorce Act* with "shared parenting."[17] This committee of senators and members of Parliament examined issues relating to parenting arrangements after separation and divorce and held public meetings across Canada, including in Vancouver.

Then a committee of government officials, the Family Law Committee,[18] examined different ways to describe parents' roles and responsibilities. In its 2002 report, the committee said it was unable to agree on the best words to use, but would not recommend using "shared parenting" for several reasons, including that the term seems to focus on parents' "rights" rather than children's interests and that its meaning and application are unclear, which could in itself promote conflict.[19]

The federal government did not accept the Special Joint Committee's recommendation of "shared parenting." Instead, it proposed different changes to the *Divorce Act* to shift the focus from parental rights to parental responsibilities. Bill C-22 (2002) would have removed the words "custody" and "access" and introduced:

- "parenting time" to describe the time a child spends in a parent's care;
- "contact" to describe the contact the child has with other people, such as grandparents; and
- "parental responsibility" to describe the decision-making responsibilities to be assigned to one or both parents, depending on what is best for their child.[20]

The bill died on the order paper when Parliament adjourned before the 2004 federal election.

The Alberta *Family Law Act* follows the approach proposed in Bill C-22. Since the changes to the *Divorce Act* included in Bill C-22 did not become law, this means that Alberta's provincial family law now describes parents' responsibilities and parenting arrangements differently than the *Divorce Act* does, but anecdotal evidence suggests that this has not caused problems.

At consultation workshops held in British Columbia in 2001 as part of the federal-provincial-territorial consultations on custody, access and child support in the *Divorce Act*, one of the questions participants discussed was whether using words other than "custody" and "access" would make a difference in the way parents make their arrangements after separation and divorce. Many of the participants felt that these words increase the tensions that occur after separation. The majority felt that "custody" and "access" should be replaced with something more neutral, but there was no consensus on what that should be.[21] Since the *Divorce Act* does not use "guardianship", changing that word was not part of the consultation.

### *QUESTIONS*

1. Would changing the words used in the *Family Relations Act* to describe parenting roles and responsibilities help people resolve parenting disputes? Why or why not?
2. What terms should the *Family Relations Act* use to describe parents' roles and responsibilities:

- ☐ guardianship
- ☐ guardian
- ☐ guardian of the person
- ☐ guardian of the estate
- ☐ property guardian
- ☐ custody
- ☐ residence
- ☐ access
- ☐ contact
- ☐ a child's time with a parent
- ☐ parenting time
- ☐ shared parenting
- ☐ parenting functions
- ☐ parental responsibility
- ☐ other:_____

3. Do you have any views on what each term you selected in Question 2 should cover? This list may help you decide what you want to include:
   - the duties, powers, responsibilities and authority that a parent has by law
   - the person a child lives with
   - the time a child spends with another person
   - the communication a child has with another person
   - nurturing a child's physical, emotional and psychological development
   - making sure a child has basic necessities, such as medical care, food, clothing, and shelter
   - making day-to-day decisions about a child's care and well-being
   - making decisions about where a child lives
   - making decisions about changing where a child lives
   - making decisions about a child's education
   - making decisions about a child's cultural upbringing
   - making decisions about a child's linguistic upbringing
   - making decisions about a child's religious upbringing
   - making decisions about health care, including medical and dental treatment
   - appointing a successor guardian for a child
   - consenting to health treatment for a child
   - receiving and responding to any notice that a parent is entitled by law to receive in relation to a child's legal or financial affairs
   - granting or refusing consent, where consent of a parent is required by law
   - identifying all legal and financial interests of a child
   - protecting all legal and financial interests of a child
   - advancing all legal and financial interests of a child
   - commencing legal proceedings on a child's behalf, where a child has a viable legal claim
   - defending a child's legal interest, where a claim has been made against the child
   - settling legal claims related to a child
   - duty to exercise all responsibilities and powers in the best interests of a child
   - other: _____.
4. Do you think that detailed definitions in the *Family Relations Act* for words used to describe parenting roles and responsibilities would help people resolve parenting disputes? Why or why not?
5. Should the *Family Relations Act* replace the words "custody" and "access" with other terms, even if the *Divorce Act* continues to use them?
6. In describing parents' roles and responsibilities, are there other considerations that you think should be reflected in the *Family Relations Act*?

## *Discussion point (2) - Responsibility for a Child's Property*

**Appointing private trustees of children's property**

One of the roles of British Columbia's Public Guardian and Trustee is to manage trust funds for children.[22] For example, if a child gets a personal injury settlement, the money is usually paid to the Public Guardian and Trustee who invests and manages it on the child's behalf until the child reaches age 19. (The law sets out the fees that the Public Guardian and Trustee may charge for this.) The law does not let the Public Guardian and Trustee decide to transfer trusteeship of a child's funds to the child's parent or guardian. Occasionally, a judge may appoint parents as trustees of their children's property,[23] but unlike some other provinces,[24] British Columbia does not have a comprehensive law for judges to use in these situations.

Alberta, Ontario and Nova Scotia all have laws that allow a judge to appoint a person–whether a parent or not—to manage the property of a child. These laws set out the factors that a judge must take into account when deciding whether to make an appointment, including:

- the person's ability to manage the child's property;
- the merits of the person's plan for managing the child's property;
- the benefits and risks of appointing that person compared to other alternatives (Alberta);
- the personal relationship between the person and the child (Ontario);
- the wishes of the child's parents (Ontario); and
- the views and preferences of the child (Ontario, Nova Scotia).

The laws allow judges to put conditions in an order, such as requiring the person to post security (e.g., a bond) for proper management of the child's property, or requiring the person to provide an accounting, that is, a report on how he or she is managing the child's property.

**Managing small trust funds for children**

In most other provinces and territories, the law allows parents to manage small trust funds for their children, without requiring authorization from a judge. In British Columbia, however, judicial authorization is required, even for small funds. The Public Guardian and Trustee has found that parents do not always understand that the funds must be used for the benefit of the child to whom they belong, not for the benefit of the whole family, and that parents do not always have the knowledge and skill in financial management needed to manage the trust funds wisely. At one time, the Insurance Corporation of British Columbia paid personal injury settlements for a child directly to the child's guardians—who were usually the parents—if the amount was less than $4,000. The Public Guardian and Trustee contacted many of these children when they turned 19 and found that in most cases the child's guardians had spent the settlement money, not necessarily for the benefit of the child to whom it belonged. Some of these young adults were not even aware that they had ever received a personal injury settlement.

Most other provinces and territories take a different approach. For example:

- In Ontario if a child does not have a property guardian, a person who owes the child up to $10,000 may pay it to a parent with whom the child lives, a person who has lawful custody of the child, or, if the child has a legal obligation to support another person, directly to the child.[25] Other provinces and territories have similar provisions.
- The Yukon,[26] Newfoundland and Labrador,[27] and the Northwest Territories[28] set the monetary limit at $2,000 in a year, or $5,000 in total.
- In Alberta, up to $5,000 may be paid to a child's guardian or, if the child has a legal obligation to support another person, directly to the child. The guardian must sign a form

stating the authority under which he or she became guardian (for example, by reason of being the child's parent) and acknowledging that the money will be used only for the child's benefit. The person who owes the money to the child has the option of paying it to the Public Trustee, if the Public Trustee is willing to accept it.[29]

- In Saskatchewan, if a person owes up to $10,000 to a child, the Public Guardian and Trustee may allow it to be paid to a responsible adult acting on the child's behalf. Also, the Public Guardian and Trustee may pay up to $10,000 to such an adult.[30]

*QUESTIONS*

7. Should British Columbia have a comprehensive law specifically authorizing a judge to appoint a parent or other person to be a trustee of a child's property?

8. If so, what should judges be required to take into account when deciding whether to appoint a person as a trustee? [check all that apply]

☐ the person's ability to manage the child's property

☐ the person's plan for managing the child's property

☐ the benefits and risks of appointing the person compared to other alternatives

☐ the person's financial circumstances

☐ the number of dependants for whom the person is responsible

☐ the personal relationship between the person and the child

☐ the wishes of the child's parents

☐ the child's views and preferences

☐ other: _____.

9. If you answered Yes to question 8, what else should the law do? [check all that apply]

☐ require the trustee to provide a bond or other security for proper performance of a trustee's responsibilities

☐ require the trustee to provide a regular accounting, that is, regular reports on how the child's property is being managed

☐ allow a judge to limit the trustee's appointment, for example, to a specific length of time or to management of specific property

☐ allow the trustee to be paid for acting as trustee

☐ other: _____.

10. Should the law in British Columbia be changed to add special provisions, like those in other provinces, to allow parents or other people to manage small trust funds for children?

11. If so,

11a. What should be the maximum value of property covered?

☐ $2,000 ☐ $5,000 ☐ $10,000 ☐ other

11b. Who should be allowed to receive the property on the child's behalf? [check all that apply]

☐ child's parent ☐ child's guardian ☐ other

11c. Should a person be required to sign a form acknowledging receipt of the property, as in Alberta?

11d. Should a person be required to sign a form accepting the responsibility to manage the property for the child's benefit, as in Alberta?

11e. Should the person receiving the property be required to account to the child, when the child turns 19, for how the property was managed?

11f. What role, if any, should the Public Guardian and Trustee play with respect to managing small trust funds for children?

## PART B – CHILDREN'S BEST INTERESTS

### *Discussion point (3) – Determining Best Interests*

Family laws in British Columbia and the rest of Canada are based on the "best interests of the child". The United Nations Convention on the Rights of the Child, which British Columbia signed in 1991, says that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."[31]

#### Best interests factors

Like the laws in other provinces and territories, British Columbia's *Family Relations Act* lists specific factors that a judge must take into account when making decisions about what is best for a child. Section 24 says that when making an order about custody, access, or guardianship, a judge must give paramount consideration to the child's best interests. In assessing those interests, the judge must consider the following factors and give emphasis to each according to the child's needs and circumstances:

(a) the child's health and emotional well being, including any special needs for care and treatment;

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and others;

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

Section 24 goes on to say that if guardianship of the estate of the child is at issue, the judge must consider as an additional factor, the child's material well-being.

Other provinces and territories list up to 11 such factors to be considered in assessing best interests. The *Divorce Act* lists none, but Bill C- 22 (2002) would have added a list of 12 to that *Act*.[32] The factors listed in Alberta's *Family Law Act* are similar to the ones in the federal bill.[33]

New Zealand's family law says that one of the things that must be considered in determining what serves a child's best interests is "the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time."[34]

#### Family violence as a factor

Family violence can take many forms. It is especially harmful to children, whether they experience it directly, as victims of abuse, or indirectly, as witnesses to violence by a parent against another family member. Research shows that children who witness violence by one parent against the other are at greater risk of becoming victims or using violence themselves.

Judges are not precluded from taking family violence into account when deciding what is best for children, but family violence is not listed in s. 24 of the *Family Relations Act* as one of the specific factors that must be considered.

At the workshops held in British Columbia in 2001 as part of the federal-provincial-territorial consultations on custody, access, and child support in the *Divorce Act*, almost all participants agreed that physical violence and the continued threat of violence should be factors in decisions about children's best interests. They did not agree on what other forms of violence should also be considered.[35] The Family Justice Reform Working Group recommended, in its 2005 report, that family violence, including its impact on the safety of children and other family members, be included in the *Family Relations Act* as a factor to be considered in making decisions about what is best for children.[36]

The laws in Newfoundland and Labrador, the Northwest Territories, Nunavut and Ontario say that violence must be taken into account when determining a child's best interests (Northwest Territories and Nunavut) or determining a person's ability to act as a parent (Newfoundland and Labrador and Ontario).[37] The federal Bill C-22 (2002) proposed adding family violence as a factor to be taken into account in determining a child's best interests under the *Divorce Act*[38] and Alberta's *Family Law Act* followed that approach.[39] Violence is a factor in determining a child's best interests in other countries as well.[40] Chapter 9 has more discussion about family violence.

### Ranking factors

The *Family Relations Act* does not rank the importance of each factor that a judge must consider in determining a child's best interests. In each case, it is up to the judge to decide the relative importance of each factor, based on the individual needs and situation of the child. Family laws in other provinces and territories do not rank the factors either. However, Alberta's law seems to give greater emphasis to protecting children's "physical, psychological and emotional safety" by listing these separately before all other factors.

### Importance of best interests

Section 24 of the *Family Relations Act* says that the best interests of the child must be the *paramount* consideration when making decisions about child custody, access and guardianship. The *Divorce Act* and the laws in most other provinces and territories say that the best interests of the child must be the *only* consideration.[41] This difference in wording suggests that something other than the best interests of the child could be taken into account when making decisions about children under the *Family Relations Act*, but not under the *Divorce Act* or the family laws in most other provinces and territories.

### Presumptions

Recently, Australia changed its family law to presume that it is in a child's best interests for parents to have equal shared parental responsibility. But the presumption does not apply if a parent (or a person living with the parent) has abused the child or another child in the family or has used violence against a family member. And there is no presumption in favour of equal time with each parent. However, a judge who orders equal shared parental responsibility must consider whether equal time with each parent would be in the child's best interests and practical and if so, must consider making such an order. If not, the judge must consider whether spending substantial and significant time with each parent would be in the child's best interests and practical.[42]

The Canadian Special Joint Committee in 1998 and then the federal government endorsed the principle that no one type of parenting arrangement is best for all children and rejected the idea of a legal presumption in favour of a particular parenting arrangement. The Special Joint Committee noted that some American states that had adopted such a presumption later removed it because the presumption had not had the desired effect.[43] The Family Law Committee also recommended against using presumptions.[44] It is too soon to know whether Australia's changes

will encourage parents to reach agreements on parenting arrangements without going to court, or will promote meaningful relationships between children and their separated parents.

**Who must consider best interests**

Section 24 of the *Family Relations Act* tells judges that they must consider children's best interests when making decisions about their care, but it says nothing to parents and others. While knowing what a judge must consider when making a decision may help parents agree on parenting arrangements without going to court, the *Family Relations Act* does not specifically require parents to consider children's best interests or any specific factors in reaching their decision. Laws in some other places do. For example, in New Zealand, the law says that in determining what is best for children, "a Court or a person must take into account" the principles set out in that law.[45]

*QUESTIONS*

12. When making decisions about parenting arrangements, should the best interests of the child be: [check one]

    ☐ the *paramount* consideration. (This is what the *Family Relations Act* says now.)

    ☐ the *only* consideration. (This is what the *Divorce Act* and family laws in most other provinces and territories say.)

    ☐ other: _____.

13. Should the *Family Relations Act* say that parents must take into account their children's best interests when making parenting arrangements after separation?

14. Should family violence be added to the factors listed in s. 24 of the *Family Relations Act*, that a judge must consider in assessing a child's best interests? Why or why not?

15. If you think that the list of factors for determining a child's best interests in s. 24 of the *Family Relations Act* should be changed, please use the table below to indicate what should be included, and add any comments you wish:

| | |
|---|---|
| • child's health and emotional well-being including special needs (in s. 24 now) | ☐ Include |
| • child's views (in s. 24 now) | ☐ Include |
| • love, affection and similar ties between the child and others (in s. 24 now) | ☐ Include |
| • child's education and training needs (in s. 24 now) | ☐ Include |
| • capacity of a person who wants to exercise custody, access or guardianship tc adequately do so (in s. 24 now) | ☐ Include |
| • where guardianship of child's estate is concerned, the child's material well-being (in s. 24 now) | ☐ Include |
| • history of care of the child | ☐ Include |
| • child's cultural upbringing | ☐ Include |
| • child's linguistic upbringing | ☐ Include |
| • child's religious upbringing | ☐ Include |
| • child's spiritual upbringing | ☐ Include |
| • child's heritage | ☐ Include |
| • family violence | ☐ Include |

| | |
|---|---|
| • ability and willingness of each person who wants to exercise custody, access or guardianship to communicate and co-operate on issues affecting the child | ☐ Include |
| • benefit to the child of developing and maintaining a relationship with each person who wants to exercise custody, access or guardianship | ☐ Include |
| • any civil or criminal cases that are relevant to the child's safety or well-being | ☐ Include |
| • any plans proposed for the child's care | ☐ Include |
| • other: | |

16. When it comes to deciding the importance of each factor in determining a child's best interests, how can the *Family Relations Act* best serve children's interests? [check one]

    ☐ by continuing to let judges decide the relative importance of each factor in each case, based on the individual needs of the child,

    ☐ by ranking some or all of the factors in order of importance, for every case. Describe which factors should be ranked and how, or

    ☐ other: _____.

17. Should the *Family Relations Act* require that decisions affecting children: [check all that apply]

    ☐ ensure the greatest possible protection of the child's physical, psychological and emotional safety

    ☐ be made and implemented within a time frame appropriate to the child's sense of time

    ☐ other: _____.

**Please note:** Chapter 8 has questions about receiving children's views and about ways for children to participate in decisions that affect them after their parents separate. Chapter 9 includes questions about adding a definition of violence to the *Family Relations Act* and about how the *Family Relations Act* could help keep children safe when a parent has been found to be violent.

## PART C – ASSIGNING ROLES AND RESPONSIBILITIES: MAKING PARENTING ARRANGEMENTS

### *Discussion Point (4) - Parenting Arrangements without Agreement or Court Order*

Family laws across Canada set out the roles and responsibilities parents have, unless an agreement or order says otherwise.

- Section 27 of the *Family Relations Act* says that as long as a child's parents live together—married or not—they are joint guardians of both the person and the estate of the child.
- If they separate, the parent who usually has "care and control" of the child is the sole guardian of the person of the child but the parents continue to be joint guardians of the child's estate.
- If parents live apart, and were not married during the child's life or 10 months before the child's birth, or never lived together during the child's life, the mother is the child's sole guardian.[46]

- Section 34 of the *Family Relations Act* says that as long as the child's parents live together, they have joint custody and if they live apart, the parent with whom the child usually lives has custody.

Other provinces and territories use different approaches. Broadly speaking, they can be described by three models:

1. Parents have joint guardianship. This does not change if they separate, unless a court order or agreement says differently.[47]
2. Parents have joint custody. ("Custody" in these provinces and territories describes what the *Family Relations Act* calls "guardianship of the person.") If they separate and the child lives with one parent with the other's consent, the other parent's right to exercise custody is suspended until there is a court order or agreement that says differently. This is the most common approach (Ontario, Prince Edward Island, Newfoundland and Labrador and all three territories). In all but the Yukon, parents are equally entitled to be appointed guardian of the child's property. In the Yukon, while parents live together they are guardians of the child's property but if they separate, the parent with "lawful care and custody" is sole guardian of the property, unless an order or agreement says differently.[48]
3. Parents have joint custody ("Custody" in these provinces describes what the *Family Relations Act* calls "guardianship of the person."), which continues after they separate unless a court order or agreement says differently. However, where the parents never lived together after the child's birth, the parent with whom the child lives has sole custody. (Manitoba and Saskatchewan) The parents are joint guardians of the child's estate unless changed by court order. (Saskatchewan)[49]

Alberta's approach is somewhat different. Unless a court order or agreement says differently, both parents are automatically guardians (of the person) if they

- were married when the child was born (or divorced less than 300 days before the child's birth),
- married each other after the child's birth,
- lived together for at least 12 months during which the child was born, or
- were living together in a relationship of some permanence when the child was born.

If the parents' relationship does not fall into one of these categories, they are both considered guardians at first: where the child usually lives will determine whether a parent continues to be a guardian. But, once a child has usually lived with a parent for a year, that parent is a guardian even if the child no longer lives with that parent.[50]

### *QUESTIONS*

18. Should the rules in sections 27 and 34 of the *Family Relations Act* for determining parental guardianship and custody (where there is no agreement or court order that says differently) be changed? If so, how should they be changed?

## *Discussion Point (5) - Parenting Arrangements by Agreement*

After separation, most parents are able to agree on how they will parent their children from separate households. They may have a separate parenting agreement, but usually these arrangements form part of a separation agreement that also includes agreements on other issues such as how they will divide their family assets. If parents cannot agree on parenting arrangements, they may ask a judge to make an order.

The *Family Relations Act* neither encourages nor requires parents to make parenting agreements. Nor does it suggest what they should include in a parenting agreement, if they decide to make one.

In its 1998 report, the Canadian Special Joint Committee on Custody and Access recommended encouraging parents to make a parenting plan, setting out the details of each parent's responsibilities for their children's residence, care and financial security and for decision-making relating to their children, as well as a process for resolving disputes and a requirement for parents to share with each other information about their children.[51]

Some other places use parenting plans to help promote parenting agreements and avoid disputes. For example, Washington State's law[52] requires separating and divorcing couples to create a parenting plan that sets out their child's residential schedule, allocates responsibilities for major decisions about the child's care, and describes how disputes about the plan will be resolved. The law requires a temporary parenting plan to cover children's living arrangements and allocate decision-making responsibility while the parents develop a permanent plan. If parents are not able to agree, a judge will make an order allocating decision-making responsibilities and spelling out the children's living arrangements in the form of a parenting plan. Parenting plans may be changed only if certain conditions are met.

Oregon also requires parents to make a parenting plan.[53] It may be general or detailed, but it must include the minimum amount of parenting time (access) a non-custodial parent is entitled to have. If parents cannot agree, a judge must make a detailed parenting plan for them.

Parenting plans are optional in Australia.[54] Provisions covering parenting plans were added to the law in 1995, but were rarely used. Problems included cumbersome registration requirements that were removed when the law was amended in 2003. More changes were made in 2006.

Australia's law sets out what may be covered in a parenting plan, including allocating parental responsibility, setting out with whom a child will live, the time a child will spend with others, and the process to be used for resolving disputes. The law also requires advisors, including lawyers and dispute resolution practitioners, to inform the parents they work with that they could consider making a parenting plan and to tell them where they can get help with it.

There is little evidence about whether parenting plans help avoid disputes. A Washington State study does underscore the importance of an easy-to-use process for developing parenting plans and appropriate services to help parents develop them, if these plans are to be a useful tool.[55]

An emerging trend in the United States is the use of parenting-time guidelines. Arizona, Colorado, Michigan and Oregon have guidelines or sample parenting plans that give general information about parenting arrangements in relation to a child's developmental stages.[56] Utah's law includes guidelines setting the minimum amount of parenting time based on a child's age, unless parents agree otherwise.[57] Appendix 1 of Meeting Access Responsibilities: Background Paper contains Oregon's parenting plan guide, with sample schedules, and Utah's guidelines.

### *QUESTIONS*

19. Would parenting plans make it easier for parents to agree on parenting arrangements? Why or why not?
20. Would parenting plans result in arrangements that better meet children's needs? Why or why not?
21. Should the *Family Relations Act* include provisions about parenting plans?
22. If so, should parenting plans be mandatory or optional?

23. Should the *Family Relations Act* require certain items to be covered in a parenting plan? If so, what should be required?

    This list may help you decide what you want to include:

    - where their child will live
    - the time their child will spend with each parent and other people
    - each parent's responsibility for making decisions concerning their child
    - each parent's responsibility for their child's care
    - each parent's responsibility for their child's financial support
    - how parents will share information about their child
    - how parents will resolve disputes about the parenting plan
    - the process parents will use to change the parenting plan to take account of changing needs of their child or either parent
    - other [describe]

24. Do you think parenting-time guidelines would help parents in B.C.? Why or why not?

## *Discussion Point (6) - Parenting Arrangements by Court Order*

### Court orders

If parents are unable to agree on their parenting arrangements, section 30 of the *Family Relations Act* allows a judge to make an order appointing a guardian for their child. The judge must base the decision on the best interests of the child, taking into account the factors set out in s. 24. There are limits on what a judge can do: a guardian cannot be appointed for a child older than 12 without the child's consent, except in certain circumstances; and a person who is not a parent of the child generally cannot be appointed as guardian without the parents' consent. Section 35 allows a judge to make custody and access orders in favour of parents, grandparents, other relatives or people who are not related to the child, based on the child's best interests, taking into account the factors in s. 24.

### Allocating parenting responsibilities

Section 35 says that a judge making a custody or access order may include any terms or conditions needed to serve the child's best interests, but does not specifically say that judges may allocate particular parenting responsibilities to one or both parents. However, it has become common in British Columbia to spell out in orders (and agreements) what is meant by joint guardianship or joint custody in the particular order (or agreement) and to identify those responsibilities that are to be shared and those that are to be the sole responsibility of one parent.

In some provinces and territories, including Saskatchewan, the law says that in a custody or access order, a judge may "determine any aspect of the incidents of the right to custody or access."[58] Saskatchewan's law also says that a judge may set out "the division and sharing of parental responsibilities" in a custody order.[59] Alberta's law says that a judge may include "an allocation, generally or specifically, of the powers, responsibilities and entitlements of guardianship among the guardians" in a parenting order.[60]

### Explaining parents' responsibilities

Some disputes over parenting arrangements arise out of a lack of understanding by one or both parents, of what the order actually means. Family laws may reduce the number of disputes over parenting orders by requiring that parents be given an explanation of the order when it is made.

Mandatory explanations are (or are soon to be) a feature of family law in Australia, New Zealand, England and Oregon. In Canada, had Bill C-22 (2202) become law, it would have required lawyers to discuss with their clients the clients' obligation to comply with any order made under the *Divorce Act*.[61]

Australia's family law requires judges to include in every parenting order details of the responsibilities being imposed, and the consequences of not meeting them.[62] It also requires an explanation of "the availability of programs to help people understand their responsibilities under parenting orders."[63] If parents do not have lawyers, the judge must provide the explanation. If they have lawyers, the judge may ask the lawyers to explain.

New Zealand's family law also requires every parenting order to explain the obligations it creates; the potential consequences of not meeting those obligations; and any processes for monitoring, reviewing, or changing or canceling the order.[64] The explanations included in parenting orders must be accompanied by general information in a prescribed form.[65] As well, the law requires lawyers to explain the effect of the order to all their clients, including children.[66]

In England, changes to the *Children Act 1989*, which have not yet been brought into effect, will require judges, when making, changing or enforcing a contact order, to provide a warning notice describing the consequences of not meeting the obligations set out in the order.[67]

Oregon's law requires a parenting time order to include a statement explaining that the purpose of child support and parenting time (access) is to benefit children and not parents; setting out the penalties for non-compliance; and providing information about who to contact if a parent is not living up to the obligations set out in the order.[68]

**Including a dispute resolution process**

The *Family Relations Act* does not specifically say that a parenting order may set out the process parents are to use to resolve problems that may come up, but it is becoming more common to see provisions like this in family laws. For example, Alberta's law says that a parenting order may contain a process that the parents agree to for resolving future disputes about guardianship or parenting arrangements.[69] Bill C-22 (2002) would have made a similar change to the *Divorce Act*.[70] Australia's family law says that a parenting order may include the steps to be taken before applying to court to change the order, and the process to be used to resolve disputes about the order. The dispute resolution process may include consulting with a family dispute resolution practitioner.[71]

### *QUESTIONS*

25. Should the *Family Relations Act* say specifically that judges may allocate aspects of parenting responsibilities between parents in a court order?
26. Should the *Family Relations Act* require that parents be given an explanation of the obligations created by a parenting order and the potential consequences of failing to meet those obligations, at the time an order is made?
27. If so, should the explanation be part of the order?
28. Should the *Family Relations Act* require other explanations to accompany parenting orders, such as an explanation of programs or services available to help if there is a problem in living up to the obligations set out in the order? If so, who should give the explanation?
29. Should the *Family Relations Act* include specific authority for judges to include in an order a process for resolving disputes about the order? If so, should judges be able to do this only if the parents agree to the process?

## *Discussion Point (7) - Giving Parenting Responsibilities to Non-Parents*

Under the *Family Relations Act*, separated parents can agree that they are joint guardians, or that one of them is the sole guardian of their children. In a will, a parent who is a guardian may appoint another person—either the other parent or someone else—to act as guardian when the parent dies. However, if parents want someone else to act as guardian during the parents' lifetimes, they must go to court and ask a judge to appoint that person as guardian.

**Testamentary guardianship: appointing a guardian by will**

The *Family Relations Act* covers guardianship issues generally, but it is s. 50 of the *Infants Act* that authorizes a parent to appoint a person to be the guardian of a child, in the event of the parent's death (a "testamentary guardian"). In 2004, the British Columbia Law Institute recommended moving the testamentary guardianship provisions from the *Infants Act* to the *Family Relations Act*.[72]

Under the *Infants Act*, only a parent can appoint a testamentary guardian. In both Ontario and England, a non-parent guardian can appoint a testamentary guardian.[73] The Law Reform Commission of Saskatchewan and the Alberta Law Reform Institute have both recommended allowing a guardian who is not the child's parent to appoint a testamentary guardian.[74] The British Columbia Law Institute also looked at this in its 2004 report and concluded that "[t]here is no apparent reason to assume that a guardian's choice would be less sound than a parent's. The private appointment of testamentary guardians is an effective mechanism for minimising the possibility of a 'gap' in the guardianship of children."[75]

**Standby Guardianship**

Standby guardianship describes the appointment of a guardian to take effect when a specified event occurs in the future. Testamentary guardianship is one form of standby guardianship.

Another form of standby guardianship takes effect during the appointing guardian's lifetime. In cases where the death of the appointing guardian is expected, standby guardianship allows for a bridging period of shared guardianship while the appointing guardian is still alive. For example, if a parent with a terminal illness appoints a standby guardian, the standby guardian assumes joint guardianship with the parent when the parent becomes incapacitated, and continues as sole guardian after the parent's death.

This form of standby guardianship is widely available in the United States where it was developed as a response to the plight of "AIDS orphans." While medical treatment for HIV/AIDS has improved tremendously over the last 15 years, standby guardianship continues to be used by parents with terminal illnesses and could be used in other situations: for example, by grandparents caring for grandchildren, who worry about their ability to continue to act as primary caregivers.

In its 2004 report, the British Columbia Law Institute recommended amending the *Family Relations Act* to allow the appointment of standby guardians. It suggested restricting the use of standby guardianship to situations involving a sole appointing guardian, and allowing activation of standby guardianship only upon the death or mental or physical incapacity of the appointing guardian.[76]

**Temporary Guardianship**

The difference between temporary guardianship and standby guardianship is that a standby guardian eventually replaces the appointing guardian while a temporary guardian is a substitute who fills in while the appointing guardian is temporarily absent or incapacitated. British Columbia's *Representation Agreement Act* allows temporary guardianship in limited circumstances.[77]

Laws in Saskatchewan, Nova Scotia, the Northwest Territories, Nunavut and the Yukon allow a person with custody (guardianship of the person) to appoint another person to act temporarily as guardian of the person of the child during the appointing guardian's lifetime.[78] In Saskatchewan, parents may agree to authorize one of them to appoint another person as the child's legal custodian (akin to guardian of the person under the *Family Relations Act*) and guardian of the child's property for a specific period of time or until the child reaches the age of majority. In Nova Scotia, a person with "care and custody" of a child may appoint another person to be the guardian of the person of the child for any period during the appointer's lifetime. In the Northwest Territories and the Yukon, a person with custody may appoint another person to have any of the appointer's rights or responsibilities of custody during the appointer's lifetime, for the period of time that the appointer specifies.

In a 1998 report, the Alberta Law Reform Institute recommended that guardians be allowed to appoint someone to act in their place "in the event of the guardian's temporary absence or incapacity to act as a guardian."[79] In 2002, the Alberta Law Reform Project consulted widely on Alberta's family law and found support for having an easy way to transfer guardianship on a temporary basis.[80] However, in British Columbia judges have emphasized that decisions about changing guardianship from a parent to a non-parent must be based on what is best for the child and not merely on convenience.[81]

Section 21 (6) (k) of the Alberta *Family Law Act* may represent a middle ground. While not authorizing appointment of temporary guardians, it allows a guardian to name a person to act on behalf of the guardian if the guardian is temporarily absent because of illness or other reason.

The United States National Conference of Commissioners on Uniform State Laws has two model uniform acts that include temporary guardianship.[82] These provisions have been adopted by some states, but temporary guardianship has not been as widely adopted as standby guardianship.

**Simple form for appointment**

Testamentary guardians are generally appointed in a will. Parents and other guardians without significant property are less likely to prepare a will and, therefore, less likely to appoint a testamentary guardian. In England, the *Children Act 1989* allows a parent or other guardian to appoint a testamentary guardian in a signed and dated document.[83] The purpose of the rule is to make the private appointment of guardians easier, by relaxing the formal requirements.[84]

In its 2004 report, the British Columbia Law Institute proposed that the *Family Relations Act* allow for appointment of a standby or testamentary guardian through the form shown in Appendix A.[85]

### *QUESTIONS*

30. Should the provisions relating to testamentary guardianship, now found in s. 50 of the *Infants Act*, be moved to the *Family Relations Act*?

31. Should a guardian who is not a parent be able to appoint a testamentary guardian (that is, a person who will become a child's guardian when the appointing guardian dies)?

32. Should the *Family Relations Act* allow a guardian to appoint a standby guardian who will assume joint guardianship during the appointing guardian's lifetime and continue as guardian after the appointing guardian's death? If so, what restrictions, if any, should there be on the situations in which a standby guardian may be appointed?

33. Should the *Family Relations Act* specifically authorize a guardian to appoint a temporary guardian? If so, what restrictions, if any, should there be on the situations in which a temporary guardian may be appointed?

34. Should a simple form be created for appointing a testamentary or standby guardian?

## PART D – GENERAL FEEDBACK

35. In your opinion, what are the three most important issues relating to parents' roles and responsibilities and parenting arrangements?

36. What three measures do you think would be most effective in resolving those issues?

37. Are there issues related to parents' roles and responsibilities and parenting arrangements that are not covered in this paper, that you would like to raise?

38. It is widely recognized that a barrier to access to justice is excessive process and procedures. Can you think of anything with respect to parenting arrangements that could be done to streamline the resolution of issues?

Please provide your feedback

**Please note:** Chapter 7 discusses ways for parents to deal with problems that come up in meeting access responsibilities. Chapter 8 raises questions about ways for children to participate in decisions that affect them when their parents separate. Chapter 9 discusses family violence.

# Appendix A – Form for Appointing a Guardian

The British Columbia Law Institute, "Report on Appointing a Guardian and Standby Guardianship" (March 2004)

## Appointment of a Standby or Testamentary Guardian

Any person who is a guardian of a child may make an appointment using this form, but if at the date the appointment is to take effect, someone other than the person making this appointment, or the person appointed, is a joint or sole guardian of the child, this appointment is void.

This appointment is made on _____20_____(Date)

by_____(child's guardian)

of_____(guardian's address)

I appoint the following individual:

_____(name of standby or testamentary guardian)

of_____(address of standby or testamentary guardian)

to become the guardian of

_____

_____

_____ (name of child or children)

upon the occasion of my (check one or more):

☐ death

☐ inability to care for the child or children named, as certified by:

_____

_____

in accordance with the *Family Relations Act*, to have the same powers and responsibilities of guardianship that I currently have, subject to the following conditions and restrictions:

_____

*cross out this line if there are no conditions or restrictions*

_____

signature of child's guardian

_____

signature of witness

_____

signature of standby or testamentary guardian (optional)

Witness if guardian unable to sign document: (cross out this portion if not applicable)

I attest that _____ (child's guardian) has made the above appointment and is unable to sign this document.

_____

signature of witness 1

_____

address of witness 1

_____

signature of witness 2

_____

address of witness 2

_____

signature of standby or testamentary guardian (optional)

## ENDNOTES

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[1] *Family Relations Act*, R.S.B.C. 1996, c. 128.

[2] Family Justice Reform Working Group's report, presented to the B.C. Justice Review Task Force, "A New Justice System for Families and Children" (May 2005), at 78, online: B.C. Justice Review Task Force <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> (last accessed: February 28, 2007).

[3] *Divorce Act*, R.S.C. 1985, (2nd Supp.) c.3.

[4].*Family Relations Act*, *supra* note 1. Section 1 defines a guardian as "a person who has all the powers and duties under s. 25 respecting a child". Section 25 defines these powers by referring to old English law, which gave a child's guardian responsibility for raising the child in a manner that suited the child's position in life, along with limited power over the child's property and finances. For more explanation, see The Law Reform Commission of British Columbia, "Report on the Authority of a Guardian" (January, 1985).

[5] *Divorce Act*, *supra* note 3, s. 2 (1).

[6] For more discussion on this point see, The Continuing Education Society of British Columbia, *Family Sourcebook for British Columbia*, Third Edition 2006 Update, Chapter 2 [Family Sourcebook].

[7] For a review of the law in British Columbia on the authority of parents and guardians to deal with a child's property, see Kristen Jenkins, "Dealing with Property Owned by Minors", *Estate Planning: Ten Timely Topics*, Continuing Legal Education Society, November 2002.

[8] Family Sourcebook, *supra* note 6.

[9] *Children's Law Act*, R.S.N.L. 1990, c. C-13, ss. 26 (2) and 56 (2) [Newfoundland and Labrador]; *Children's Law Act*, S.N.W.T. 1997, c. 14, ss. 18 (2) and 40 (2) [Northwest Territories]; *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, ss. 18 (2) and 40 (2) [Nunavut]; *Children's Act*, R.S.Y. 2002, c. 31, ss. 31 (2) and 60 (1) [Yukon].

[10] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 20 (2) and 47 (2) [Ontario].

[11] *Children's Law Act*, 1997, S.S. 1997, c. C-8.2, ss. 2 (1) and 32 [Saskatchewan].

[12] *Family Law Act*, S.A. 2003, c. F-4.5, s. 21 [Alberta].

[13] *Children Act 1989*, Ch. 41, s. 3 [England]; *Family Law Act 1975*, CWLTH, s. 61B [Australia].

[14] The Law Reform Commission of British Columbia, *supra* note 4 at 6.

[15] *Family Relations Act*, R.S.B.C. 1996 (Supp.), c. 128, s. 4.

[16] See for example, The Honourable Landon Pearson and Roger Galloway, M.P., "For the Sake of the Children – Report of the Special Joint Committee on Child Custody and Access" (December 1998), Chapter 2 C 1. The Language of Divorce, online: Parliament of Canada House of Commons Committees <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230> (last accessed: February 28, 2007).

[17] *Ibid.*, recommendation 5.

[18] The Family Law Committee was a long-standing committee of government officials familiar with family law, who represented each province and territory and the federal government. It is now part of the Co-ordinating Committee of Senior Officials (Family Justice).

[19] Federal-Provincial-Territorial Family Law Committee, "Final Federal-Provincial-Territorial Report on Custody and Access and Child Support – Putting Children First" (November 2002) at 29-30 online: Department of Justice Canada <http://justice.gc.ca/en/ps/pad/reports/flc2002.html> (last accessed: February 28, 2007).

[20] Bill C-22, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence*, cl. 10, online: Parliament of Canada LEGISinfo <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=11&query=3276&List=toc> (last accessed: February 28, 2007) [Bill C-22].

[21] Custody, Access and Child Support in Canada: Report on Federal-Provincial-Territorial Consultations, prepared by IER Planning, Research and Management Services (November 2001), Appendix C: Report on British Columbia Workshops at 136-138 [Report on Federal-Provincial-Territorial Consultations].

[22] See *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 75; *Insurance Act*, R.S.B.C. 1996, c. 226, s. 77 (1) (a); *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 32 (1); *Employment Standards Act Regulation*, B.C. Reg. 396/95, s. 45.14.

[23] Judges make these orders under s. 31 of the *Trustee Act*, R. S.B.C. 1996, c. 464 or under their *parens patriae* authority.

[24] For example, Alberta's *Minors' Property Act*, S.A. 2004, c. M-18.1 covers approval by a judge of a contract made by a child, a settlement of a child's claim made by a guardian and a disposition (e.g., sale) of a child's property; performance of obligations under a contract with a child, with special provisions if the value of the contract is $5,000 or less; and appointment by a judge of a trustee of children's property.

[25] Ontario, *supra* note 10, s. 51 (1).

[26] Yukon, *supra* note 9, s. 72 (2).

[27] Newfoundland and Labrador, *supra* note 9, s.59.

[28] Northwest Territories, s*upra* note 9, s. 50.

[29] *Minors' Property Act, supra* note 24, ss. 8 and 9.

[30] *Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3, s. 16.

[31] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S., art. 3.

[32] *Supra* note 20.

[33] *Supra* note 12, s. 18 (2).

[34] *Care of Children Act 2004*, s. 4 (5) (a) [New Zealand].

[35] Report on Federal-Provincial-Territorial Consultations, *supra* note 21 at 139.

[36] *Supra* note 2, recommendation 26 at 81.

[37] Ontario, *supra* note 10, s. 24(4); Newfoundland and Labrador, *supra* note 9, s. 31; Northwest Territories, *supra* note 9, s. 17(3); Nunavut, *supra* note 9, s. 17(3).

[38] *Supra* note 20.

[39] *Supra* note 12, s. 18 (2).

[40] See, for example, Australia, *supra* note 13, ss.43, 68F &68K; New Zealand, *supra* note 34, ss. 51, 59 & 60; Arizona: *Marital and Domestic Relations*, A.R.S. s. 25-403.03; California: *Family Code* , s. 3011; Colorado: Domestic Matters/Dissolution of Marriage, C.S., s. 14-10-124, 1.5(a)(IX) & (X), Louisiana: *Revised Statutes of Louisiana*, Title 9: 364, Michigan: *Child Custody Act of 1970*, Act 91 of 1970, Statutes of Michigan, 722.23, Sec. 3(k).

[41] *Divorce Act*, *supra* note 3, s. 16 (8); Ontario, *supra* note 10, s. 24 (1); Newfoundland and Labrador, *supra* note 9, s. 31 (1); Northwest Territories, *supra* note 9, s. 17; Nunavut, *supra* note 9, s. 17; Saskatchewan, *supra* note 11, s. 8 (a); Alberta, *supra* note 12, s. 18 (1); New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 129(2); Prince Edward Island: *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 15 [P.E.I.].

[42] Australia, *supra* note 13, ss. 61DA & 65DAA, in effect as of July 1, 2006.

[43] *Supra* note 16, Chapter 4 A 1. (i) No Presumptions.

[44] *Supra* note 19, recommendation 6. The recommendation reads, "It is recommended that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child."

[45] New Zealand, *supra* note 34, s. 4 (5).

[46] *Family Relations Act*, *supra* note 1, ss. 27,28 & 30.

[47] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.18 (4) and *Guardianship Act*, S.N.S. 2002, c. 8, s. 3 (1).

[48] Ontario, *supra* note 10, ss. 20 and 48; Newfoundland and Labrador, *supra* note 9, ss. 26 and 57; Northwest Territories, *supra* note 9, ss. 18 and 41; Nunavut, *supra* note 9, ss. 18 and 41; Yukon, *supra* note 9, ss. 31 and 61; P.E.I., *supra* note 41, s. 3.

[49] Saskatchewan, *supra* note 11, ss. 3 and s. 30; *Family Maintenance Act*, C.C.S.M. c. F20, s. 39 (1).

[50] Alberta, *supra* note 12, s. 20.

[51] *Supra* note 16, recommendation 11.

[52] *Revised Code of Washington* Title 26 (*Domestic Relations*), ss. 26.09.181, 26.09.184, 26.09.187, 26.09.191, 26.09.194, 26.09.197, 26.09.210.

[53] *Oregon Revised Statutes*, Title 11 (Domestic Relations), Chapter 107.

[54] Australia, *supra* note 13, Part VII, Division 4.

[55] Diane N. Lye, "Washington State *Parenting Act* Study: Report to the Washington State Gender and Justice Commission and Domestic relations Commission, June 1999," online: <http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/parentingAct/index> (last accessed: February 28, 2007).

[56] Superior Court of Arizona in Maricopa County, Self Service Centre, "Parenting Time Guidelines," (March 21, 2005) at 5-10; Colorado Department of Labor & Employment, "Connecting With Your Kids: Important Information on Parenting Time in Colorado," 2nd ed. (2004) at 33-40 & 43-46; Michigan State Court Administrative Office, "Michigan Parenting Time Guideline," 7-9, 23-26; Oregon Judicial Department, *et al.*, "Basic Parenting Plan Guide for Parents, Version 7 (June 2003) at 12-21 & "Safety Focussed Parenting Plan Guide for Parents," Version 4 (June 2003), Options A, B & C.

[57] *Utah Code*, ss. 30-3-33, 35 & 35.5.

[58] Saskatchewan, *supra* note 11, s. 6 (1) (b). See also, Ontario, *supra* note 10, s. 28 (b) and Yukon, *supra* note 9, s. 33 (2) (b).

[59] Saskatchewan, *ibid.*, s. 6 (7).

[60] Alberta, *supra* note 12, s. 32 (2) (a).

[61] *Supra* note 20.

[62] Australia, *supra* note 13, s. 65DA.

[63] *Ibid.*, s. 65DA (3).

[64] New Zealand, *supra* note 34, s. 55 (1) (a).

[65] *Ibid.*, s. 55 (1) (b).

[66] *Ibid.*, ss. 55 (2) and (4). Children are provided with legal representation in contested cases unless the judge does not think it would be useful. See also ss. 7 ((1) and (2).

[67] See *Children and Adoption Act 2006, 2006*, c. 20, ss. 3 and 4 (received Royal Assent on June 21, 2006, but not yet in effect).

[68] *Oregon Revised Statutes*, 11-107.106 (1998).

[69] Alberta, *supra* note 12, s. 32 (2) (c).

[70] *Supra* note 20.

[71] Australia, *supra* note 13, s. 64B (2) (g) and (h) and (4A).

[72] The British Columbia Law Institute, "Report on Appointing a Guardian and Standby Guardianship" (March 2004), online: The British Columbia Law Institute < http://www.bcli.org> (last accessed: February 28, 2007).

[73] Ontario, *supra* note 10, s. 61; England, *supra* note 13, s. 5.

[74] Law Reform Commission of Saskatchewan, "Tentative Proposals Relating to Testamentary Custody and Guardianship of Children" (1984), at 21; Alberta Law Reform Institute, "Family Law Project: Child Guardianship, Custody and Access", *Report for Discussion No. 18.4* (October 1998) [ALRI].

[75] *Supra* note 72 at 4.

[76] *Ibid.,* at 8.

[77] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 9(1) (f) allows a person to authorise a representative to make arrangements for the temporary care, education and financial support of the person's children who are under age 19.

[78] Northwest Territories, *supra* note 9, s. 19 (2) (a); Nunavut, *supra* note 9, s. 19(2) (a); Yukon, *supra* note 9, s. 32 (1); Saskatchewan, *supra* note 11, s. 3(3); Nova Scotia: *Guardianship Act*, S.N.S. 2002, c.8, s. 19 (1).

[79] ALRI, *supra* note 74 at 109.

[80] "Alberta Law Reform Consultation Stakeholder Report", Marcomm Works, 2002 at 15.

[81] See, for example, *Wong (Re)* [2000] B.C.J No. 2095.

[82] Section 105 of the *Uniform Guardianship and Protective Proceedings Act* and 5-105 of the *Uniform Probate Code* provide:

A parent or guardian of a minor or incapacitated person, by power of attorney, may delegate to another person, for a period not exceeding six months, any power regarding the care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

[83] England, *supra* note 13, s. 5 (3), (4) & (5).

[84] A. Bainham, "The Children Act 1989: Welfare and Non-Interventionism" [1990] *Fam. Law* 143.

[85] *Supra* note 72 at 9.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 7

# Meeting Access Responsibilities

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

### The *Family Relations Act* Review & The 2005 Report of the Family Justice Reform Working Group

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*.[1] The law can offer only part of the answer to the question of what to do when parents do not follow access orders and agreements, but the focus of this paper is on law reform. Family justice programs and services are another important response to access-related difficulties and there are ongoing initiatives on that front as well. Some of these are listed below; for more information, please see Chapter 5.

This paper takes into account recent work in the area of family justice, such as the 2005 report of the Family Justice Reform Working Group to the B.C. Justice Review Task Force. By way of background, that Task Force was established by the Law Society of B.C. in March 2002 to examine possible reforms to B.C.'s justice system. The Task Force appointed four working groups, one of which–the Family Justice Reform Working Group–suggested reforms to the Province's family justice system. The final report of the Family Justice Reform Working Group is entitled "A New Justice System for Families and Children" and is available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf.

The Working Group's report addresses access enforcement in a general way. It recommends that judges be given more tools, such as authority to order parents to attend a specialized parenting program, or to appoint a mediator or a parenting co-ordinator, and that there be a visible contact point (Family Justice Information Hub) where people could bring ongoing access disputes. The report also calls for greater services to assist high-conflict families.[2]

This paper has been prepared to seek your views on a variety of options within the context of the *Family Relations Act*. It is divided into five parts. The first four address: prevention of access disputes; legal remedies for access denial or failure to exercise access; complex cases; and preventing the wrongful removal of children from B.C. The fifth provides an opportunity for you to highlight what you feel are the most pressing issues and identify any issues that are not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

A separate paper contains more detailed background information. See background paper.

### Terminology

This paper refers to "custody" and "access." This reflects the current terminology used in the *Family Relations Act*. A separate discussion paper asks whether these words should be changed. Please refer to Chapter 6 for more discussion.

### The Two Sides of Access Responsibilities

When parents do not comply with the access responsibilities set out in their agreements or court orders, there can be many consequences. Children and parents lose the chance to spend time together. Conflict between parents over access issues takes a toll on children. Costs mount, as plans have to be changed and changed again. Parents may continue to feel stuck in ongoing conflict with one another, and quality of relationships may suffer.

Meeting access responsibilities has two sides:

- the parent with whom the child primarily resides may prevent the child from spending scheduled access time with the other parent, or frustrate access, for example, by deliberately scheduling appointments only during access visits; or

- the non-resident parent may fail to turn up for scheduled access, always arrive late, or show up only some of the time.

Access denial and failure to exercise access may be related. For example, a parent whose efforts to exercise access are blocked consistently by the other parent may eventually give up and stop coming to pre-arranged visits. Alternatively, failure to exercise access may flip to access denial when a parent who has not exercised access for a time is refused the opportunity to revitalize the existing but previously unused access arrangement.

## Scope of the Problem

There are no firm statistics in B.C. to describe the scope of the problem of non-compliance with access orders and agreements, though a 2005 survey of 501 payors enrolled with the Family Maintenance Enforcement Program provides some information. Custody or access problems were reported by 3% of respondents as the underlying cause of late support payments or those not paid in full.[3] This survey did not address parents who continue to meet their child support obligations even if access arrangements break down. Nor is it representative of all B.C. families, since not all parents use the enforcement program. But numbers from other jurisdictions also suggest that enforcement problems arise in a minority of families.[4] Of the two forms of parental non-compliance with access orders, research suggests that failure to exercise access may be the more prevalent problem.[5]

Where problems over access arrangements do arise, however, they pose a significant hardship not only on individual families, who often find themselves without effective legal recourse, but also on the family justice system since ongoing access disputes may consume significant public resources.

## British Columbia's Current Response

### *Programs and Services*

Although B.C. does not offer programs and services dedicated specifically to access enforcement, the following general resources can help parents to prevent and to resolve disputes over access:

- Family Justice Centres spread across the province, which offer information and referral services, as well as dispute resolution for non-property related family matters;

- Family Justice Services Centre (what the Family Justice Reform Working Group referred to as a "Family Justice Information Hub") in Nanaimo, http://www.nanaimo.familyjustice.bc.ca/index.htm;

- parent education (Parenting After Separation) – mandatory in 13 Provincial Court registries under Family Court Rule 21;

- custody and access assessments or "views of the child" reports prepared by Family Justice Counsellors;

- legal services, such as LawLINE, brief legal advice, and duty counsel;

- the B.C. Supreme Court Self-Help Centre located in Vancouver, which offers access to computers and online resources, as well as self-help packages and forms;

- opportunities for early settlement of court cases or case management by a judge, available in all Provincial Court Registries via Family Case Conferences under Family Court Rule 7;

- additional mandatory events that promote early settlement of court cases, such as meetings with a Family Justice Counsellor, available in four registries designated as Family Justice Registries under Family Court Rule 5, and

- opportunities for early settlement through mandatory Judicial Case Conferences applicable to most interlocutory[6] motions brought in Supreme Court under Supreme Court Rule 60E.

Some of these programs and services are more widely available than others, partly because of the cost of providing a wide range of services over such a large geographical area. Another explanation for the disparity in availability of services is that access-related applications may be brought under two separate statutes—the federal *Divorce Act*[7] or the provincial *Family Relations Act*—and in two separate courts—the Provincial Court or the Supreme Court.

A separate paper that outlines family justice programs and services is available online: see Chapter 5.

### *Legal Remedies*

Currently, the principal legal responses to a breach of an access order in B.C. are either civil contempt of court proceedings, if the order was made in Supreme Court, or applications under s. 128(3) of the *Family Relations Act*, which trigger a quasi-criminal hearing under the *Offence Act*. Section 128(3) reads:

> *128(3) A person who, without lawful excuse, interferes with the custody of, or access to, a child in respect of whom an order for custody or access was made or is enforceable under this Act commits an offence.*

Neither enforcement option is particularly effective, for several reasons. In quasi-criminal proceedings such as these, the burden of proof is high. The parent who is trying to enforce an order must prove the violation beyond a reasonable doubt. If the wording of the original order is vague (for example: "liberal" access), this burden is virtually impossible to meet. The parent may first have to apply for a court order specifying access terms before he or she can bring contempt proceedings to enforce the order.

More significantly, the remedies for contempt of court or for s. 128(3) applications are fines or imprisonment, or both. Sending a parent to jail, or further depleting already scarce family resources may be at odds with the best interests of the child, so judges are reluctant to make such orders, particularly if there is no clear pattern of non-compliance.

Also, the available remedy depends on which court the family has used and under which statute the order was made: contempt proceedings may only be used to enforce Supreme Court access orders made under the *Divorce Act* or the *Family Relations Act*, while s. 128(3) applications are possible only in relation to *Family Relations Act* orders.

## Response of Other Jurisdictions

### *Outside Canada*

Internationally, the trend is towards using legislation to create a range of tools for enforcing access orders, beginning with a preventative or educational approach and progressing through to punitive sanctions. Australia and New Zealand have already amended their family law statutes to embrace this approach. England is in the process of doing so, and the same trend can be seen in the U.S. For example, Arizona, Colorado and Oregon have specific access enforcement remedies in their family law statutes. Michigan and Utah include specialized remedies for contempt of access orders in their contempt legislation. If you wish to look at these laws, please refer to the following link to Legislation.

These legislative remedies, discussed in more detail in the body of this paper, are often paired with some combination of procedural reforms, expanded access-related programs and services, and capital investment in family justice infrastructure. For example, the Private Law Programme issued by the President of England's Family Division uses the "one family/one judge" case management principle. The government has also announced major funding increases for supervised access and exchange services. New Zealand and England have piloted parent education workshops, and the U.S. has embraced parenting co-ordination[8] as a solution to access disputes in higher-conflict families. Australia has introduced the most sweeping changes: spending increases of $400 million to fund the creation of Family Relationship Centres across Australia, and expanded access-related programs and services such as supervised access and a parenting orders program for access disputes that arise after an order has been made. Australia has also recently legislated a less adversarial trial format for family cases involving children, in which judges play a more active role and have greater control over litigation. New Zealand has adapted Australia's less adversarial hearing model and is piloting it in six court locations.[9]

Another important development is the recasting of access disputes from competing rights to ongoing responsibilities. In both New Zealand and Australia, family legislation requires that when an access order is first made, an explanation must be given to parents about the ongoing obligations it places on them.[10]

### *Inside Canada*

Canadian jurisdictions are also moving towards legislated remedies, which are discussed in more detail in the body of this paper. The family laws of Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Nunavut, and the Northwest Territories have adopted specific access enforcement remedies. Ontario's family statute also contains detailed access enforcement provisions passed in 1990, although these are not in force. If you wish to see these laws please refer to the following link to Legislation.

Like their international counterparts, Canadian jurisdictions are beginning to combine legislative reform with changes to access-related services and programs, and family law procedure. These differ from jurisdiction to jurisdiction. The prairie provinces and New Brunswick have specialized parent education tailored for high conflict families. Ontario has invested significant resources in supervised access and exchange services, and Quebec is contemplating doing the same. Alberta has piloted the use of brief conflict intervention programs, and Saskatchewan is trying out an access facilitator program, focusing on the creation of the initial access order.

For further detail about reforms in other jurisdictions, please refer to the background paper on access responsibilities: background paper.

## DISCUSSION

### PART A – CHANGING THE LAW TO PREVENT ACCESS DISPUTES

Many have commented that litigation is ill-suited to the resolution of family problems.[11] On the one hand, family law tries to protect the best interests of the child and support family relationships, while on the other, enforcement proceedings traditionally have a punitive focus. Access disputes highlight this built-in tension. A parent may be in breach of an access order, but a court may hesitate to order the traditional remedies of fines or imprisonment, because of the risk to children of continuing toxic conflict between their parents.

There are also limits to what legal access enforcement remedies can achieve. A law, however well crafted, cannot mandate good parenting, and litigation is not known for its beneficial impact on ongoing relationships.

The challenge, then, is to find ways to prevent non-compliance in the first place, or to minimize it. By getting the initial order "right," it may be possible to reduce the likelihood of future problems. This is discussed in Chapter 6 Parenting Apart.

## PART B – CHANGING THE LAW TO RESPOND TO ACCESS DISPUTES

### *Discussion Point (1)—Current Legislative Remedies in the Family Relations Act*

**Using the *Offence Act* to enforce access**

One tool that is currently available to a parent who wants to enforce an access order is s. 128(3) of the *Family Relations Act*. This section (quoted earlier in this paper) makes it an offence to interfere with access that has been ordered by a court. The remedy is to prosecute the offending parent under the *Offence Act*. Penalties include a fine of up to $2,000, up to six months' imprisonment, or both.[12]

These applications are not a real option in most cases, for at least three reasons. First, they are quasi-criminal proceedings, and so require a prosecution. Private prosecutions are very unusual, so it means getting Crown Counsel involved. Given the already heavy criminal caseloads they carry, this can be difficult. Second, the burden of proof is high: unless the violation of s. 128(3) can be proven beyond a reasonable doubt, as in any criminal case, there will be no conviction. (Proof is easier in a civil case, where the standard is a balance of probabilities; that is, more likely than not.) Finally, even if the case is proven, judges are often reluctant to impose a fine or jail time on a parent because this could negatively affect the child.

*QUESTION*

1. Should s. 128(3) of the *Family Relations Act* be retained? Why or why not?

### *Discussion Point (2)—Contempt of Court and Provincial Court Orders*

**Using contempt of court proceedings to enforce access**

Contempt proceedings are another way to enforce access orders, but only for those made in Supreme Court. This option is not available to the many families who have access orders that were made in Provincial Court.

But even in Supreme Court, contempt proceedings are not widely used in B.C. to enforce access orders. The explanation is similar to that given above for the impracticality of s.128(3) applications. As in those applications, the burden on the person trying to prove contempt of court is high—likely requiring evidence of a clear pattern of access disruption. And because judges are required by the *Family Relations Act* to make decisions in the best interests of the child, they may be reluctant to fine or jail the child's parent.

Some provinces and territories in Canada have changed their family law to permit contempt applications to be brought in provincial or territorial courts. One example is s. 38 of Ontario's *Children's Law Reform Act*, which empowers its provincial trial court, the Ontario Court of Justice, to punish "any wilful contempt" of its custody or access orders. Penalties include fines up to $5,000, or imprisonment up to 90 days, or both.

*QUESTION*

2. Should the *Family Relations Act* authorize the Provincial Court to fine or imprison those in contempt of its access orders? Why or why not?

## *Discussion Point (3)—Specific Remedies in Family Laws to Enforce Access*

In some other countries, family laws have been expanded to include specific remedies for enforcement of access orders. Australia, New Zealand, and several U.S. states have taken this approach.[13] England is on the verge of doing so.[14]

Canadian family laws do this too, to varying degrees. For example, Canadian family statutes commonly allow a court to order apprehension of a child who has been unlawfully withheld from a parent who has an order for access.[15] A police officer or other official can pick up the child and return that child to the other parent.

Some provinces and territories, such as Alberta, Saskatchewan, Manitoba, the Northwest Territories, Nunavut, and Newfoundland and Labrador, have incorporated detailed access enforcement remedies into their family laws.[16] Ontario's family law also has a set of remedies that are specific to access enforcement, but they are not in force.[17]

Unlike their international counterparts, these Canadian laws provide separate remedies for access denial, and for failure to exercise access. The tables below go into more detail about the kinds of remedies available. The first table lists remedies for access denial; the second, remedies for failure to exercise access.

B.C. does not appear on either of these tables because its family law does not have a detailed system of access enforcement remedies. As noted in "Setting the Scene", the main enforcement options in B.C. are fines or imprisonment, or both, through contempt proceedings or s. 128(3) applications.

| Legislative Remedies for ACCESS DENIAL: If a parent who has custody prevents the other parent from exercising court-ordered access, a judge hearing an enforcement application may order: | | | | | | | |
|---|---|---|---|---|---|---|---|
| | AB | SK | MB | ON | NL | NWT | NUN |
| reimbursement of expenses | ● | ● | ● | ●* | ● | ● | ● |
| fines, or imprisonment, or both | ● | ●** | ●*** | ●** | ●** | ●** | ●** |
| supervised access | | ● | ● | ●* | ● | ● | ● |
| make-up access time | ● | ● | | ●* | ● | ● | ● |
| court-ordered apprehension of a child | ● | ● | ● | ● | ● | | |
| mediation | | ● | | ●* | ● | ● | ● |
| posting of security[18] | ● | ● | | | | | |
| general directions to promote compliance | ● | | | | | | |
| a custody or access order be made or varied (e.g. add an access schedule to an order) | | ● | | | | | |

* not in force
** via contempt of court proceedings
*** via contempt of court proceedings or general offence provision

| Legislative Remedies for FAILURE TO EXERCISE ACCESS: If a parent fails to exercise access, a judge hearing an enforcement application by the parent with custody may order: | | | | | | | |
|---|---|---|---|---|---|---|---|
| | AB | SK | MB | ON | NL | NWT | NUN |
| reimbursement of expenses | ● | ● | ● | ●* | ● | ● | ● |
| supervised access | | ● | ● | ●* | ● | ● | ● |
| mediation | | ● | | ●* | ● | ● | ● |
| posting of security | | ● | | | | | |
| requiring access parent to give his or her telephone number and address to other parent | | ● | | | | ● | ● |
| a custody or access order be made or varied (e.g. change access times) | | ● | | | | | |

* not in force

** via contempt of court proceedings

*** via contempt of court proceedings or general offence provision

**Supervised Access**

The use of supervised access to deal with access disputes varies considerably from jurisdiction to jurisdiction. Internationally, there appears to be growing enthusiasm for this service. For example, Australia and England have recently announced major spending increases for supervised access and exchange facilities. The Australian Attorney General recently announced the creation of 30 new supervised access and exchange facilities, called "children's contact services," bringing the total to 65 country-wide.[19] England also has increased spending, from £100,000 in 2003-04, to £1.8 million in 2004-05 and £1.5 million in 2005-06 on child contact centres. Most of that money—approximately £2.4 million—went to the creation of 14 new supervised contact centres.[20] The government has committed a further £7.5 million in funding for the two-year period, 2006-08.[21]

The response in Canada has been mixed. Ontario offers publicly funded supervised access services in 52 out of 54 of its judicial districts.[22] Alberta, New Brunswick and P.E.I., do not provide publicly funded supervised access services. B.C. tried a middle approach, contracting with service providers to provide short-term supervised access. The service was under-used and costly. Consequently, at the start of the 2006-07 fiscal year, the Province moved to a private, fee-for-service model.

Supervised access may benefit parents with serious difficulties that cannot be resolved in the short-term, or possibly ever, but the potential for a continuing need for the service coupled with infrastructure, training and labour costs makes this an expensive option.

**Limitations of using the law to enforce access**

Statutory access enforcement remedies are not a "silver bullet" that can fix disrupted or inconsistent access visits. Even in those Canadian provinces and territories that have more comprehensive access enforcement remedies in their family laws, these remedies are rarely used.[23]

Sometimes, they can be misused. Some commentators note that access enforcement applications can be used by one spouse to harass the other.[24] In the first three years after Australia

introduced its three-tiered access enforcement regime, access enforcement applications increased by 250% from 786 in 1995/96 to 1,976 in 1999/00. A review of applications made in 1998/99 found that judges dismissed 45% of them and imposed no penalty in a further 17% because the breach of the access order was trivial.[25]

### *QUESTIONS*

3. Should the *Family Relations Act* include specific access enforcement remedies? Why or why not?

4. Should there be separate remedies for access denial and failure to exercise access?

5. Which remedies should be included? Possible remedies identified from Canadian and international jurisdictions are listed below. Please rank those you think should be included in order of priority, with 1 having the highest priority. If you favour separate remedies for access denial and failure to exercise access, please indicate your preferences in the section entitled "Additional Comments".

| Options for access enforcement | Priority Ranking | Additional Comments |
|---|---|---|
| • admonishment (reprimand) | | |
| • attendance at a program or service (e.g. parent education) if appropriate | | |
| • community service | | |
| • costs | | |
| • counselling (family or child) to be paid for by the non-compliant parent | | |
| • court-ordered apprehension and delivery of a child to the access parent | | |
| • fines | | |
| • imposition of (additional) conditions on the order | | |
| • information regarding a parent's telephone number, address | | |
| • imprisonment | | |
| • make-up access time | | |
| • mediation | | |
| • re-imbursement of reasonable expenses incurred as a result of the breach | | |
| • security | | |
| • specification of the access order | | |
| • supervised access | | |
| • termination, modification or suspension of spousal support | | |
| • variation of the access order | | |
| • OTHER: | | |

6. Should the *Family Relations Act* make fines and imprisonment available only as a last resort, or where the breach of the access order is extremely serious?

## *Discussion Point (4)—Excusable Breaches of Access Orders or Agreements*

Some family laws in Canada address when a breach of an access order or agreement is excusable. For instance, Saskatchewan's *Children's Law Act, 1997* remedies only "wrongful" access denial or failure to exercise access. A breach is "wrongful" unless there was a legitimate reason for it and reasonable notice was given,[26] although these are not defined. Other laws list specific exceptions. For example, Newfoundland and Labrador's *Children's Law Act* (similarly worded to Ontario's unproclaimed s. 34a(4)) states:

> *41(4) A denial of access is not wrongful where*
>
> *(a) the respondent believes on reasonable grounds that the child will suffer physical or emotional harm if access is exercised;*
>
> *(b) the respondent believes on reasonable grounds that he or she might suffer physical harm if access is exercised;*
>
> *(c) the respondent believes on reasonable grounds that the applicant is impaired by alcohol or a drug at the time of access;*
>
> *(d) the applicant fails to present himself or herself to exercise the right of access within 1 hour of the time specified in the order or a time otherwise agreed on by the parties;*
>
> *(e) the respondent believes on reasonable grounds that the child is suffering from an illness of such a nature that it is not appropriate to allow access to be exercised;*
>
> *(f) the applicant does not satisfy written conditions that were agreed on by the parties or that are part of the order for access;*
>
> *(g) on numerous occasions during the preceding 12 months the applicant had, without reasonable notice and excuse failed to exercise the right of access;*
>
> *(h) the applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question; or*
>
> *(i) the court thinks that the withholding of the access is, in the circumstances, justified.*

### *QUESTIONS*

7. Should the *Family Relations Act* set out specific circumstances in which a denial of access is excusable? Why or why not?

8. If so, what circumstances should be included?

| **Possible reasons for access denial** (check all that you would include) | | **Additional Comments** |
|---|---|---|
| • harm to the child if access is exercised | ☐ | What kind of harm?<br>☐ physical<br>☐ emotional<br>What level of risk?<br>☐ reasonable belief that the child **WILL** be harmed by the scheduled access visit<br>☐ reasonable belief that the child **MIGHT** be harmed by the scheduled access visit |
| • harm to the parent with whom the child usually resides if access is exercised | ☐ | What kind of harm?<br>☐ physical<br>☐ emotional<br>What level of risk?<br>☐ reasonable belief that the other parent **WILL** be harmed<br>☐ reasonable belief that the other parent **MIGHT** be harmed |
| • reasonable belief that the access parent is intoxicated at the time of the visit | ☐ | |
| • access parent is more than one hour late | ☐ | |
| • child is too ill | ☐ | |
| • access parent is in breach of written conditions attached to the access order or agreed upon by the parties | ☐ | |
| • numerous times during the preceding 12 months the access parent had, without reasonable notice and excuse, failed to exercise the right of access | ☐ | |
| • access parent had indicated that he or she would not be seeking to exercise the right of access on the occasion in question | ☐ | |
| • any reason the court finds to be reasonable in the circumstances | ☐ | |
| • OTHER: | | |

## *Discussion Point (5)—Remedies for an Excusable Denial of Access*

Even where a denial of access time is found to have been excusable, Alberta's *Family Law Act* authorizes orders for:

- compensatory (make-up) time;
- reimbursement of necessary expenses incurred as a result of the denial of time;
- directions to one or both parents "to do anything that the court considers appropriate in the circumstances that is intended to induce compliance with the time with a child [access] clause".[27]

Similarly, recent changes to Australia's *Family Law Act 1975* authorize family courts to order compensatory access time even where there is a reasonable excuse for the denial.[28]

This kind of provision might come into play, for example, if a child is too ill to attend an access visit. The child's illness may be a reasonable excuse for the child not to go on the visit as planned, but the parent who missed the opportunity to spend time with his or her child would be able to make up the lost visit and might be entitled to reimbursement for extra expenses incurred.

### *QUESTIONS*

9. Should the *Family Relations Act* provide remedies even when there is a reasonable excuse for the scheduled access visit not going ahead?

10. If so, which remedies should be included?

    ☐ make-up time

    ☐ reimbursement of reasonable expenses

    ☐ other _____

## *Discussion Point (6)—Other Rules Governing Access Enforcement by a Court*

Some Canadian family laws impose restrictions on the way in which access enforcement proceedings are brought before a court, or on the timing of applications. For example:

- they set out the time limits within which access enforcement applications must be brought (limitation periods);
- some specify how soon the hearing should take place once the court enforcement process has been put into motion (timing of hearing);
- some specify how the dispute will be heard by the court (oral vs. written testimony); and
- some laws attempt to focus the information that may be brought before the court by directing that only information that is directly related to the alleged access problem is to be presented (scope of evidence).

| Sample legislative restrictions on access enforcement applications | | | | |
|---|---|---|---|---|
| **Province** | **limitation periods for applying to court** | **timing of hearing** | **type of evidence** | **scope of evidence** |
| **AB**<br>*Family Law Act*, S.A. 2003, c. F-4.5 | 12 months after the alleged denial of time: s. 40(1) | | | |
| **ON**<br>*Children's Law Reform Act*, R.S.O. 1990, c. C-12<br>*unproclaimed | 30 days after the alleged breach: s. 34a(8)* | within 10 days of service of the application on the respondent: s. 34a(7)* | oral evidence only, unless leave granted to file affidavit: s. 34a(9)* | only evidence directly related to the alleged breach of the order OR to the reasons for breach: s. 34a(10)* |
| **NL**<br>*Children's Law Act*, R.S.N.L. 1990, c. C-13 | 30 days after the alleged breach: s. 41(8) | within 10 days of service of the application on the respondent: s. 41(7) | oral evidence only, unless leave granted to file affidavit: s. 41(9) | only evidence directly related to the alleged breach of the order OR to the reasons for breach: s. 41(10) |

*QUESTIONS*

11. Should the *Family Relations Act* specify a limitation period for making an access enforcement application? If so, how long should it be?

12. Should the *Family Relations Act* specify the kind of evidence (e.g. oral evidence only, unless leave is granted) that may be presented in an access enforcement proceeding?

13. Is it necessary to specify that only evidence that is directly related to the alleged breach or the reasons for the breach will be considered?

14. Should the *Family Relations Act* set out the timing of the hearing of an access enforcement application? If so, what should it be?

## PART C – COMPLEX CASES

### *Discussion Point (7)—Older Children*

Unlike support orders, which depend solely on the compliance of one of the parents, access orders depend on the compliance of both, and also the children. Access arrangements may break down if children refuse to go on scheduled visits as sometimes happens, particularly with older children.

New Zealand's family statute says that custody orders must not be made for children who have reached the age of 16, unless there are special circumstances.[29] Access orders are not specifically addressed.

The Ministry of Attorney General has prepared a separate consultation paper on children's participation in family law disputes: Chapter 8 Children's Participation.

### *QUESTIONS*

15. Should the *Family Relations Act* specifically address the issue of the creation, variation or enforcement of access orders involving older children?

16. If so, what should it provide?

## *Discussion Point (8)—Responding to Higher Conflict Families*

**High Conflict & Family Violence**

Much has been written about "high conflict families," but it is a very broad phrase. Some use it to mean families marked by violence, but others use it to refer to people who may have never been violent but continue to have extremely strained relations and communication with their ex-spouses for many years after separation.

Family violence raises distinct policy issues and a separate discussion paper has been prepared on that topic. For questions about access and family violence, please refer to Chapter 9 Family Violence.

**Parenting Co-ordination (Special Masters)**

One emerging response to higher conflict families is parenting co-ordination. Parenting co-ordination was developed by a group of lawyers and psychologists in Denver, Colorado in the early 1990s.[30] Its use has skyrocketed across the U.S. in the last decade and is now attracting interest in Canada. The Family Justice Reform Working Group recommended that it be available to help high conflict parents in B.C. sort out access matters.[31]

Parenting co-ordinators are typically mental health professionals, such as social workers, psychologists, psychiatrists or marriage counsellors. However, some jurisdictions also permit the appointment of family lawyers or family mediators.[32]

The tasks of parenting co-ordinators may be divided into four broad areas:

1. assessment;
2. education;
3. resolution of minor conflicts; and
4. recommendations to the court.[33]

First, they assess the difficulties the parents are having, to try to identify the underlying causes of the conflict. This assessment helps the co-ordinator to make appropriate referrals and to tailor advice to the particular family.[34] The educative role includes communication, child development, conflict resolution skills, community resources, and the negative effect of continuing parental conflict on the family's children.[35] Their third function is to resolve disputes. They try to help the parents reach agreement; however, unlike many court-based mediators, they can go one step further and arbitrate (decide) the issue if agreement is not possible.[36] Their final function is to make recommendations to the court.[37]

Some American states have built in incentives to keep parents from taking the decisions of parenting co-ordinators to court. For example, in Colorado, if a parent requests a court hearing and the court "substantially upholds" the decision of the domestic relations decision-maker, that parent has to pay the fees and costs of the other parent, as well as the domestic relations decision-maker's fees and costs for the court hearing, unless the court decides it would be manifestly unjust to do so.[38]

A further incentive against continuing conflict is the fact that under the American model of parenting co-ordination, the parents bear the full cost of the parenting coordinator's involvement. Typically, the fees are split between the parties.

Although parenting co-ordination has been implemented in different ways—court order, court rule, non-specific legislation, specific legislation—the trend in the U.S. is toward legislating provisions specific to parenting co-ordination. California has non-specific legislation (*Code of Civil Procedure*) that permits the appointment of special masters or referees, but Arizona, Colorado and Oregon have adopted either a specific court rule or specific provisions within their family law statutes.[39]

Supporters of specific legislation for parenting co-ordinators argue it is needed to:

- authorize the appointment of a co-ordinator after a court order has been made;
- permit the court to order fees to be paid by the parents; and
- set out the responsibilities of parenting co-ordinators while respecting the legal rights of the parties.[40]
- An inter-disciplinary committee of private-sector family lawyers and mental health professionals has been looking at issues related to the use of parenting co-ordinators in B.C. Interest in parenting co-ordination seems to be growing.

Parenting co-ordination is also discussed in the paper on family justice programs and services: Chapter 5.

*QUESTIONS*

17. Do you think parenting co-ordinators would help families in B.C.?
18. Have you had any experience with parenting co-ordinators?
19. Do you have other suggestions for resolving or preventing access disputes in higher-conflict families?

## *Discussion Point (9)—Higher Conflict Families & Repeat Litigation*

Some people use "high conflict" to describe those who return to court again and again, sometimes with minor disputes; that is, whose conflict with their former spouse does not lessen with the passage of time. For families who experience high levels of conflict long after separation or divorce, access may be a flashpoint for ongoing disputes.

Orders for costs are one way to discourage parents from overusing access enforcement applications. In 2006, Australia amended its family law to provide that if an application to enforce access is brought, but a judge decides to make no order (i.e. imposes no penalty) for the breach, the judge can nevertheless make an order for costs against the person who brought the application.[41] Presumably, this change in the law is meant to deter parents from using access enforcement applications as a way of controlling or harassing their former spouses.

Another option is increased reliance on existing provisions that address vexatious litigation. A vexatious proceeding is one where the person starting it does so merely "to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result".[42] The Australian Law Reform Commission recommended in its 1995 report on complex contact (access) cases that:

> *The Family Court should be more robust in declaring a party in a complex contact case to be a vexatious litigant and in adhering to a declaration when a vexatious litigant seeks*

> *leave to commence proceedings, unless the best interests of the child require otherwise. The [Family Law Act 1975] should be amended to allow the Court to make an order of its own motion ...*[43]

British Columbia's *Supreme Court Act* contains a vexatious litigant provision. However, it requires that one of the litigants apply for such an order: it does not allow for an order to be made on the court's own motion:

> ***18.*** *If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.*[44]

Such an application would take place in Supreme Court. In considering a vexatious litigant application under s. 18, the Supreme Court may take into consideration vexatious proceedings started in either Provincial Court or Supreme Court.

Michigan law allows officials to decline to respond to an access enforcement complaint if:

> *The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because a complaint was found to be unwarranted, and the party has not paid those costs.*[45]

Another approach is to enact a provision regarding bad faith applications. For example, s.41(13) of Newfoundland and Labrador's *Children's Law Act*[46] responds to bad faith[47] applications by imposing a mandatory leave requirement on further applications. Ontario's unproclaimed s. 34a(13) would do the same.[48] Michigan's *Support and Parenting Time Enforcement Act* includes fines for bad faith applications: up to $250 for the first, up to $500 for the second and up to $1,000 for third and subsequent bad faith applications.[49] A finding of bad faith also triggers a mandatory costs order.[50]

### *QUESTIONS*

20. Is s. 18 of the *Supreme Court Act* (see above) adequate to deal with vexatious litigants in family cases?

21. Should the *Family Relations Act* include a provision permitting the court, on its own motion or on application by a party, to ban a litigant who brings unmeritorious or trivial complaints from further litigation without the express permission of the court?

22. If yes, should the leave requirement be automatically triggered after a certain number of applications are found to be either unsubstantiated or too trivial to warrant a sanction? How many?

23. Should the *Family Relations Act* address access enforcement applications brought in bad faith? How?

24. Do you have any comments about the role of orders for costs in access enforcement proceedings?

## PART D – INTER-JURISDICTIONAL ENFORCEMENT

Families are increasingly mobile, moving between provinces and between Canada and other countries. When parents who live in different jurisdictions have disputes over access, a number of problems can arise.

Orders made outside of B.C. can be enforced here under Part 3 of the *Family Relations Act*. Most other provinces and territories have similar provisions in their family laws that allow their courts to enforce custody and access orders made in B.C.

The *Criminal Code* also deals with parental child abduction,[51] and the 1980 *Hague Convention on the Civil Aspects on International Child Abduction* has a procedure for securing the return of a child abducted from one country that has implemented the convention to another.[52] This convention has been implemented in B.C. and the rest of Canada, but it only applies between a province and another country, not between provinces.

The 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* sets out a conflict of laws regime that provides international rules for recognizing and enforcing custody and access orders made in other countries.[53] Canada has not yet signed this convention.

### *Discussion Point (10)—Preventing Wrongful Removal of Children from B.C.*

Enforcing a B.C. order outside the province can be time-consuming and expensive. A better approach would be to find ways to minimize the number of inter-jurisdictional disputes that arise in the first place.

Unlike the equivalent law in most other provinces and territories, the *Family Relations Act* does not have a provision specifically aimed at minimizing the potential for inter-jurisdictional access disputes.[54]

By contrast, in Saskatchewan, a custody order must include a requirement that a custodial parent who intends to change place of residence must give at least 30 days notice of the move (or as otherwise ordered) to anyone who has access to the child, or who shares custody. Alberta provides for a 60 day notice period (or as otherwise ordered) but does not require judges to add this term to custody orders.[55]

In most other provinces and territories, the law provides a number of options in cases where a person intends to move a child from the province or territory, contrary to a court order or agreement: a judge may order that person to transfer property to a trustee; make child support payments to a trustee; post a bond; or deliver his or her passport, the child's passport, or other travel documents to a specified person or to the court.[56]

#### *QUESTIONS*

25. Should the *Family Relations Act* include a specific provision aimed at preventing wrongful removal of children from B.C.?

26. If so, what type of provision do you think would be most effective?

| Possible provisions (check all that you would include) | Include | Additional Comments |
|---|---|---|
| • a requirement that all custody orders include a notice-of-move provision | ☐ | |
| • discretion for judges to include a notice-of-move provision where needed | ☐ | |
| • discretion for judges to impose terms in an order if satisfied that a person prohibited from doing so intends to remove a child, such as: | ☐ | |
| ♦ transfer property to a trustee to be held subject to terms and conditions | ☐ | |
| ♦ if the person is a child support payer, make the child support payments to a trustee | ☐ | |
| ♦ post a bond payable to the applicant | ☐ | |
| ♦ deliver his or her passport, the child's passport, or other travel documents to a specified person or to the court | ☐ | |
| ♦ OTHER:_____ | ☐ | |

27. Do you have any suggestions for dealing with the issues that arise once a child has been removed from B.C. or has been brought to B.C. from another province or country, contrary to a court order or agreement?

## PART E – GENERAL FEEDBACK

*QUESTIONS*

28. In your opinion, what are the three most pressing issues related to access enforcement?

29. What three measures do you think would be most effective in resolving those issues?

30. Are there issues related to access enforcement not covered in this paper that you would like to raise?

31. It is widely recognized that a barrier to access to justice is excessive process and procedures. Can you think of anything with respect to meeting access responsibilities that could be done to streamline the resolution of issues?

Please provide your feedback.

## ENDNOTES

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[1] *Family Relations Act*, R.S.B.C. 1996, c.128.

[2] Family Justice Reform Working Group's Report, presented to the B.C. Justice Review Task Force, "A New Justice System for Families and Children," (May 2005) at 74 & 75.

[3] There were 501 respondents out of a total 2,022 who were contacted. Matrix Planning Associates, "Payer Survey – Family Maintenance Enforcement Program," (March 2005) at 12.

[4] Alberta reports < 1% of Provincial Court applications in Calgary from Oct. 2001 to March 2006 relate to access enforcement (180/19,408): Alberta Justice, "Key Research Questions in Respect of Access Enforcement" (23 January 2006). Manitoba's access enforcement program which operated in Winnipeg from 1989-1993 had only 99 client families: Pauline O'Connor, "Child Access in Canada: Legal Approaches and Program Supports" (2002) at 45, presented to the Department of Justice Canada. Australia reported that 10% of all divorce applications involving custody and access matters involved court applications over access enforcement in 1996 and 1997 (105,234 total divorce applications, of which 21,897 involved custody and access issues, of which approximately 2,000 involved applications over access enforcement): Family Law Council of Australia, "Interim Report: Penalties and Enforcement" (March 1998) at paras. 2.06 & 3.06. Michigan's Friend of the Court Office, a body charged with access enforcement, shows 2,639 parenting time petitions out of a total of 23,682 filed (11%) for 2003: State Court Administrative Office, "Friend of the Court – Petition Activity," Friend of the Court Statistics 2003 at 30, online: http://courts.michigan.gov/scao/resources/publications/statistics/foccaseloadreport2003.pdf (last accessed: February 23, 2007).

[5] See, for example, two research reports commissioned by the Department of Justice Canada: Dr. Martha Bailey, "Overview and Assessment of Approaches to Access Enforcement," (2001) at 11 and Pauline O'Connor, "Child Access in Canada: Legal Approaches and Program Supports," (2002) at 9. Both reports are available online at: http://canada.justice.gc.ca/en/ps/pad/reports/index.html (last accessed: February 23, 2007).

[6] "Interlocutory" means: "Provisional; interim; not final. ... An interlocutory order...is one which does not finally determine a cause of action but only decides some intervening matter pertaining to cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Black's Law Dictionary*, 6th ed., *s.v.*, "Interlocutory".

[7] *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3.

[8] The Family Justice Reform Working Group report describes a parenting co-ordinator as a highly trained mental health professional, mediator or family law lawyer who is appointed by a judge to help parents resolve parenting disputes, provide education and advice, and with the prior approval of the parents and the judge, make decisions within the scope of the order of appointment: Family Justice Reform Working Group, *supra* note 2 at 73.

[9] Judge Peter Boshier, "Parenting Hearing Programme – Less Adversarial Children's Hearings," speech to Auckland Family Courts Association, Novotel, Ellerslie, Auckland (14 September 2006), online: http://www.courts.govt.nz/family/publications/speeches-papers/default.asp?inline=auckland-family-courts-association-september-2006.asp (last accessed: February 23, 2007) & New Zealand Family Courts, "Parenting Hearings Programme – What this new Family Court process means for you and your children," (brochure), online: http://www.justice.govt.nz/family/pdf-pamphlets/courts085.pdf (last accessed: February 23, 2007).

[10] *Family Law Act 1975*, CWTH, s. 65DA [Australia] & *Care of Children Act 2004*, s. 55 [New Zealand].

[11] Family Justice Reform Working Group, *supra* note 2 at 10.

[12] *Offence Act,* R.S.B.C. 1996, c. 338, s.4.

[13] Australia, *supra* note 10, Part VII (Children), Division 13A; New Zealand, *supra* note 10, ss. 68-71, 73, 78-79 & 142; *Arizona Revised Statutes*, 25-414; California's *Code of Civil Procedure*, s. 1218; *Colorado Statutes*, 14-10-129.5; Michigan's *Support and Parenting Time Enforcement Act*, Act No. 295 of 1982, 552.644; 1998 *Oregon Revised Statutes*, 11-107.434; and *Utah Code*, 78-32-12.1.

[14] See *Children and Adoption Act 2006*, 2006, c. 20, Part 1 (given Royal Assent on 21 June 2006 but not yet brought into force).

[15] Eight jurisdictions – Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, P.E.I., and the Yukon – have apprehension orders in their family statutes as an access enforcement remedy: *Family Law Act*, S.A. 2003, c. F-4.5, ss. 40(2)(f) & 44 [Alberta]; *Children's Law Act, 1997*, S.S. 1997 c. C-8.2, s. 24 [Saskatchewan]; *Child Custody Enforcement Act*, C.C.S.M. c. C360, s. 9 [Manitoba]; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 36 [Ontario]; *Family Services Act*, R.S.N.B. 1980, c. F-2.2, s. 132.1 [New Brunswick]; *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 43 [Newfoundland and Labrador]; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 21 [P.E.I.]; & *Children's Act*, R.S.Y. 2002, c. 31, s. 46 [Yukon].

[16] Alberta, *ibid.*, ss. 40 & 41; Saskatchewan, *ibid.*, ss. 24, 26-29; Manitoba, *ibid.*, ss. 9, 14 & 14.1; Newfoundland and Labrador, *ibid.*, ss. 41 & 43; *Children's Law Act*, S.N.W.T. 1997, c. C.14, s. 30 [N.W.T.] & *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. C.14, s. 30 [Nunavut].

[17] Ontario, *supra* note 15, s. 34a.

[18] Security means paying money into court. If the parent violates the access order again, he or she loses the money.

[19] Government of Australia's Family Relationships Online, "Fact Sheet No. 3 – Additional Services for Families," at 2 online: http://www.familyrelationships.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~FactSheet_3.pdf/$file/FactSheet_3.pdf (last accessed: February 23, 2007).

[20] According to the House of Commons, Hansard Written Answers for 10 November 2004 (pt 22), £2.5 million was spent to develop 14 new supervised contact centres. In the 2 March 2006 Debates, the figure cited was £2.4 million (pt 12). See UK, H.C., *Written Answers*, Vol. 426, col. 757W (10 November 2004) & UK, H.C., *Debates*, Vol. 443, col. 419 (6 March 2006).

[21] UK, H.C., *Debates*, Vol. 443, col. 419 (6 March 2006).

[22] Sylvie Lachance, "Rapport du comite interministeriel sur les services de supervision des droit d'access," *Advocate* (Fev. 2004) at 14.

[23] For example, a QuickLaw search revealed only one reported case decided under Alberta's legislative access enforcement regime, 14 under Saskatchewan's, and one from Newfoundland and Labrador: *S.J.S. v. M.W.S.*, 2005 ABQB 817; *Jarocki v. Callaghan*, [1996] S.J. No. 206 (Q.B.) (Q.L.); *Paul v. Pisio*, [1998] S.J. No. 243 (Q.B.) (Q.L.); *R.L.G. v. S.A.F.*, [1999] S.J. No. 507 (Q.B.) (Q.L.); *D.A.L.(F.) v. D.A.L.*, 2003 SKQB 132; *Flood v. Flood*, 2005 SKQB 475; *R.F. v. O.B.*, 2006 SKQB 496; *Longeau v. Longeau*, 2001 SKQB 533 (Q.B.) (Q.L.); *Simpson v. Simpson*, 2002 SKCA 97; *Kerfoot v. Pritchard*, 2005 SKQB 63, appeal dismissed 2006 SKCA 22; *Sikler v. Snow*, 2000 SKQB 189; *Tubello v. Tubello*, 2000 SKQB 276; *Weiman v. Liske*, 2003 SKQB 4; *Berg v. Bruton*, 2006 SKQB; *Mercer v. Mercer*, 2006 SKQB 381 & *Drake v. Cox*, [1993] N.J. No. 40 (Prov. Ct.) (Q.L.).

There were no reported cases from Manitoba, the Northwest Territories or Nunavut.

[24] Helen Rhoades *et al.*, "The Family Law Reform Act 1995: The First Three Years," (Dec. 2000) at 9, available online: http://www.familycourt.gov.au/presence/resources/file/eb0011059e844c8/famlaw.pdf (last accessed: February 23, 2007).

[25] *Ibid.*

[26] Saskatchewan, *supra* note 15, s. 26(3).

[27] Alberta, *supra* note 15, s. 40(6).

[28] Australia, *supra* note 10, ss. 70NDA & 70NDB.

[29] New Zealand, *supra* note 10, s. 50(1).

[30] Family Law Institute, "What is Parenting Coordination?" (July 13, 2004) at 2, online at www.ottawalawyer.net/images/ParentingCoordinationarticle.pdf, (last accessed: February 25, 2007).

[31] Family Justice Reform Working Group, *supra* note 2 at 75.

[32] Barbara Ann Bartlett, "Parenting Coordination: A New Tool for Assisting High-Conflict Families," Oklahoma Bar Journal Articles (Feb 14, 2004) at 3, online: http://www.okbar.org/obj/articles_04/021404.htm (last accessed: February 25, 2007) & Marin County Task Force on Special Masters, "Marin County Special Master Program – Recommended Special Master Credentials and Qualifications," (1995).

[33] See discussion in Christine A. Coates *et al*, "Parenting Coordination for High-Conflict Families," (April 2004), 42 *Fam. Ct. Rev.* 246 at 254 & Family Law Institute, *supra* note 30 at 5-7.

[34] Family Law Institute, *ibid.* at 5-6.

[35] "The Functions of the Parenting Coordinator" taken from *Working with High-Conflict Families: A Practitioner's Guide* by Mitchell Baris et al. (2001), Northvale, New Jersey: Jason Aronson Inc.

[36] Family Law Institute, *supra* note 30 at 6.

[37] *Ibid.* at 6-7.

[38] *Colorado Statutes*, 14-10-128.3, s. 4(b).

[39] California *Code of Civil Procedure*, 638-645.2 & 1285-1287; *Arizona Rules of Family Law Procedure*, Rule 74; *Colorado Statutes*, 14-10-128.1 to 128.5; and *Oregon Revised Statutes*, 11-107.425(3).

[40] Judge Arline Rotman, (Ret.), "Parenting Coordination: Facts & Pending Legislation," Winter 2004, Vol. 3 No. 1, *Fam. Med. Q.* 17 at 18.

[41] Australia, *supra* note 10, s. 70NEB(1)(g).

[42] *Black's Law Dictionary*, 6th ed., *s.v.*, "Vexatious proceeding".

[43] Australian Law Reform Commission, "For the Sake of the Kids: Complex Contact Cases & the Family Court," Report No. 73 (1995), Recommendation 5.7.

[44] *Supreme Court Act*, R.S.B.C. 1996, c. 443, s.18.

[45] *Support and Parenting Time Enforcement Act*, Act 295 of 1982, 552.641, Sec. 41(2)(a).

[46] Newfoundland and Labrador, *supra* note 15.

[47] "Bad faith" means: "The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty... it implies the conscious doing of a wrong because of dishonest purpose..." *Black's Law Dictionary*, 6th ed., *s.v.*, "Bad faith".

[48] Ontario, *supra* note 15, s. 34a(13).

[49] *Support and Parenting Time Enforcement Act*, Act No. 295 of 1982, 522.644, Sec. 44(6).

[50] *Ibid.*, Sec. 44(8).

[51] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 282 & 283.

[52] *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89.

[53] *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for Protection of Children*, 19 October 1996, 35 I.L.M. 1391.

[54] Section 35 (4) of the *Family Relations Act*, *supra* note 1 is a general provision providing that: "An order for custody or access may include terms and conditions the court considers necessary and reasonable in the best interests of the child."

[55] Saskatchewan, *supra* note 15, ss. 6(5) & (6); Alberta, *supra* note 15, s. 33 (2).

[56] Manitoba, *supra* note 15, s. 10; Ontario, *supra* note 15, s. 37; *New Brunswick*, *supra* note 15, s.132.2; P.E.I., *supra* note 15, s. 22; Newfoundland and Labrador, *supra* note 15, s. 45; Yukon, *supra* note 15 s. 47; N.W.T., *supra* note 16, s. 32 (3); & Nunavut, *supra* note 16, s. 32(3).

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 8

# Children's Participation

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

### The *Family Relations Act* Review & The 2005 Report of the Family Justice Reform Working Group

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*[1]. While it is recognized that legislation is only one piece of the puzzle when it comes to helping families navigate separation or divorce, the focus of this paper, and the others in this series, is law reform.

When parents separate, decisions have to be made that will have significant impacts on their children: this paper is a search for ways to involve children and young people in those decisions. This is sometimes called "voice of the child" although this paper calls it "children's participation". Both expressions simply mean giving children a say.

This paper also takes into account other recent work in the area of family justice, such as the 2005 report of the Family Justice Reform Working Group to the B.C. Justice Review Task Force. By way of background, that Task Force was established by the Law Society of B.C. in March 2002 to examine possible reforms to B.C.'s justice system that could make it more responsive, accessible and cost-effective. The Task Force appointed four working groups, one of which–the Family Justice Reform Working Group–suggested reforms to the Province's family justice system. The final report of the Family Justice Reform Working Group is entitled "A New Justice System for Families and Children" and is available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf

The chief recommendation of the Working Group's report was to replace the family justice system's adversarial, litigation-based framework with a comprehensive system of dispute resolution.[2] In terms of the voice of the child, the Working Group suggested that: "all participants in the family justice system find better ways to discover children's best interests and to make them a meaningful part of family justice processes."[3]

This paper also takes into account a project called Meaningful Child Participation in BC Family Court Processes, an initiative of the University of Victoria's International Institute for Child Rights and Development (IICRD). In August 2006, the Institute released a report entitled: *Through the Eyes of Young People: Meaningful Court Participation in BC Family Court Processes*, available online at: http://www.iicrd.org/familycourt/. This project has resulted in the development and trial of an interview process to be used with children in court cases about custody and access arrangements. The IICRD started to pilot its interview model in October, 2005 in Kelowna. An evaluation of that pilot project is planned.

This paper is divided into five sections. The first four sections discuss the voice of the child in relation to: general reforms of the *Family Relations Act*; consensual dispute resolution; family litigation; and parenting disputes after an order has been made. The final section of the paper provides an opportunity for you to highlight what you feel are the most pressing issues and identify any issues that are not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

A separate background paper contains more detailed information on the voice of the child. See background paper. If you wish to see any of the laws in this paper please refer to the following link to Legislation.

## The Evolving Legal Framework

Over time, the law has developed different approaches to children. Traditionally, it has viewed them as objects of concern. Since the late 1600s, its focus has been protecting children and safeguarding their best interests.[4] Some academics, including Australian Nicola Ross, whose research interests at the University of Newcastle include children's participation in the legal process, have commented that such an approach is adult-oriented. "'Best interests,'" she writes, "is fundamentally about expert, adult interpretations of what is best for children."[5] Others say the best interests' discourse historically paints children "as lacking capacity to participate on the grounds of immaturity, irrationality, and incompetence and as participating in the legal system only as part of a wider family identity."[6]

More recently, the law has taken a rights-based approach to children, considering the voice of the child as a human rights issue.[7] In human rights law, voice itself is seen as a human rights issue:[8] a denial of a voice in decisions that affect one's life is seen as a denial of the opportunity for meaningful participation and, ultimately, a denial of one's personhood.

The challenge is to integrate these two strands of the law that have developed at different times. There may be a tension at times between the two, but they are not mutually exclusive.

Indeed, the United Nations *Convention on the Rights of the Child*[9] embodies both. Article 3 requires states to act in 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.*

However, as its name suggests, the convention clearly entrenches a rights-based approach as well. In particular, Article 12 (set out below under Discussion Point (2)) guarantees children the right to have a voice in relation to decisions that affect them.

Canada ratified the *Convention on the Rights of the Child* in 1991.[10] However, ratification does not mean that the Convention became part of Canadian law directly. To have full effect, it must be implemented, or woven into, the relevant federal, provincial and territorial laws and policies.

British Columbia's *Family Relations Act* contains two relevant provisions. The first is s. 24, which makes the views of the child an explicit factor in the best interests test governing custody, access and guardianship applications:

> *Part 2 – Child Custody, Access and Guardianship*
>
> *****
>
> *24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:*
>
> *****
>
> *(b) if appropriate, the views of the child;*

Second, s. 30 requires the written consent of a child older than 12 before a court can appoint a guardian for that child. (The court may override the need for the child's consent if it is in the best interests of the child to do so.) Section 30 says:

> *30 (1) Subject to this Act, a court may, on application,*
>
> *(a) appoint a guardian . . .*

> *(2) If a child is over 12 years of age, a court must not make or give effect under subsection (1) to an appointment unless*
>
> *(a) the child consents in writing to the appointment, or*
>
> *(b) if the child withholds consent to the appointment, the court is satisfied that the appointment is necessary in the best interests of the child . . .*

## The Evolving Social Science Research

Traditionally, it was assumed that children's views and interests were adequately represented by their parents. A related belief was that if children could be insulated from post-separation decision-making, they could be protected from the turmoil of their parents' relationship breakdown.[11]

Social science research is beginning to cast doubt on these assumptions. It shows that in the midst of the pain of separation and divorce, parents may not be well placed to adequately represent the views and interests of their children. Parenting capacity dips in the face of the parents' own process of post-separation adaptation.[12] Some parents, particularly those locked in bitter conflict, may lack the ability to separate their children's interests from their own.[13] Other parents may simply be ignorant of their children's feelings, or at least the true extent of them.[14]

Research also reveals that not listening to children may cause more harm than not. There is a link between positive mental health and perceived control over decisions.[15] Further, being kept in the dark may increase children's stress levels.[16] In the absence of information, they may fill the gaps in their understanding[17] with erroneous interpretations of the changes in their family: they may imagine, for example, that the parent who left no longer loves them[18] or that they themselves caused the break up.[19]

## Ongoing Debate

The debate about children's roles in post-separation decision-making has shifted from whether children ought to have a voice to how this goal ought to be achieved. On this, there is a wide range of views. For example, some judges support the use of judicial interviews in appropriate circumstances, particularly with respect to older children.[20] Other judges view these as problematic and potentially in conflict with the judge's role as an impartial trier of fact.[21] Some in the family justice system believe that inquiring too directly as to a child's views may cause loyalty conflicts and anxiety.[22] In contrast, psychologist Joan Kelly, with over 35 years of expertise in interviewing children, writes: "The caution against not asking children to choose has led to a systematic failure to consult children about any aspects of divorce decisions that markedly change their lives and have long-term consequences."[23]

Legal representation for children is approached in different ways in different parts of the world. Publicly funded legal representation is routinely available to children in contested cases in New Zealand, whereas in England appointment of lawyers for children is seen as an extraordinary step, appropriate for only the most difficult cases.[24] Nor is there agreement as to what role children's lawyers should play.

Until recently, discussions centred mainly on court proceedings. The larger question is how to integrate children's voices into all aspects of the family justice system.

## A Snapshot—Voice of the Child & Post-separation Decision-making in B.C.

Although most post-separation decisions are made outside of court, little is known about how or whether children are involved at the front end of the family justice system in B.C.; that is, at the stages of obtaining information, informal discussions or negotiations within the family, or early

consensual dispute resolution. There have been no comprehensive studies on this point. Nor is there a specific legal duty on parents under the *Family Relations Act* to consider their children's views when making decisions that will affect them.

General information about separation and divorce is available to young people in B.C. through two online guidebooks: *A Kids' Guide to Separation and Divorce* and *A Teen Guide to Parental Separation and Divorce*. (See http://www.familieschange.ca.)

Traditionally, young people have not involved in publicly funded family (separation and divorce) mediations in B.C. Starting in mid- to late- May 2007, Family Justice Services Division of the Ministry of Attorney General, the department that oversees public sector family justice programs and services, plans to pilot child-inclusive mediation in several Family Justice Centres across B.C.

If a family dispute goes to court, young people's voices are most often heard indirectly through written reports authorized under s. 15 of the *Family Relations Act*. These may take the form of full custody and access assessments, or more focussed "views-of-the-child" reports. As well, some B.C. judges and masters (other court-based decision-makers) interview children as a means of obtaining their views.

Further information about family justice programs and services is available in a separate paper on that topic. See Chapter 5.

## Possible Voice-of-the-Child Mechanisms

The background research conducted for this discussion paper revealed an array of voice-of-the-child mechanisms, including:

1. the provision of child-friendly information about the family justice system generally, and about the specific case involving the child;
2. linked parent education and children's programs that contain a voice-of-the-child element (for example, the children write a group letter to the parents, setting out their experiences);
3. child-inclusive mediation, which could involve:
    - a youth's direct participation in the mediation session;
    - a youth's direct participation in the mediation session, with the help of a support person; or
    - a child's or youth's views being sought and fed back into the mediation session.
4. children's participation in collaborative law practice, including the use of child specialists to interview children and feed back their views into the collaborative sessions.
5. written reports and assessments, such as views-of-the-child reports or custody and access assessments;
6. legal representation for children;
7. opportunities for children's direct evidence, which may take the form of:
    - oral testimony in court;
    - oral testimony provided via closed circuit television;
    - a judicial interview, outside the courtroom;
    - a videotaped statement; or
    - a written statement, that may include:
        - a letter to a judge;
        - a fill-in-the-blank court form;

- a verbatim statement of the child's responses to interview questions; or
- an affidavit.

8. the adoption of a special (less adversarial) hearing format for family cases involving children; and
9. the use of parenting co-ordinators to resolve disputes that arise after an agreement or court order has been made, with authority to speak directly with children in fulfillment of their duties.

## DISCUSSION

## PART A – GENERAL AMENDMENTS TO THE FAMILY RELATIONS ACT

### *Discussion Point (1) – Persons Making a Major Decision Affecting a Child*

Section 24 of the *Family Relations Act* speaks to the court's duty to consider the views of the child, if appropriate, when making decisions about custody, access, or guardianship, but it does not place a similar duty on parents.

In contrast, s. 6 of Scotland's *Children (Scotland) Act 1995* places a legal duty on anyone making a major decision about a parental right or responsibility to "have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity . . ." The Scottish law does not distinguish between decisions made inside or outside court.

*QUESTION*

1. Should the *Family Relations Act* be amended to require any person making a major decision involving a child to consider the child's views, provided the child is capable of forming views and wants to share them?

### *Discussion Point (2) – Children's Rights*

Article 12 of the U.N. *Convention on the Rights of the Child* heralds a rights-based approach to children's participation in matters that affect them. It reads as follows:

> 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.*

There are two different kinds of family cases within the family justice system: private and public. Private family cases deal with questions that arise due to separation and divorce (e.g. custody and access arrangements). In public family cases, the Province has intervened in a family to ensure that children are kept safe, such as in situations of child neglect or abuse. Both respond to issues that directly affect children's lives, such as where the children will live, and who will care for them.

Even though B.C.'s child protection statute, the *Child, Family and Community Service Act* (CFCSA), has developed in a very different context from the *Family Relations Act*, it has express opportunities for children and youth to have a voice in decisions that will affect them. For example, the CFCSA refers explicitly to the children's rights, including the right "to be consulted and to express their views, according to their abilities, about significant decisions affecting them"

and "to be informed of their rights, and the procedures available for enforcing their rights."[25] In addition, the CFCSA guarantees children over 12 years of age certain procedural rights, such as notice of various hearings.[26]

Article 34 of Québec's *Civil Code* also gives children a right to be heard in family cases:

> *Art. 34. The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.*[27]

As a result of article 34, young people in Québec are more likely to testify in family law proceedings than elsewhere, albeit with the benefit of modified procedures:

- The judge screens the questions the parents plan to ask the child.
- At the hearing, the questions are asked by either the judge or the children's lawyer rather than by a parent's lawyer (or a parent).
- Parents may be excluded from the courtroom during a child's testimony.[28]

The *Family Relations Act* takes a different approach to the issue of children's voices. Section 24, which sets out the best interest factors judges must consider when making decisions about custody, access or guardianship, requires that children's views be considered "if appropriate." In other words, it is not automatic for children's views to be included. A judge must first decide it is appropriate to do so.

Regardless of the legislative wording, it should be noted that providing children and youth with a voice under family legislation does not mean asking what they want and then granting their wishes. As child participation expert, Joan Kelly, writes:

> *It should be stressed that children's participation in divorce and custody processes is generally viewed as an opportunity for relevant input from children, but not actual decision-making, which may create stress and compromise parent-child relationships. Children not only understand the difference between expressing their thoughts and making final decisions, but most state that they do not want to make autonomous choices.*[29]

### *QUESTIONS*

2. Does s. 24 of the *Family Relations Act* adequately reflect article 12 of the U.N. *Convention on the Rights of the Child*?
3. If not, what is needed?

## *Discussion Point (3) – Views of Mature Children*

The wishes of older children are often highly influential in custody and access applications, in part, because of the ability of these young people to vote with their feet. That said, the *Family Relations Act* does not set a threshold age at which a child's views must be given greater weight or become determinative. For example, although s. 30 refers to the written consent of children over 12 years in applications to appoint guardians other than the child's parents, the consent requirement may be overridden if "the court is satisfied that the appointment is necessary in the best interests of the child."[30]

Other Canadian family statutes also refer to the consent of children 12 and older. For example, under Alberta's *Family Law Act*, a guardianship order requires the consent of children 12 years or older,[31] although as in B.C., the judge can dispense with the consent requirement if "satisfied that there are good and sufficient reasons for doing so."[32] Saskatchewan's *Children's Law Act, 1997* requires the consent of a child 12 years or older for an order appointing a guardian of the child's property.[33] The Northwest Territories' and Nunavut's family laws require the consent of a

child 12 years and older for an order approving the disposition or encumbrance of the child's property.[34]

Special provision for decisions involving older children can also be found in the family statutes in other countries. For example, s. 50 of New Zealand's *Care of Children Act 2004* says that custody orders must not be made for children 16 or older, unless there are special circumstances.[35]

**QUESTIONS**

4. Should the views of mature children ever be determinative of custody, access or guardianship decisions under the *Family Relations Act*? If so, under what circumstances?

## PART B – CONSENSUAL DISPUTE RESOLUTION

### *Discussion Point (4) – Children & Mediation*

Traditionally children and young people have not been included in *Family Relations Act* mediations conducted by Family Justice Counsellors. However, in the spring of 2007, Family Justice Services Division plans to pilot child-inclusive mediation in several Family Justice Centres across B.C., including the pilot Family Justice Services Centre (called the Family Justice Information Hub in the Family Justice Reform Working Group report) in Nanaimo. For more information about family justice services in B.C. or about the Nanaimo pilot, please refer to Chapter 5.

In its 2005 report, the Family Justice Reform Working Group recommended mandatory dispute resolution for all family cases, including applications for custody, guardianship and access.[36] The Working Group spoke highly of mediation's potential for bringing children's voices to the fore. The report said: "Mediation can offer a forum where parents can more easily hear their children's concerns and take them into account in their agreements. Mediators need to be trained to involve children in the process in appropriate ways."[37]

Child-inclusive practice has developed somewhat differently in child protection mediations than *Family Relations Act* mediations. In the last decade, child protection mediators, who are lawyers and others in private practice under contract with the Province, have explored various practices to facilitate children's voices in child protection mediations, including:

- reading a letter written by the child at the outset of the mediation;
- interviewing the child separately before the mediation, to obtain the child's views; and
- inviting the young person to participate in the mediation session directly, with the help of a support person.[38]

Family policy in other jurisdictions is also increasingly focussed on the development of appropriate ways to involve children and youth in mediation. Australia, in particular, has been active in this field. It began piloting child-inclusive mediation nearly a decade ago.[39] The main innovation of its pilot was the introduction of a children's interview into the process. Subject to a confidentiality policy, information from the children was gathered in the interview and fed back into the mediation. Children's needs were listed on a whiteboard along with those of the two parents. The mediator was then responsible for integrating the third agenda, the children's agenda, into subsequent mediation sessions.[40]

In lower conflict separations, the same person could both interview the child and conduct the mediation. In medium to high conflict families, separate mediators were used.[41]

An early evaluation of the Australian pilot reported favourable outcomes. Over 80% of parents whose children participated in the pilot reported that their children had benefited "a great deal" from the new model of mediation while only 4% said there had been no benefit. In contrast, among the control group, who participated in traditional mediation where children were not

interviewed, 42% said the mediation had been of no benefit to their children, and only 20% said their children had benefited "a great deal."[42]

The use of child-inclusive mediation continues to expand in Australia.[43] A detailed study of comparative outcomes of traditional family mediation and child-inclusive mediation is now underway.[44]

In England, child-inclusive mediation is now available in a handful of cities, including Leeds, Derbyshire, and London.[45] Government officials and mediation providers in England have expressed keen interest in the Australian program and ongoing research.[46] Opportunities for collaboration between Australian and English researchers are being considered.[47]

In Scotland and in California, child-inclusive practice is also a part of family mediation services.[48] Indeed, Drs. Janet Johnston and Joan B. Kelly, from California, provided input into the development of the Australian child-inclusive mediation program.[49]

Child-inclusive mediation practice is also being piloted in Auckland, New Zealand.[50] A recent research report that looked at 17 families with 26 children aged 6 to 18 years of age[51] who participated in the child-inclusive model reported favourable findings, including: an increased opportunity for children to have a voice in post-separation negotiations and planning;[52] high satisfaction levels among children and parents;[53] easier adaptation on the part of children to their parents' separation or divorce;[54] and reduced conflict between parents.[55]

*QUESTIONS*

5. Have you had experience involving children in family mediations, and if so, how were they involved?
6. If you have had such experience, what worked about the mediation sessions? What did not?

## PART C – FAMILY LITIGATION

### *Discussion Point (5) – Automatic Voice-of-the-Child Mechanisms*

Although children's views are an explicit factor in the best interests' test that governs custody, access and guardianship applications under s. 24 of the *Family Relations Act*, the *Act* does not guarantee young people an opportunity for direct input, should they want it. Stated differently, filing a family law application involving children does not automatically trigger a voice-of-the-child mechanism.

Under Scottish court rules, an application for an order relating to parental responsibilities or rights, guardianship or the administration of a child's property triggers an obligation to provide notice to the affected child.[56] This notice, called an "intimation," is carried out through an F-9 Form (a copy of which is attached as Appendix A to this paper). In addition to notifying the child that a major decision involving him or her is about to be made, it invites the child's views about his or her future.[57]

If the child submits that form, indicating a desire to be heard, the court may not make an order until the child has had the opportunity to express his or her views, and the court must attach due weight to them.[58]

Scottish children are eligible to receive publicly funded legal assistance to help complete the F-9 Form.[59] If a child needs help finding a lawyer, the Scottish Child Law Centre, a non-profit organization based in Edinburgh, offers a referral service.[60]

The pilot project in Kelowna led by the University of Victoria's International Institute of Child Rights and Development is also examining the use of children's statements in family law proceedings. The pilot, which began in October 2005 as part of the Institute's project on Meaningful Child Participation in BC Court Processes, involves recording children's replies to questions posed in an intake interview.

Participation in the Kelowna project is voluntary. If the parents, their lawyers, the child, and the decision-maker agree to participate, an interviewer (a family lawyer or counsellor) is selected from a roster. With an observer present, the interviewer meets with the child and records the child's views word-for-word in response to the intake questionnaire. The resulting verbatim statement is then provided to the decision-maker.[61] The Institute will report its findings once the program concludes.

### *QUESTIONS*

7. Should the filing of an application for custody, access or guardianship under the *Family Relations Act* automatically trigger a child's right to have his or her views considered?
8. If so, what kind of practice would be helpful?

   ☐ fill-in-the-blank court forms for children

   ☐ interviews with children, where their responses are recorded

   ☐ written reports or assessments

   ☐ other: _____
9. If so, when should it take place—for example, upon filing? before mediation is attempted? when a trial is scheduled?

## *Discussion Point (6) – Expert Witness Reports*

There are a variety of expert witness reports referenced under s. 15 of the *Family Relations Act*. These reports are both publicly and privately funded. Publicly funded s. 15 reports, prepared by Family Justice Counsellors, include full custody and access reports or more focussed, briefer views-of-the-child reports that addresses one or two issues, such as the child's views on where he or she wishes to live. There are also various kinds of s. 15 reports that parents can retain professionals in private practice to prepare, including reports that contain psychological testing or home studies. Section 15 reports are a common way in B.C. to put children's views before a judge in *Family Relations Act* cases.

Currently, 10% of Family Justice Counsellor resources go towards preparing s. 15 reports and 90% to dispute resolution services. Demand for publicly funded s. 15 reports consistently outstrips resources, and delays result. Because of the delay, some families pay for private-sector s. 15 reports even though these are costly.

In Ontario, staff at the Office of the Children's Lawyer in the Ministry of the Attorney General prepare publicly funded assessments and reports in disputed custody and access cases. Staff have a greater role in deciding which publicly funded service will be provided to a particular family than do their B.C. counterparts. Under the Ontario model, the court requests the assistance of the Office of the Children's Lawyer, but that office must consent, and will decide what professional service will be offered to the family.[62] Thus, for example, staff at the Office of the Children's Lawyer may decline to complete a full custody and access report if the family has not first tried mediation.

In contrast, in B.C., it is the judge who decides whether a s. 15 report is necessary and also the judge who may specify which kind of s. 15 report –full custody and access assessment, for instance– is to be prepared. With respect to publicly funded s. 15 reports, Family Justice

Counsellors are not able to prioritize the s. 15 report orders or suggest what would be the most appropriate service. Family Justice Counsellors must complete the report in the fashion outlined in the order and cannot recommend another kind of report (for example, a views-of-the-child report rather than a full custody and access report) or even a different kind of service such as mediation.

### *QUESTIONS*

10. Are s. 15 reports a valuable way of putting children's views before a judge?
11. If you are a professional with experience using s. 15 reports, do you find them more useful in certain kinds of cases than in others? Please explain your answer.
12. Regarding publicly funded s. 15 reports, should the *Family Relations Act* be amended to leave it up to those providing the family justice services to determine which kind of report is most appropriate for a particular family or should this remain a decision for the judge?

## *Discussion Point (7) – Legal Representation*

Legal representation is another way to ensure that children's views come before the court. There are at least three different roles for a lawyer in children's cases:

- *amicus curae*, or "friend of the court," who acts for the court to ensure that the judge has the benefit of the most complete information upon which to make a decision;[63]
- best interests' lawyer, who advocates the position that he or she believes is in the best interests of the child, although the child may not necessarily agree;[64] or
- the traditional advocate's role, with the child instructing the lawyer, and the lawyer advocating on the basis of those instructions.[65]

British Columbia's system of legal representation of children is premised on a best interests' model. Section 2 of the *Family Relations Act* contemplates the appointment of a Family Advocate to represent "the interests and welfare of the child." However, that program is no longer funded.

Of the international jurisdictions canvassed for this paper, New Zealand offers the most extensive legal representation for children in family disputes. Section 7 of its *Care of Children Act 2004*, requires the appointment of counsel in custody and access cases unless "the appointment would serve no useful purpose." Consequently, children's lawyers are the most common voice-of-the-child mechanism in New Zealand.[66]

New Zealand uses two types of legal representatives for children: children's lawyers, and counsel to assist the court. Children's lawyers bring the views and wishes of the child before the court and are under a further duty to inform the court of "other factors that impact on the child's welfare".[67] A 2001 Practice Note instructs them to try to resolve any conflict between the child's views and his or her best interests. If this cannot be done, the children's lawyer may advocate the child's wishes, but invite the court to appoint a second lawyer (counsel to assist the court) to argue the best interests issue.[68] So, for example, if a child's wish is to remain in a situation that is clearly unsafe, the children's lawyer will talk this over with her and point out that this living arrangement is likely not in her best interests. If the conflict cannot be resolved, then the children's lawyer would invite the court to appoint a second lawyer who would argue that the arrangement preferred by the child would not be in that child's best interests.

Theoretically, the costs of children's legal representation, which are paid by the New Zealand Family Court, may be recovered from the parties.[69] Nevertheless, considerable public resources are invested in the program.[70]

Australia's system is the mirror opposite of New Zealand's. It, too, contemplates publicly appointed legal counsel for children and has potentially two different kinds of children's lawyers: child representatives and direct representatives. However, the starting point under ss. 68L and 68LA of the *Family Law Act, 1975* is best interests' advocacy. The appointment of a direct representative for the child is possible only in limited circumstances. The Family Court of Australia's 2003 Guidelines for the Child Representative state:

> *...where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court. . . .*

Although children's representatives are not appointed in every contested family case in Australia, appointments have been on the rise since the High Court's 1994 decision in the case called *Re K*. That decision sets out a list of some of the circumstances that would justify the appointment of a children's representative, including: cases of alleged abuse; intractable conflict between the parents; or alienation of the child from one or both parents. By 2002-03, children's representatives accounted for 10.6% of the total family legal aid budget.[71]

As in New Zealand, the costs of children's legal representation in Australia do not necessarily fall entirely to the public purse. In 2003, Parliament amended the *Family Law Act, 1975* to permit orders for contribution from the parents "in such proportion as the court considers just." The *Act* specifies that such an order cannot be made against a legally aided party or against a person who would otherwise suffer financial hardship.[72]

In England, separate representation for children is possible under Rules 9.2 and 9.5 of the *Family Proceedings Rules 1991*. According to a recent consultation paper prepared by the Department for Constitutional Affairs, "Rule 9.2A allows competent children of sufficient age and understanding to participate in proceedings without a guardian, and Rule 9.5 provides for separate representation where a child has been made a party to the proceedings."[73] A young person's access to Rule 9.2A depends, however, on either the court granting leave, or the lawyer's assessment "that the minor is able, having regard to his understanding, to give instructions in relation to the proceedings."[74]

Appointments of *guardians ad litem* (litigation guardians)[75] under the English Rule 9.5 are on the rise. Because there was concern about the "excessive use"[76] of the rule in some areas, the President of the Family Division issued a practice direction in 2004 to limit appointments to cases involving issues of "significant difficulty," including cases in which serious abuse is alleged; where there are mental health issues; or where there is an intractable dispute over residence or contact.[77] The primary focus of a *guardian ad litem* is to advocate for the welfare of the child.[78]

As noted above, England is currently reviewing its court rules relating to legal representation of children. Its consultation process ended on December 8, 2006.[79]

Scotland, too, offers children and youth Legal Aid to obtain lawyers in connection with family cases.[80] Normally, it is children 12 years and older who are eligible for publicly funded legal representation.[81] However, when Scotland introduced the *Children (Scotland) Act 1995*, it also amended the *Age of Legal Capacity (Scotland) Act 1991*, to recognize a child's capacity to instruct a lawyer so long as the child "has a general understanding of what it means to do so."[82] Thus, children under 12 years are not precluded from seeking publicly funded legal assistance.

Ontario's Office of the Children's Lawyer employs both social workers and lawyers who work together closely. In custody and access cases, that Office either provides a lawyer for the child or prepares a report by a social worker, or, in exceptional circumstances, both.

***QUESTIONS***

13. Is separate legal representation an effective way to ensure children's voices are heard in decisions that will affect them?
14. If so, what role should these lawyers play?
    - ☐ friend of the court
    - ☐ best interests' advocate,
    - ☐ traditional advocate, or
    - ☐ other.
15. Should the *Family Relations Act* be amended to permit courts to allocate the costs of children's legal representation between the parties, or to recover those costs from the parties?
16. What is your opinion on Ontario's multidisciplinary approach to disputed custody and access cases (i.e. social workers and lawyers working together)?

## Discussion Point (8) – Less Adversarial Hearings: The Children's Cases Model

Much of the concern about children's direct involvement in family proceedings relates to the adversarial nature of litigation. There is widespread concern that involvement in adversarial proceedings can be disturbing for children and can adversely affect their relationships with one or both parents.[83]

Australia has recently introduced a different, less adversarial, format for family law cases involving children. What began as the Children's Cases Pilot Project in the Family Court registries of Sydney and Parramatta in 2004 has now been included in Australia's *Family Law Act, 1975*.[84]

The new format has a much more active role for judges in the hearings. The judge, rather than the parties, determines:

- the issue(s) in dispute;
- the evidence to be called; and
- the manner in which the evidence is to be received.[85]

There are other departures from the traditional hearing format as well:

- The focus is on the future rather than the past.[86]
- The atmosphere is informal—for example, counsel do not wear robes,[87] nor are there formal requirements as to where lawyers should sit in the courtroom relative to parties.[88]
- There may be direct discussions between the judge, the parties, and the parties' lawyers – as opposed to the usual pattern of direct examination by one lawyer followed by cross examination by the other lawyer.[89]
- The judge has authority to dispense with the traditional rules of evidence, including those governing hearsay or opinion evidence.[90]
- The judge may decide individual issues at any point during the hearing rather than giving a comprehensive judgment at the end.[91]
- A family consultant (a mediator) is present to assist the parties.[92]

On November 1, 2006, New Zealand began to pilot its own version of a children's cases hearing format.[93] It has many of the same elements as the Australian program, but it differs in that it does not involve a court-based mediator (the family consultant in the Australian model).[94]

The 2005 report of the Family Justice Reform Working Group recommended that a similar model be tested in B.C.[95]

*QUESTIONS*

17. Would a less adversarial trial format for children's cases help to ensure that children's voices are heard in family disputes?
18. Would such a fundamental change in the format of a family law trial suggest a different approach to how children's voices ought to be heard, such as more direct participation?
19. Would you support the introduction of the Australian Children's Cases model in B.C.?
20. What are the most useful aspects of the Australian model?
21. What are the least useful aspects of the Australian model?

## *Discussion Point (9) – Judicial Interviews*

An interview with the judge is another method of ensuring children's participation in *Family Relations Act* decisions. Some say that the judicial interview is far from the ideal way of ascertaining a child's wishes because:

1. *it is conducted in an environment which is intimidating;*
2. *it is conducted by one who is not skilled in asking questions of children and interpreting their answers;*
3. *the short time of the interview makes it unlikely that the perceptions of the child explaining or representing her wishes can be considered with sufficient depth; and*
4. *the interview may be seen as a violation of the judge's function as an impartial trier of fact, in part because the judge need assume an inquisitor role when questioning children.*[96]

Some judges, however, support judicial interviews of children. For example, the former Chief Justice of Australia's Family Court stated that judges should consider interviewing older children more often.[97]

Under German law, children are entitled "to make their personal relationships to both parents . . . known to the court."[98] Judicial interviews are widely used. An appellate judge from Frankfurt who participated in the 4th World Congress on Family Law and Children's Rights in March 2005, stated that a sensitively handled judicial interview "can boost the child's self-esteem" because the process recognizes the child as a person in his own right and allows the child to know his views are being taken seriously.[99] The conversation between the judge and the child may also serve to reassure the child that the final decision is in the hands of the judge and relieve the child's misplaced sense of guilt over the separation.[100]

In B.C., judicial interviews are not commonplace, but they do occur more frequently than in other Canadian jurisdictions.[101] The judge who decided the B.C. Supreme Court's case of *L.E.G. v. A.G.* held that parental consent was not a pre-requisite to a judicial interview. She found the court's jurisdiction to interview children was grounded in its inherent *parens patriae*[102] powers and in its statutory duty to act in the best interests of children.[103]

As observed in *L.E.G. v. A.G.* decision, a number of Canadian family statutes specifically grant judges a discretion to interview children. The family legislation of Newfoundland and Labrador, P.E.I., Ontario, the Northwest Territories, and Nunavut take this approach.[104]

*QUESTION*

22. Should the *Family Relations Act* be amended to set out a discretionary power on the part of judges to interview children to determine their views?

## PART D – PARENTING DECISIONS AFTER A COURT ORDER

### *Discussion Point (10) – Children & Post-Order Decision-Making*

In some families, disputes over parenting arrangements do not end with the making of a court order. Some American jurisdictions have enacted legislation that permits the use of parenting co-ordinators as a means to resolve disputes in higher conflict families. Parenting co-ordinators are usually social workers, psychologists, psychiatrists, marriage counsellors, family lawyers or mediators.[105] Often the disputes they seek to resolve centre on child-related issues such as holiday scheduling, transportation of the children to and from access visits, bedtime routines, the participation of other people in scheduled access visits, such as a new partner, or child care arrangements.[106]

In fulfillment of their mediation or arbitration duties, parenting co-ordinators are empowered to speak directly with the children (as well as with other family members).[107] In addition, they may be authorized by law to request relevant information from third parties, such as the child's doctor, therapist, school or caregivers. They may recommend that the children (or the parents) participate in other services such as physical or psychological assessments or counselling.[108]

The Family Justice Reform Working Group recommended the use of parenting co-ordination as a way to address the needs of higher conflict families.[109] The B.C. Ministry of Attorney General is considering the option of parenting co-ordinators as part of its response to the Working Group's report. For further information about programs and services for families in B.C., please refer to Chapter 5.

*QUESTION*

23. If the *Family Relations Act* were amended to address the appointment of parenting co-ordinators, what legislative guidance, if any, should be given about how these professionals should interact with the young people at the centre of a family dispute? For example, should parenting co-ordinators be authorized to interview young people? Should it be necessary for the parenting co-ordinator to obtain the young person's consent before accessing medical or school records?

## PART E – GENERAL FEEDBACK

*QUESTIONS*

24. There are a number of options to ensure that children's voices are heard in decisions that will affect them following their parents' separation or divorce. Which **three** do you view as the most important? Please prioritize the following, with 1 being the most important and 3 being the least important.

| OPTION | RANKING |
|---|---|
| ○ amending the *Family Relations Act* to place a duty on anyone making a major decision affecting a child to consider that child's views | |
| ○ amending the *Family Relations Act* to reflect more closely Art. 12 of the United Nations *Convention on the Rights of the Child* | |

| | |
|---|---|
| ○ making special provision in the *Family Relations Act* for the views of mature children (for example, make them determinative in certain situations) | |
| ○ developing child-inclusive mediation | |
| ○ amending the *Family Relations Act* to provide an automatic voice-of-the-child mechanism such as an interview with the child, a fill-in-the-blanks court form for children to complete, etc. | |
| ○ having separate legal representation | |
| ○ adopting a less adversarial hearing format | |
| ○ encouraging judicial interviews | |
| ○ adopting parenting co-ordination | |
| ○ other | |

25. Are there issues related to voice of the child not covered in this paper that you would like to raise?

Please provide your feedback.

## APPENDIX A - Scotland's F-9 Form

Form F9 Form of intimation in an action which includes a crave for a section 11 order

Rule 33.7(1)(h) Court Ref. No.

**PART A** **This part must be completed by the Pursuer's solicitor in language a child is capable of understanding**

To **(1)**

The Sheriff (the person who has to decide about your future) has been asked by **(2)** to decide:-

(a) **(3)** and **(4)**

(b) **(5)**

(c) **(6)**

If you want to tell the Sheriff what you think about the things your **(2)** has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at **(7)** by **(8)** . An envelope which does not need a postage stamp is enclosed for you to use to return the form.

**IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.**

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

NOTES FOR COMPLETION

(1) Insert name and address of child.

(2) Insert relationship to the child of party making the application to court.

(3) Insert appropriate wording for residence order sought.

(4) Insert address.

(5) Insert appropriate wording for contact order sought.

(6) Insert appropriate wording for any other order sought.

(7) Insert address of sheriff clerk.

(8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to imtimation and service.

(9) Insert court reference number.

(10) Insert name and address of parties to the action.

PART B

**IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM**

**To the Sheriff Clerk, (7)**

**Court Ref. No. (9)**

**(10).....**

**QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?**
**(PLEASE TICK BOX)**

| | |
|---|---|
| YES | |
| NO | |

**If you have ticked YES please also answer Question (2)** *or* **(3)**

**QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSONTO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?**
**(PLEASE TICK BOX)**

| | |
|---|---|
| YES | |
| NO | |

**If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.**

BOX A:

**(NAME)** . . . . . .

**(ADDRESS)** . . . . . .

. . . . . .

| | | | | |
|---|---|---|---|---|
| Is this person - | A friend? | | A relative? | |
| | A teacher? | | Other? | |

OR

QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE? (PLEASE TICK BOX)

YES ☐

NO ☐

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

BOX B:

WHAT I HAVE TO SAY ABOUT MY FUTURE:-

NAME: . . . . . .

ADDRESS: . . . . . .

DATE: . . . . . .

## ENDNOTES

[1] *Family Relations Act*, R.S.B.C. 1996, c.128.

[2] Family Justice Reform Working Group, "A New Justice System for Families and Children," presented to the B.C. Justice Review Task Force (May 2005) at 13, available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last accessed: November 3, 2006).

[3] *Ibid.* at 69.

[4] Anne Graham and Robyn Fitzgerald, "Taking Account of the 'To and Fro' of Children's Experiences in Family Law," presented at the Childs 2005 Conference, Oslo, Norway (June 2005) at 4. See also Nicola Ross, "Agency, Article 12 and Models for Legal Representation of Children in Australia," presented at the 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, (March 2005) at 4.

[5] Nicola Ross, *ibid.* at 4-5.

[6] Anne Graham and Robyn Fitzgerald, *supra* note 4 at 4, citing Smith, 1997 & Prout & James, 1997.

[7] Nicholas Bala, "The Role of Advocacy & The Children's Lawyer in Ontario's Justice System," (Draft, November 10, 2002) at 2-4 & Alan Campbell, "The Voice of the Child in Family Law: Whose Right? Who's Right?" Ph.D. thesis, submitted to the School of Social Work and Social Policy, Division of Education, Arts and Social Sciences, University of South Australia (2004) at 55.

[8] Carol Smart, "From Children's Shoes to Children's Voices," *Family Court Review*, Vol. 40, No. 3 (July 2002) 307-319 at 307.

[9] *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990).

[10] Department of Justice Canada, "Meeting Our Obligations under the United Nations *Convention on the Rights of the Child*," online at: http://www.justice.gc.ca/en/news/nr/2003/doc_30988.html (last accessed: November 3, 2006).

[11] Carol Smart, *supra* note 8 at 307-308.

[12] See discussion in Pauline O'Connor, "Voice and Support: Programs for Children Experiencing Parental Separation and Divorce," presented to the Family, Children and Youth Section of the Department of Justice Canada (2004) at 12-14 & 34.

[13] Helena Barwick, Alison Gray and Roger Macky, "Characteristics Associated with the Early Identification of Complex Family Court Custody Cases," prepared for the New Zealand Department for Courts (September 2003) at 12.

[14] Ann O'Quigley, "Listening to Children's Views: The Findings and Recommendations of Recent Research," Joseph Roundtree Foundation (2000) at 10.

[15] Joan B. Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice," (2002) *Va. J. Soc. Pol'y & L.*, Vol. 10(1) 129 at 149.

[16] *Ibid.* at 150.

[17] See discussion in Suzanne Williams, International Institute of Child Rights and Development, "Through the Eyes of Young People: Meaningful Child Participation in Family Court Processes," (August 2006) at 25.

[18] Ernest A. Sanchez & Sherrie Kibler-Sanchez, "Empowering Children in Mediation: An Intervention Model," *Family Court Review*, Vol. 42, No. 3 (July 2004) 554 at 558, citing Dunn, Davies and O'Connor (2001).

[19] Ann O'Quigley, *supra* note 14 at 2.

[20] Alastair Nicholson, Former Chief Justice, Family Court of Australia, "Children and Children's Rights in the Context of Family Law," address given at the Law Asia Conference, Children and the Law: Issues in the Asia Pacific Region, Brisbane, Australia (21 June 2003) at 6-7 & "Children and Young People – The Law and Human Rights," address to the Law Society of the Australian Capital Territory, Canberra, Australia (14 May 2002) at 18.

[21] See discussion in Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children," (1991-92) 8 *C.F.L.Q.* 95 at 103.

[22] Joan B. Kelly, *supra* note 15 at 148.

[23] *Ibid.*

[24] New Zealand Ministry of Justice, "Lawyer for the Child," (brochure) & President's Direction on Representation of Children in Family Proceedings (UK) (5 April 2004).

[25] *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 70(c) & (o).

[26] *Ibid.*, ss. 38(1)(a) & 49(2)(a).

[27] *Civil Code of Quebec*, L.Q. 1991, c. 64, Art. 34.

[28] Nicholas Bala, Victoria Talwar & Joanna Harris, "The Voice of Children in Canadian Family Law Cases," (2005) Vol. 24, No. 3, 221-280 at 252-253.

[29] Joan B. Kelly, *supra* note 15 at 150-151, citing Smart & Neal, "'It's My Life Too' – Children's Perspectives on Post-Divorce Parenting," 30 *Fam. L.* 163 at 166; Carol Smart *et al.*, "Objects of Concern? – Children and Divorce," 11 *Child. & Fam. L.Q.* 365, 374-76 (1999) & Joan B. Kelly, Mediation Interviews with Children (unpublished work product, on file with author).

[30] *Family Relations Act*, *supra* note 1, s. 30(2)(b).

[31] *Family Law Act*, S.A. 2003, c. F-4.5, s. 24(1).

[32] *Ibid.*, s. 24(2).

[33] *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 31(2).

[34] *Children's Law Act*, R.S.N.W.T. 1997, c. 14, s. 51 [N.W.T.] & *Children's Law Act (Nunavut)*, R.S.N.W.T. 1997, c. 14, s. 51 [Nunavut].

[35] *Care of Children Act 2004*, s. 50(1).

[36] Family Justice Reform Working Group, *supra* note 2 at 45.

[37] *Ibid.* at 51.

[38] Interview with Andrea Clarke, Senior Policy Analyst, Dispute Resolution Office, B.C. Ministry of Attorney General (16 June 2006).

[39] Australian Department of Families, Community Services, and Indigenous Affairs, "Chapter 3: The Project Story," in *Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation*, (Nov. 1998), online: http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/families-CIPcontents.htm (last accessed: November 3, 2006).

[40] Jennifer McIntosh, "Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study," 18(1) *Med. Q.* (Fall 2000) 55 at 58-59.

[41] Australian Department of Families, *supra* note 39, "Overview".

[42] Jennifer McIntosh, *supra* note 40 at 61-62.

[43] Child-inclusive mediation was initially piloted in Melbourne and Darwin: Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39. Later papers refer to the services in Canberra and Adelaide: Jennifer McIntosh and Caroline Long, "Current Findings in Australian Children in Postseparation Disputes: Outer Conflict, Inner Discord," (April 2005), *J. of Fam. Studies*, Vol. 11, No. 1 99-109 at 101.

[44] *Ibid.* See also http://www.childreninfocus.org/work_researchproject.html (last accessed: November 3, 2006).

[45] Clare Dyer, "Family Judges Learn From Australian Approach to Battles Over Children," *The Guardian* (July 31, 2006).

[46] *Ibid.* See also Children in Focus, "Research Project," online http://www.childreninfocus.org/work_researchproject.html (last accessed: November 3, 2006).

[47] Children in Focus, *ibid.*

[48] See discussion of Janet Johnston's work at the Center for the Family in Transition in the Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39, "Chapter 5.2: What Kind of Support Helps? Research Views". Joan B. Kelly has also spoken in favour of child-inclusive mediation: "Listening to Children's Voices: Helping Separating Parents Tune In," slide show presented to Family Mediation Scotland (June 28, 2004).

[49] Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39, "Overview".

[50] Jill Goldson, Centre for Child and Family Policy Research, Auckland University, "Hello, I'm a Voice, Let Me Talk – Child-Inclusive Mediation in Family Separation," Report #1/06 (December 2006), online: http://www.familiescommission.govt.nz/download/innovativepractice-goldson.pdf (last accessed: January 16, 2007) at 10.

[51] *Ibid.*

[52] *Ibid.* at 11-13 & 16.

[53] *Ibid.* at 4 & 16.

[54] Jill Goldson, *supra* note 50 at 16.

[55] *Ibid.*

[56] *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993,* No. 1956 (s. 223), Chapter 33 (Family Actions), Rule 33.7(1)(h), available online at: http://www.scotcourts.gov.uk/library/rules/ordinarycause/index.asp (last accessed: November 3, 2006).

[57] Sheriff Court Form F-9, available online at: http://www.scotcourts.gov.uk/library/rules/ordinarycause/ordinary_cause_rules/Form%20F09.doc (last accessed: November 3, 2006).

[58] *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993*, s*upra* note 56, Rule 33.19.

[59] Scottish Child Law Centre, "Have Your Say in Court," (brochure) at 4 & E. Kay M. Tisdall, *et al.*, "Children's Participation in Family Law Proceedings: A Step Too Far or a Step Too Small," *Journal of Social Welfare and Family Law*, 26(1) 2004: 17-33 at 21.

[60] Scottish Child Law Centre, *ibid.* at 4.

[61] "Further Pilot Information – Meaningful Child Participation in BC Family Court Process," IICRD website: http://www.iicrd.org/childparticipation/PilotInformationDocument.doc (last accessed: November 3, 2006).

[62] Office of the Children's Lawyer, Ontario Ministry of the Attorney General, "More About What We Do," available online at: http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp (last accessed: January 8, 2007).

[63] Ronda Bessner, "The Voice of the Child in Divorce, Custody and Access Proceedings," presented to the Family, Children and Youth Section of the Department of Justice Canada (2002) at 21-22.

[64] *Ibid.* at 22-23.

[65] *Ibid.* at 23.

[66] Judge Peter Boshier, Family Court of New Zealand "Making Our Children Count: The New *Care of Children Act 2004* – Is Section 59 of the *Crimes Act 1961* Good Law?" speech presented to Save the Children New Zealand (Kilbirnie, Wellington, 17 June 2005) at 4, available online at: http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=save-the-children-nz-wellington-17-june-05.asp (last accessed: November 3, 2006).

[67] Family Court of New Zealand, "Practice Note – Counsel for Child: Code of Practice" (effective 1 February 2001), online: http://www.justice.govt.nz/family/practice/notes/default.asp?inline=child-counsel.asp (last accessed: November 3, 2006).

[68] *Ibid*. See also Family Law Council, "Pathways for Children: A Review of Children's Representation in Family Law," (August 2004) at 20-21.

[69] Family Law Council, *ibid.* at 21. See also New Zealand Ministry of Justice, "Lawyer for the Child," (brochure) at 5.

[70] Family Law Council, *ibid.*

[71] *Ibid.* at 28.

[72] *Family Law Act, 1975* (Cth), s. 117(4).

[73] Department for Constitutional Affairs, "Separate Representation of Children," (2006) at 7, available online at: http://www.dca.gov.uk/consult/separate_representation/cp2006.htm (last accessed: Nov. 3, 2006).

[74] England, *Family Proceedings Rules 1991*, R. 9.2A(1).

[75] A *guardian ad litem* is "a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs." Bowen v. Sonnenburg, Ind.App., 411 N.E.2d 390, 396. *Black's Law Dictionary*, 6th ed., *s.v.* "Guardian."

[76] There was a 108% increase from 549 appointments in 2003-2004 to 1,141 in 2004-2005: Gillian Douglas, Mervyn Murch, Claire Miles and Lesley Scanlan, "Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs," (2006) at para. 2.47.

[77] Dame Elizabeth Butler-Sloss, President of the Family Division, "President's Direction on Representation of Children in Family Proceedings," (5 April 2004).

[78] Gillian Douglas *et al.*, *supra* note 76 at 29 & 39.

[79] Department for Constitutional Affairs, *supra* note 73.

[80] Scottish Child Law Centre, *supra* note 59 at 6 & Scottish Executive, "Meeting in the Middle: A Study of Solicitors' and Mediators' Divorce Practice," (2000) at 86, available online at: (2000), available online at: http://www.scotland.gov.uk/cru/kd01/blue/meet01.pdf (last accessed: November 3, 2006).

[81] Scottish Child Law Centre, *ibid.*

[82] *Age of Legal Capacity (Scotland) Act 1991*, s. 4A.

[83] Nicholas Bala *et al.*, *supra* note 28 at 251.

[84] Family Court of Australia, "Less Adversarial Trials," online at: http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/ (last accessed: November 3, 2006) ["Less Adversarial Trials"].

[85] Family Court of Australia, "Practice Direction No. 2 of 2006 – Child-related Proceedings (Division 12A)," (7 July 2006) at para. 2.2, available online at http://www.familycourt.gov.au/presence/connect/www/home/directions/practice_directions/2006+practice+directions/practice_direction_no_2_of_2006 (last accessed: November 3, 2006) ["Practice Direction No. 2 of 2006"].

[86] *Ibid.* at para.2.3.

[87] The Honourable Diana Bryant, "The Future of the Family Court," The Third Annual Austin Asche Oration (23 November 2004) at 14, available online at: http://www.familycourt.gov.au/presence/connect/www/home/publications/papers_and_reports/new_papers/papers_Third_Annual_Austin_Asche_Oration (last accessed: November 3, 2006).

[88] "Practice Direction No. 2 of 2006," *supra* note 85 at para. 5.2.

[89] The Honourable Diana Bryant, *supra* note 87 at 15, 16 & 19; "Less Adversarial Trials," *supra* note 83;"Practice Direction No. 2 of 2006," *supra* note 85 at paras. 6.19-6.20.

[90] The Honourable Diana Bryant, *ibid.* at 19.

[91] "Practice Direction No. 2 of 2006," *supra* note 85 at paras. 6.12 & 6.13.

[92] "Less Adversarial Trials," *supra* note 84.

[93] Judge Peter Boshier, Principal Family Court Judge, "Parenting Hearing Programme: Less Adversarial Children's Hearings," speech to the Auckland Family Courts' Assn., Novotel, Ellerslie, and Auckland (14 September, 2006), online at: http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=auckland-family-courts-association-september-2006.asp (last accessed: January 16, 2007) at 2.

[94] Jill Goldson, *supra* note 50 at 17.

[95] Family Justice Reform Working Group, *supra* note 2 at 68.

[96] Carol Mahood Huddart and Jeanne Charlotte Ensminger, *supra* note 21 at 103.

[97] The Honourable Alastair Nicholson, Former Chief Justice of the Family Court of Australia, "Children and Children's Rights in the Context of Family Law," address at the Law Asia Conference on Children and the Law: Issues in the Asia Pacific Region (21 June 2003) at 7 & the Honourable Alistair Nicholson, Former Chief Justice of the Family Court of Australia, "Children and Young People – The Law and Human Rights," presented to the Law Society of the Australian Capital Territory, Sir Richard Blackburn Lecture, Canberra (14 May 2002) at 18.

[98] Eberhard Carl, Judge at the Court of Appeal of Frankfurt am Main, seconded to the German Federal Ministry of Justice, "Giving Children Their Own Voice in Family Court Proceedings: A German Perspective" at 2, presented at the 4th World Congress on Family Law and Children's Rights (Capetown, South Africa, 20-23 March 2005), available online at: http://www.childjustice.org/html/2005.htm (last accessed: November 3, 2006).

[99] *Ibid.* at 5.

[100] *Ibid.* at 6-7.

[101] Nicholas Bala *et al.*, *supra* note 28 at 247.

[102] *Parens patriae*... "refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane..." *Black's Law Dictionary*, 6th ed., *s.v.*, "*Parens patriae*".

[103] *L.E.G. v. A.G.*, 2002 BCSC 1455 at para. 4.

[104] *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 71(2); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 8(2); *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 64(2); N.W.T., *supra* note 34, s. 83(2); & Nunavut, *supra* note 34, s. 83(2).

[105] Barbara Ann Bartlett, "Parenting Coordination: A New Tool for Assisting High-Conflict Families," Oklahoma Bar Journal Articles (Feb 14, 2004), online at: http://www.okbar.org/obj/articles_04/021404.htm (last accessed Jan. 11, 2007) & Marin County Task Force on Special Masters, "Marin County Special Master Program – Recommended Special Master Credentials and Qualifications," (1995).

[106] Marin County, Sample Special Master Stipulation and Appointment Order (1995).

[107] See, for example, *Arizona Rules of Family Law Procedure*, Rule 74 – Parenting Co-ordinator, R. 74F.

[108] *Ibid.*

[109] Family Justice Reform Working Group, *supra* note 2 at 75.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

## Chapter 9

## Family Violence

## Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

Violence is an issue for some families in B.C. Both men and women report having experienced family violence, although the nature and consequences are typically more severe for women.[1]

Children are also profoundly affected by direct or indirect exposure to family violence. Children who live in a home marred by family violence are at greater risk of physical harm, whether the violence is directed at them specifically, or whether they get caught accidentally in "cross-fire violence" (for example, getting hit by a stray punch intended for the parent). The overlap between spousal abuse and child abuse is in the order of 30-60%.[2] Children exposed to violence are also at greater risk of psychological harm, including increased incidence of aggression, hyperactivity, anxiety, depression, or behavioural problems.[3] Sometimes, patterns of violence can repeat from generation to generation.[4]

Family violence does not necessarily stop when a relationship ends. In fact, a family breakup may mark the beginning, or the escalation of violence.[5]

Since the early 1990s, researchers have developed a deeper understanding of the different patterns of violence experienced in families. This research recognizes that not all family violence is the same, and places it along a continuum.[6] LaViolette's Continuum of Aggression and Abuse from 2005, for instance, has five categories of violence, from "common couple aggression" at one end to "terrorism/stalking" at the other.[7] A spouse with no previous history of violence who throws a book at the other upon being told of an affair and the end of the marriage poses a different risk than one who stalks a former spouse and kills or tortures that person's pets.

Taking account of the differences in types of family violence may help those working in the family justice system to make more accurate assessments of future risk and could guide the development and implementation of social and legal responses tailored to particular situations and differing risks of future violence.[8]

On the other hand, some question whether including violence in family legislation will have unintended consequences, such as intensifying the degree of conflict between the former spouses or becoming the focal point of all decision-making regardless of the circumstances or future risk.

### The *Family Relations Act* Review & The 2005 Report of the Family Justice Reform Working Group

In 2005, the Family Justice Reform Working Group published a report to the B.C. Justice Review Task Force. The report, entitled *A New Justice System for Families and Children* and available at http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf, suggested a comprehensive set of reforms to B.C.'s family justice system. Family violence was addressed throughout the report. To summarize the Working Group's main points on this subject:

- Separation is a high risk time for family violence.[9]
- Safety of family members must be the number one priority for the family justice system.[10]
- Early screening for family violence issues is critical. The report suggested that when families approach a Family Justice Information Hub (now called a Family Justice Services Centre)—the "front door" of the family justice system—staff complete an assessment of the needs of the family, including identifying any safety issues.[11]
- Information about family violence would be available from Hubs (Family Justice Services Centres) as would referrals to community agencies and resources that could help victims of abuse.[12]

- The Working Group recommended that families be required to attend one mediation session (or other collaborative dispute resolution session) for cases involving support, custody, access, guardianship, or property division, before being permitted access to court.[13] However, urgent matters such as applications for restraining orders would be automatically exempted from mandatory mediation.[14] Other cases involving violence could also be exempted from the requirement to try consensual dispute resolution if, for example, a family member would likely come to harm as a result of participating, or if the imbalance in bargaining power could not be managed to make the mediation procedurally fair.[15] The report recognized that there will always be some cases for which negotiation through lawyers, or a trial, will be appropriate.[16]
- The report did not recommend that cases involving allegations of violence be automatically exempted from consensual dispute resolution. The Working Group identified some options that could be appropriate, in some circumstances, even if violence has been an issue. These include: shuttle mediation (mediation where parties do not meet face-to-face), the use of support people, impasse mediation (a combination of mediation and therapy), and collaborative law, where an interdisciplinary team of family lawyers and mental health experts and possibly other professionals help parties to reach an out-of-court agreement.[17]
- It recommended that training about family violence be provided to judges hearing family cases, to lawyers and law students, and to mediators.[18]
- It also recommended that family violence, including its impact on the safety of children and other family members, be included in the list of factors that judges must consider when assessing the best interests of the child, in making decisions about custody, access and guardianship.[19]

The Family Justice Reform Working Group took a broad view of the family justice system, looking particularly at policies, programs and services. Although this paper on family violence draws upon that work, its focus is on law reform. As part of the Province's review of the *Family Relations Act*,[20] it considers family violence as it intersects with other family law issues.

### Organization of This Paper

The paper is divided into three parts. The first part discusses threshold policy issues, such as how or whether to define family violence, and how to deal with false allegations of violence. The second part looks at how the presence of violence intersects with other family law issues, such as who is permitted to stay in the family home immediately after the separation, protection orders, decisions about children, and collaborative decision-making. The final section of the paper provides you with an opportunity to highlight what you feel are the most pressing issues, and identify issues not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws in this paper please refer to the following link to Legislation.

## DISCUSSION

## PART A – THRESHOLD QUESTIONS ABOUT FAMILY VIOLENCE

### *Discussion Point (1) – Defining Family Violence*

Several Canadian family laws include violence as a factor to be considered by judges in determining children's best interests in custody, access or guardianship disputes. (The factors that a judge in B.C. must consider when determining a child's best interests, for the purposes of a decision about custody, access, or guardianship, are discussed in Chapter 6). Even where

violence is not a specific factor in the best interests test listed in a family statute, there are cases where judges have considered it when making decisions involving children.[21]

Where violence is included in a family law, it is not always defined. In this paper, when we refer to family violence, we are speaking about violence committed by adult members of the family. Children may be the direct targets of violence, or they may be indirect victims of violence directed at another family member, whether they inadvertently get in the "cross-fire" of violence between their parents (for example, they get struck when one parent tries to punch the other), whether they witness family violence, hear it, or simply know about it.

In Canadian family laws, only Alberta's recently updated *Family Law Act* (effective November 1, 2005) includes a definition of family violence.[22] Alberta's definition is similar to the definition of violence found in an earlier federal bill, Bill C-22 (2002), which would have amended the *Divorce Act* had it not died on the order paper in 2004.[23]

This paper considers definitions in family laws and family violence laws across Canada. It also refers to B.C.'s *Violence Against Women in Relationships Policy*, a policy that describes how the criminal justice system should respond to relationship violence and applies to women, children, men, and same-sex couples who have experienced violence.[24] Definitions of violence usually cover physical abuse, including forcible confinement,[25] and sexual abuse, or sexual assault.[26] Fewer definitions include psychological or emotional abuse.[27] Some include neglect, such as depriving a person of food or clothing or other basic necessities, and financial abuse.[28] Threats of violence are included in the definition of violence in civil laws aimed at protecting against family violence in other parts of Canada, as well as in B.C.'s *Violence Against Women in Relationships Policy*.[29] Alberta's *Family Law Act* and the federal government's Bill C-22 (2002) also include attempted violence.[30]

Some laws that define violence go further and say what is *not* violence. Alberta's *Family Law Act*, which follows Bill C-22 (2002), excludes "acts of self-protection or protection of another person" from its definition of violence.[31] Similarly, s. 24(5) of Ontario's *Children's Law Reform Act*, brought into force on February 23, 2006, says that "anything done in self-defence or to protect another person" is not to be considered violence or abuse.[32] A self-defence exception is also found in several civil family violence laws.[33]

*QUESTIONS*

1. Should the *Family Relations Act* define family violence? Why or why not?
2. If so, check below, all the elements that you think should be covered in a definition of violence:

| Form of Violence | Actual | Attempted | Threatened |
|---|---|---|---|
| physical abuse | ☐ | ☐ | ☐ |
| forcible confinement | ☐ | ☐ | ☐ |
| sexual abuse | ☐ | ☐ | ☐ |
| psychological or emotional abuse | ☐ | ☐ | ☐ |
| neglect | ☐ | ☐ | ☐ |
| financial abuse | ☐ | ☐ | ☐ |
| other: | ☐ | ☐ | ☐ |

3. Should a definition of violence exclude acts of self-protection or protection of others?

### *Discussion Point (2) – False Allegations*

At the hearings of the Canadian Special Joint Committee on Custody and Access in 1998, representatives from men's groups across Canada testified that some parents make false allegations of child abuse against the other parent to try to keep that parent from spending time with the children. Some British Columbians also raised false claims of abuse as a concern in the 2001 federal-provincial-territorial consultations on custody, access and child support.

In its final report, *For the Sake of the Children*, the Special Joint Committee recommended that the federal government assess the adequacy of the *Criminal Code* to deal with intentional false claims of abuse, and develop policies for taking action on clear cases of mischief, obstruction of justice or perjury.[34] The final report from the 2001 federal-provincial-territorial consultations, *Putting Children First*, published in November 2002, made no recommendation about false allegations, citing research from law professor Nicholas Bala that suggested deliberately false claims are few.[35] According to Professor Bala's research, most false claims result from misunderstandings, not deliberate lying.[36]

In addition to criminal penalties, another possibility available to a falsely accused parent is to bring an application for a finding of contempt of court.[37] A parent who is denied access by the other parent who says the child is being abused during access visits could ask a judge to find the parent who is withholding access in contempt of court for violating the access order. If there is no proof that the access parent has been violent, or if access denial continues in the face of expert reports or assessments that find there has been no abuse, a judge may use his or her contempt powers to punish the parent who made the false allegations, by ordering a fine or imprisonment or both.

A falsely accused parent could also use the civil justice system to seek damages based on defamation,[38] negligence,[39] infliction of mental suffering or malicious prosecution[40].[41]

A judge hearing a family case may also address false allegations through a costs order (an order that one parent pay a portion of the legal costs of the other).[42] In Australia, a judge who is satisfied that a person "knowingly made a false allegation or statement" is required to order that person pay some or all of the other party's costs, under s. 117AB of the *Family Law Act, 1975*.[43]

*QUESTIONS*

4. Are existing criminal and civil penalties adequate to address false allegations of violence or abuse raised in family law cases?
5. If not, should the *Family Relations Act* deal with false allegations? How?

## PART B – THE IMPACT OF FAMILY VIOLENCE

### *Discussion Point (3) – Orders to Ensure Safety*

Peace bonds and restraining orders are both protection orders; that is, orders made by a judge to protect one person from another. Peace bonds are made in criminal court under s. 810 of the *Criminal Code*.[44] The police apply for a peace bond on a person's behalf, and a prosecutor, a government lawyer, handles the case in court. Restraining orders are made in civil (family) court under the *Family Relations Act*. A person may either apply for a restraining order on his or her own, or get a lawyer to do it.[45]

Both forms of protection order provide some similar safeguards—they can both prohibit or limit contact with a person—but there are some differences. A peace bond can provide protection from

anyone, while a family connection is generally needed for a restraining order under the *Family Relations Act*. This discussion focuses on orders available under the *Family Relations Act*.

Broadly speaking, there are three types of orders judges may make under the *Family Relations Act* that can help to protect the safety and security of family members. Two are restraining orders; either to prevent harassment (s. 37), or to prohibit contact (s. 38, s. 126). The third is an order for temporary exclusive occupancy of the family home (s. 124), which judges sometimes use as a way to keep family members safe.

### Preventing Harassment and Prohibiting Contact

Under s. 37, a judge may make an order to prevent a person from molesting, annoying, harassing or communicating with another person or a child in that person's custody, or attempting to do any of those things. [46] Although s. 37 does not say that only a parent or guardian may apply, there has been litigation over whether these orders are available to people who are not also making a claim under the *Family Relations Act* for child custody, access or guardianship.[47] Other questions are whether the section applies to other kinds of relationships (dating, for example); or where violence is directed at a spouse, rather than at a child. It has been argued that it does not,[48] which is at odds with the growing body of research on the harm that spousal violence causes children. Studies on family violence suggest that being exposed to spousal violence is harmful to children, whether they see it, hear it, or experience its aftermath.[49]

Under s. 38, a judge may make an order prohibiting a person from entering a place where a child resides, and prohibiting that person from contacting or trying to contact the child or a person who has custody of or access to the child.[50] An order under s. 38 may be made only if the judge makes a custody order for the child, or there is already a custody order or a separation agreement filed with the court.

Restraining orders under ss. 37 and 38 can be made with or without notice to the other person. Without notice orders can be granted in cases of urgency, including where the location of the other person is unknown or if the fact of giving notice itself may lead to violence.

Orders made under ss. 37 and 38 authorize the police to arrest the other person if he or she violates the terms of the restraining order. To facilitate the enforcement of restraining orders, each court registry in B.C. sends a copy of the restraining order to a central restraining order registry, which the police can access.

Both ss. 37 and 38 allow a judge to require the person named in the order to put up money that will be forfeited if the person fails to obey the order, or to require the person to report to a designated person for a period of time set by the judge. In addition, under s. 38, a judge may require the person to deposit documents, such as a passport, with a designated person, or transfer specific property to a trustee on specified terms and conditions. An order to transfer property may only be made by a Supreme Court judge.

Section 126 allows a judge to make an order prohibiting one person from entering a place occupied by another person or a child in that person's custody.[51] This is similar to one of the orders available under s. 38, but s. 126 applies only to separated spouses, regardless of whether or not they have children.

### Temporary Exclusive Occupancy of the Family Home

When spouses break up, problems can arise if both of them want to continue to stay in the family home. Family violence is not necessarily a factor in these disputes, but resolving a disagreement over who is to live in the home is especially pressing if one spouse has been violent toward the other, or to the children. In certain circumstances, under s. 124, a judge can allow one spouse and any children to live temporarily in the family home without the other spouse. This is called

"exclusive occupancy." An exclusive occupancy order is available only in Supreme Court; it cannot be made in Provincial Court.

The *Family Relations Act* does not specify what a judge should consider in making a decision about exclusive occupancy. However, case law has established that the spouse who wants such an order must show that sharing the home with the other spouse is a practical impossibility. [52] Violent conduct by the other spouse may show the required practical impossibility.

In some provinces and territories, family laws specify what a judge must consider when making the decision to let one spouse have exclusive occupancy of the family home. Violence is listed as one of the factors. [53]

An exclusive occupancy order may not be very effective to protect against future family violence. Where there is a risk of future violence, a spouse may ask for an order under s. 126 prohibiting contact, and an exclusive occupancy order under s. 124 at the same time, for a greater measure of protection. The combined orders are meant to ensure that the family home is safe, but they do not address what happens outside of the home.

**Elsewhere in Canada**

As in B.C., judges in other parts of Canada may grant peace bonds under s. 810 of the *Criminal Code*. As well, many family laws in other provinces and territories allow judges to make restraining orders.[54] Unlike B.C., most of these provinces and territories also have a separate civil (non-criminal) law that covers family violence.[55] These laws vary from place to place, but they often cover a wider range of family relationships than the *Family Relations Act*. As one example, Alberta's family violence law covers:

- people who are, or have been, married to one another;
- people who are, or have been, adult interdependent partners;
- people who live, or have lived, together in an intimate relationship;
- parents, regardless of whether they ever married or lived together;
- people who live together and are related to one or more of the people in the household;
- children in the care and custody of any of the above mentioned people; and
- people who live together where one has care and custody of the other under a court order.[56]

Almost all family violence laws contain some form of temporary emergency orders[57] and a simplified process for obtaining such an order. For example, some laws allow an application to be made by phone, fax, or even e-mail.[58] They often allow a person other than the victim, such as a police officer, a victim services worker, or a lawyer, to apply for the emergency order.[59] Some of these laws allow for other types of orders as well. [60]

The following are the kinds of orders that judges may make under the various family violence laws in Canada:

- restraining the respondent from committing (further) family violence;[61]
- directing the seizure of personal property of the respondent that was used in furtherance of violence or stalking;[62]
- granting the victim (and other family members) exclusive occupation of a residence;[63]
- requiring the respondent to make the rent or mortgage payments for a residence;[64]

- restraining the respondent from terminating a residence's basic utilities;[65]
- directing a peace officer to remove the respondent from a residence;[66]
- directing a peace officer to accompany a person to a residence to supervise the removal of personal belongings;[67]
- restraining the respondent from communicating with or contacting the victim and others or from making any communication likely to cause the victim annoyance or alarm, including contact with that person's, or other family members' employers, employees or co-workers;[68]
- restraining the respondent from attending at or entering into a place regularly attended by the victim, such as a residence, or place of employment;[69]
- restraining the respondent from following the victim or other person from place to place;[70]
- directing the delivery or seizure of weapons (and of related documents, such as permits);[71]
- requiring the respondent to reimburse the victim for monetary losses suffered by that person, that person's child or any child in the custody of that person as a result of the family violence, such as lost wages; medical, dental or legal costs; or moving expenses;[72]
- granting the victim (or respondent) temporary possession over specific personal property, such as a car, utilities accounts, or a cheque book;[73]
- restraining the respondent (or victim) from taking, converting, damaging or otherwise dealing with property in which the other person may have an interest;[74]
- requiring the respondent to post a bond or cash deposit;[75]
- recommending or requiring counselling for the respondent (and any other family member);[76]
- prohibiting the publication of identifying information about the victim (or a child), such as a name, or an address;[77]
- awarding temporary care and custody of any children to the victim or to another person;[78]
- providing for access to children on terms for the judge to decide, giving "paramount consideration to the safety and well-being of the victim and the children;"[79] and
- any other provision the court thinks necessary or appropriate.[80]

Summary

The *Family Relations Act* does not have a simplified procedure for obtaining a restraining order without the need to go to court, as family violence laws elsewhere in Canada do. Nor does that *Act* permit police officers or others to apply for protection orders on behalf of those at risk of family violence. Finally, the various interpretations judges have given the restraining order provisions in the *Family Relations Act*, as well as their overlapping nature, may complicate their use.

Some of the types of orders available under those other family violence laws are also specifically authorized under the *Family Relations Act*. And all of these orders, including those not specifically

mentioned in the *Family Relations Act*, could be made by Supreme Court judges. However, Provincial Court judges can only make orders that are specifically referred to in the *Family Relations Act*, and they cannot make orders for exclusive occupancy of the family home.

### *QUESTIONS*

6. Should s. 124 of the *Family Relations Act* include specific factors, such as violence, to guide a judge's decision about making orders for temporary exclusive occupancy of the family home? Why or why not?
7. Should the *Family Relations Act* be amended to make it clear that family members, such as former spouses, may bring applications for restraining orders, even if they are not applying for anything else under the *Family Relations Act*?
8. Should restraining orders under the *Family Relations Act*, which could help to prevent violence, be available to anyone in a domestic or family relationship, including people who are dating or those who are living together as a couple but who do not meet the legal definition of "spouse"?
9. Do the existing restraining orders available under the *Family Relations Act* adequately address violence against spouses? against children? If not, what kinds of relief would you suggest be added to the *Family Relations Act*?
10. Do you have any other suggestions as to how restraining orders under the *Family Relations Act* can be structured so as to best ensure the safety of family members in the face of family violence?

## *Discussion Point (4) – Family Violence & Arrangements Involving Children*

#### Violence as a Factor in the Best Interests of the Child Test

Although B.C. does not include family violence as a factor that judges must consider when determining the best interests of a child, in making a decision about custody, access or guardianship, a number of other places do.[81] Please refer to Chapter 6 Parenting Apart for a discussion of this issue.

#### Legislative Presumptions

Some laws go further than just including family violence as a factor to be considered, and give directions as to how it should be taken into account. Some family laws limit the role of a violent parent in the child's life, unless that parent can prove that such a limit is not in their child's best interests.

For example, Arizona's law says that "there is a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests."[82] It forbids orders for joint custody if the judge finds there has been significant domestic violence, or a significant history of it.[83] Arizona's law also describes what should happen with respect to parenting time (access). The parent found to have been violent "has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development."[84] Even if the parent meets that burden, the judge must put conditions on parenting time "that best protect the child and the other parent from further harm."[85] Possible conditions include supervised exchange, supervised access, a requirement to attend and complete a violence treatment program, bonds, and a ban on overnight visits.[86]

Louisiana's law also creates a legal presumption against an order for sole or joint custody to a parent with a "history of perpetrating family violence."[87] Like Arizona's statute, Louisiana's law

also sets out presumptions regarding access; however, it distinguishes between sexual violence and other forms of violence:

- If a parent has been violent, a judge can order only supervised contact. If the violent parent completes a treatment program, is not abusing alcohol or drugs, poses no danger to the child, and it is in the child's best interests, the judge can later change the order to unsupervised contact.
- If a parent has sexually abused a child, the judge cannot make any contact order. If the abusive parent completes a treatment program, and it is in the child's best interests, the judge may then order supervised contact.[88]

California's *Family Code* contains a general statement that exposure to violence harms children, and presumes that giving custody to a parent who has been violent is harmful to the child's best interest. The parent who has been found to be violent can only overcome this presumption by proving that it is in the child's best interest for that parent to have custody.[89]

New Zealand's *Care of Children Act, 2004* says that a judge must not make an order giving a violent parent day-to-day care of the child (custody) or contact, other than supervised contact, unless satisfied that the child will be safe.[90] In deciding whether the child will be safe, the judge must consider:

- the nature and seriousness of the violence;
- how recently it occurred;
- the frequency of the violence;
- the likelihood of more violence;
- the physical or emotional harm the violence caused the child;
- whether the other parent thinks that the child will be safe with the parent found to have been violent;
- the child's views;
- any steps the violent parent has taken to prevent violence from occurring again;
- anything else the judge thinks is relevant.[91]

In addition, New Zealand's law permits a judge to make any order to protect the child's safety, even if he or she is unable to determine on the evidence provided whether the allegation of violence is proved, so long as the judge is satisfied that there is a real risk to the child's safety.[92]

*QUESTIONS*

11. Should the *Family Relations Act* create a presumption that a violent parent ought not to be given custody of a child unless that parent can prove it would be in the best interests of the child to do so? Why or why not?
12. Should the *Family Relations Act* include presumptions with respect to access or parenting time if there has been family violence? Why or why not?
13. If you think that violence ought to trigger certain presumptions with respect to access in the *Family Relations Act*, what should they be? Should the presumption depend on the type of violence at issue (For example, a presumption of no access in the case of sexual abuse; and a presumption of supervised access in the case of other forms of violence if there is a continuing risk?)
14. Should the *Family Relations Act* require that access orders include conditions on the parent found to have been violent, as Arizona's law does? If so, what conditions?

| Possible conditions on access orders | | Additional Comments |
|---|---|---|
| attendance at a program or counseling designed for perpetrators of violence | ☐ | |
| no use of alcohol or non-prescription drugs during access visits and 24 hours before | ☐ | |
| no overnight access visits | ☐ | |
| a bond[93] | ☐ | |
| an order that the address of the other parent and the child remain confidential | ☐ | |
| other: | ☐ | |

15. Should the *Family Relations Act* follow New Zealand's *Care of Children Act, 2004* (see above) and set out a list of factors judges are to consider when making orders involving children where violence has occurred? Why or why not?

16. Should the *Family Relations Act* follow New Zealand's *Care of Children Act, 2004* and allow a judge to make any order to protect a child's safety, even if the judge has not been able to find that the allegation of violence is proved, so long as the judge is satisfied that there is a real risk to the child? Why or why not?

## *Discussion Point (5) – Family Violence & Collaborative Decision-Making*

The 2005 Family Justice Reform Working Group report recommended that, unless exempted, people wishing to use the court to resolve a family dispute be required to have first attended one dispute resolution session.[94] This could take the form of one mediation session or a collaborative law[95] meeting.

The Ministry of Attorney General has completed further research into the use of mandatory and quasi-mandatory consensual dispute resolution (CDR) in family law disputes. It showed that, while the matter is not free from controversy, a number of jurisdictions, such as Australia,[96] California,[97] Utah,[98] Nevada,[99] and South Dakota[100] have mandatory CDR in their family laws for contested custody and access cases.

Family violence is an important consideration in the design and provision of CDR services. In some situations, the violence may be such that participation in CDR may be inappropriate because of the safety risk. In others, the nature of the violence may be such that the mediator would not be able to balance the power difference between the parties. For example, it would not be possible to work out a true agreement if one of the parties is terrified or intimidated by the other.

The jurisdictions that have mandatory CDR in their family laws also have exemptions or special protocols for cases involving family violence. For example, s. 60I(9) of Australia's *Family Law Act 1975* lists a number of exemptions to mandatory CDR, including situations where a judge is satisfied that there are reasonable grounds to believe that:

- one of the parties has abused the child;
- there is a risk of abuse to the child if the application were delayed;
- there has been family violence by one of the parties;
- there is a risk of family violence by one of the parties.

California's *Family Code* establishes a special kind of mediation for cases involving violence. Section 3181(a) requires the mediator to meet with the parties separately and at separate times. A support person may accompany the person alleging to be the victim of domestic violence to mediation orientation or mediation sessions, to provide moral and emotional support.[101] However, safeguards, such as separate mediation sessions, are only effective to the extent they are applied consistently.[102]

The *Utah Code* provides that:

> *(5) The director of dispute resolution programs for the courts, the court, or the mediator may excuse either party from the requirement to mediate for good cause.*[103]

Nevada's law authorizes judges to exempt a contested custody or access application if "good cause" is shown.[104] Evidence of "a history of child abuse or domestic violence by one of the parties" is considered "good cause" for an exemption from mandatory mediation.[105]

In South Dakota, an exemption is available from the requirement to attempt mediation of a custody or visitation (access) dispute if a judge determines that it would be "inappropriate under the facts of the case."[106]

*QUESTIONS*

17. If B.C. were to adopt mandatory CDR for contested custody or access disputes, should it develop exemptions similar to those jurisdictions that already have mandatory CDR, as discussed above?

18. Who ought to decide if a case should be exempted?

| | |
|---|---|
| the judge | ☐ |
| the person(s) conducting the dispute resolution session | ☐ |
| the manager of the family justice programs and services in the particular region where the case will be heard | ☐ |
| other: _____ | ☐ |

## PART C – GENERAL FEEDBACK

*QUESTIONS*

19. Which three issues regarding family violence do you consider to be the most pressing?

20. Are there issues related to family violence and the *Family Relations Act* not covered in this paper that you would like to raise?

Please provide your feedback.

## ENDNOTES

[1] Statistics Canada, "Measuring Violence Against Women: Statistical Trends 2006," (October 2006) at 30-31 & 35, online: http://www.statcan.ca/english/research/85-570-XIE/85-570-XIE2006001.pdf, citing information from the General Social Survey 2004 on Victimization (last accessed: April 3, 2007).

[2] Martha Shaffer, "The Impact of Wife Abuse on Child Custody and Access Decisions," (2004) 22 *C.F.L.Q.* 85 at 89, citing Jeffrey Edleson, "The Overlap Between Child Maltreatment and Woman Abuse" (February 1997, revised April 1999).

[3] *Ibid.* at 94 & 95, citing Kolbo, *et al.*, 1996 and Rudo *et al.*, 1998.

[4] Christine Alksnis and Jo-Anne Taylor, prepared for the Correctional Service of Canada, "Introduction" in "The Impact of Experiencing and Witnessing Family Violence during Childhood: Child and Adult Behavioural Outcomes," (1994) online: http://www.csc-scc.gc.ca/text/pblct/fv/fv04/toce_e.shtml (last accessed: April 21, 2007).

[5] Statistics Canada, "Family Violence in Canada: A Statistical Profile 2006" (July 2006) at 15, online: http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/pdfs/85-224-XIE2006000.pdf (last accessed: April 3, 2007) & Peter G. Jaffe, *et al.* "Making Appropriate Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices," (September 2005) at 21. See also British Columbia's Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004) at 11 which states that "…risk to women is highest just before, during and immediately after separation..." online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[6] See discussion of "Typologies of Family Violence" in Peter G. Jaffe, Ph.D., C.Psych. *et al.*, (Sept. 2005) "Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices," at 16-20, online: http://hspc.org/policy_forums/pdf/JaffePaper_JusticeReport_Sept05.pdf (last accessed: April 3, 2007).

[7] *Ibid.* at 20.

[8] *Ibid.* at 16.

[9] Family Justice Reform Working Group, "A New Justice System for Families and Children," presented to the B.C. Justice Review Task Force (May 2005) at 41, online: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last accessed: April 3, 2007).

[10] *Ibid.*

[11] *Ibid.* at 7, 34-35.

[12] *Ibid.* at 41.

[13] *Ibid.* at 7, 42-45.

[14] *Ibid.* at 48.

[15] *Ibid.* at 47.

[16] *Ibid.* at 13.

[17] *Ibid.* at 42-46, 74.

[18] *Ibid.* at 42, 104, 107-108.

[19] *Ibid.* at 81.

[20] *Family Relations Act*, R.S.B.C. 1996, c.128.

[21] See, for example *D.E.I. (Re)*, [1998] B.C.J. No. 1791 (S.C.) (Q.L.); *P.L.W.* v. *B.D.H.*, [1999] B.C.J. No. 231 (S.C.) (Q.L.); *P.B.* v. *H.R.*, [2000] B.C.J. No. 313 (S.C.) (Q.L.); *J.N.Z.* v. *J.D.*, [1994] B.C.J. No. 969 (S.C.) (Q.L.); and *Gibb* v. *Gibb*, [2000] B.C.J. No. 2730 (S.C.) (Q.L.).

[22] *Family Law Act*, S.A. 2003, c. F-4.5, s. 18(3).

[23] Bill C-22, *An Act to Amend the Divorce Act*, s. 16.2(3), online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-22&parl=37&ses=2&language=E&File=28 (last accessed: April 3, 2007).

[24] British Columbia's Ministry of Attorney General and Ministry of Solicitor General and Public Safety, "Violence Against Women in Relationships Policy," available online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf at footnote 1, (last accessed: April 2, 2007).

[25] See *Family Law Act*, S.A. 2003, c. F-4.5, s. 18(3) & Bill C-22, *An Act to Amend the Divorce Act*, s.16.2(3). See also: *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(d); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(1); *Domestic Violence Protection Act, 2000*, S.O. 2000, c. 33, s. 2 [**unproclaimed**]; *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 5(1); *Victims of Family Violence Act*, R.S.P.E.I., 1988, c. V-3.2, s. 2; *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 3(1); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 1; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 1(2); & *Family Abuse Intervention Act*, S.Nu. 2006, c. 18, s. 3 [**unproclaimed**]. See also B.C. Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004) which refers to "assault", at 4, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[26] See *Family Law Act*, S.A. 2003, s. F-4.5, s. 18(3). See also *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 1(e)(iv); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(d)(iv); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(1)(e); *Domestic Violence Protection Act, 2000*, S.O. 2000, c. 33, s. 2(5) [**unproclaimed**]; *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 5(1)(d); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 2(2)(e); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 3(1)(e); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 1; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 1(2)(c); & *Family Abuse Intervention Act*, S.Nu. 2006, c. 18, s. 3 [**unproclaimed**]. See also B.C. Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004), at 4, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[27] See *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(1)(c); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 2(2)(e); *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 1(2)(e) & *Family Abuse Intervention Act*, S.Nu 2006, c. 18, s. 3(1)(e) [**unproclaimed**]. See also Alberta's *Family Law Act*, S.A. 2003, s. F-4.5, which is ambiguous. Section 18(3) refers to "injury". It is unclear whether that could cover psychological injury as well as physical injury. See also B.C. Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004) at 4, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[28] See *Protection Against Family Violence Act*, S.N.L. 2005, c. F-3.1, s. 3(1)(g); *Victims of Family Violence Act*, R.S.P.E.I 1988, c. V-3.2, s. 2(2)(f); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 1; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s.1(2)(e) & *Family Abuse Intervention Act*, S.Nu 2006, c. 18, ss. 3(1)(f) & 3(1)(g) [**unproclaimed**]. See also B.C. Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004) at 4, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[29] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 1(e)(ii); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(d)(ii); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 2(1)(a) & (b); *Domestic Violence Protection Act, 2000*, S.O. 2000, c. 33, ss. 2(3) & 2(5) (**unproclaimed**); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, ss. 5(1)(b) & (d); *Protection Against Family Violence Act*, S.N.L. 2005, c. F-3.1, ss. 3(1)(b), (c) & (e); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, ss. 2(2)(c) & (e); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 1; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 1(2)(b) & *Family Abuse Intervention Act*, S.Nu 2006, c. 18, ss. 3(1)(a)-(c) [**unproclaimed**]. See also B.C. Ministry of Solicitor General, *Violence Against Women in Relationships Policy* (updated to March 2004) at 4, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: April 3, 2007).

[30] See *Family Law Act*, S.A. 2003, c. F-4.5, s. 18(3) & Bill C-22, *An Act to Amend the Divorce Act*, s. 16.2(3).

[31] *Family Law Act, ibid.*

[32] *Children's Law Reform Act*, R.S.O 1990, c. C-12, s. 24(5).

[33] See *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 5(1)(a) & *Protection Against Family Violence Act*, S.N.L. 2005, c. F-3.1, s. 3(1)(a). See also *Domestic Violence Protection Act, 2000*, S.O. 2000, c. 33, s. 2 (**unproclaimed**) & *Family Abuse Intervention Act*, S.Nu 2006, c. 18, s. 3(2) [**unproclaimed**].

[34] Parliament of Canada, "For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access," (December 1998) at recommendation 43, online: http://cmte.parl.gc.ca/Content/HOC/committee/361/sjca/reports/rp1031529/sjcarp02/12-ch1-e.htm#0.2.5FPCNZ.Y2KCKM.XT5O3F.13 (last accessed: April 3, 2007).

[35] Final Federal-Provincial-Territorial Report on Custody and Access and Child Support (November 2002) at 19, online: http://www.justice.gc.ca/en/ps/pad/reports/flc2002e.pdf (last accessed: November 20, 2006). See also Nicholas Bala *et al.*, "Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper," (2001) at part 1.1, online: http://www.justice.gc.ca/en/ps/pad/reports/2001-FCY-4.html (last accessed: April 3, 2007) ["Allegations of Child Abuse"].

[36] "Allegations of Child Abuse," *ibid.* at part 1.1.

[37] *Ibid.* at part 3.1.1 & Nicholas Bala, "Sexual Abuse Allegation When Parents Have Separated: Social Context & Evidentiary Issues," (February 2002) at 16, online: http://law.queensu.ca/facultyAndStaff/facultyProfiles/bala/balaRecentPapers/balaAbuseAllegationsParents.pdf (last accessed: April 3, 2007) ["Sexual Abuse Allegation"].

[38] See "Allegations of Child Abuse," *ibid.* at part 3.2. "Defamation," is defined as: "An intentional false communication, either published or publicly spoken, that injures another's reputation or good name." *Black's Law Dictionary*, 6th ed. *s.v.* "Defamation".

[39] See "Allegations of Child Abuse," *ibid.* "The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of particular case. Doctrine of negligence rests on duty of every person to exercise due care in [that person's] conduct toward others from which injury may result." *Black's Law Dictionary*, 6th ed., *s.v.* "Negligence".

[40] An action based on malicious prosecution is "An action for damages brought by person, against whom civil suit or criminal prosecution has been instituted maliciously and without probable cause, after termination of prosecution of such suit in favour of person claiming damages." *Black's Law Dictionary*, 6th ed., *s.v.* "Malicious prosecution".

[41] "Allegations of Child Abuse," *supra* note 35 at part 3.2 & "Sexual Abuse Allegation," *supra* note 37 at 16.

[42] "Sexual Abuse Allegation," *ibid.* at 17-18.

[43] *Family Law Act 1975*, CWTH.

[44] *Criminal Code*, R.S.C. 1985, c. C-46.

[45] These may be either lawyers in private practice or those working for the Legal Services Society of B.C. The Legal Services Society of British Columbia will pay for a lawyer "in emergency situations to help eligible clients obtain immediate court orders if these are needed to ensure their and/or their children's safety and security". See, Legal Services Society of British Columbia, "Fact Sheet – Legal Representation: Family Law," at 1 available online at: http://www.lss.bc.ca/assets/newsroom/fact_sheets/Legal_representation_family_law.pdf (last accessed: April 4, 2007).

[46] *Family Relations Act*, *supra* note 20, s. 37.

[47] See, for example, *Abe v. Abe*, [1995] B.C.J. No. 1643 (S.C.) (Q.L.) & *Levassier v. Taylor*, [1995] B.C.J. No. 907 (Prov. Ct.) (Q.L.).

[48] See, for example, *Wilson (Re)*, 2000 BCSC 648.

[49] Peter G. Jaffe and S. Grace Kerr, "The Need for Differentiated Clinical Approaches for Child Custody Disputes with Findings of Domestic Violence and Legal Aspects of Domestic Violence and Custody/ Access Issues," presented at the National Family Law Program (Whistler, B.C., June 29-July 2, 1998) at 14.

[50] *Family Relations Act*, *supra* note 20, s. 38.

[51] *Ibid.* at s. 126.

[52] *Family Law Sourcebook for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §8.35.

[53] See *Family Law Act*, R.S.O. 1990, c.F.3 at s.24; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.25; *Family Law Act*, S.N.W.T. 1997, c.18 at s.55; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s. 55.

[54] See, for example, *Family Law Act*, S.A. 2003, c. F-4.5, s. 68(1)(c) (restraining attendance, entry at or near primary home); *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 23 (restraining harassment/communication/interference re applicant or child in the lawful custody of applicant); *Child Custody Enforcement Act*, C.C.S.M. c. C360, s. 8 (restraining harassment of the applicant or a child in the lawful custody of the applicant); *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 45 (restraining harassment/communication re the applicant or children in the applicant's lawful custody); *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 42 (restraining harassment/communication re the applicant or children in the lawful custody of the applicant; *Children's Law Act*, R.S.Y. 2002, c. 31, s. 36 (restraining harassment of the applicant or a child in the lawful care or custody of the applicant); & *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 72 (restraining harassment/communication re applicant or children in the applicant's lawful custody).

[55] *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27; *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02; *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93; *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29; *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1; *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2; *Family Violence Prevention Act*, R.S.Y. 2002, c. 84; and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24. Ontario and Nunavut also have such statutes, although they have not yet been brought into force: *Domestic Violence Protection Act, 2000*, S.O. 2000, c. 33 & *Family Abuse Intervention Act* S.Nu. 2006, c. 18.

[56] See the definition of "family members" in *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 1(d).

[57] See, for example, *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 2; *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 3; *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 6; *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, ss. 5 & 6; *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4; *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 4; and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 4. Manitoba's *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 4 refers to "protection orders" that designated JPs or magistrates may grant, including, in certain circumstances "by telecommunication".

[58] See, for example, *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 6(2), which allows applications to be made "by telecommunication"; *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 8(2), which also allows applications "by telecommunication"; *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 4(2)(c) & 5, which contemplate applications "by telecommunication" defined in s. 1 to include telephone, electronic mail or fax; *Domestic Violence Intervention Regulations*, N.S. Reg. 75/2003, s. 4(3) stipulates that an application for an emergency intervention order must be made by telephone; *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(7) allows applications "by telecommunication" defined in s. 1(p) as including communication by telephone or fax; *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 2(3) allows applications "by telecommunication" if "no designated justice is readily available to hear the application in person"; and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 2(4)(b) & *Protection Against Family Violence Regulations*, R-013-2005, s. 3.

[59] See, for example, *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 6(1) & *Protection Against Family Violence Regulation*, Alta. Reg. 80/99, s. 3; *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 8(1)(b) & (c) & *Victims of Domestic Violence Regulations*, V-6.02-Reg. 1, s. 3; *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93. ss. 4(2)(b) & (c); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, ss. 7(1)(b) & (c) & *Domestic Violence Intervention Regulations*, N.S. Reg. 75/2003, s. 3; *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, ss. 4(2)(a) & (b); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, ss. 4(6)(b) & (c) & *Victims of Family Violence Act Regulations*, P.E.I. Reg. EC558/96, s. 3; *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, ss. 2(1)(b) & (c) & *Family Violence Prevention Act* O.I.C. 1999/190, s. 2 and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s 2 & *Protection Against Family Violence Act Regulations*, R-013-2005, s. 2(1).

[60] Alberta has Queen's Bench protection orders in addition to emergency protection orders: *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4. Saskatchewan has victim's assistance orders in addition to emergency intervention orders: *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7. P.E.I. and the Yukon also have victim assistance orders: *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 7 & *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7. In the Northwest Territories, there are Supreme Court protection orders in addition to emergency protection orders: *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 7. Manitoba has prevention orders the Court of Queen's Bench may make: *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14.

[61] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(b). See also *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(h); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(h); & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(i).

[62] See *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1)(l).

[63] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, ss. 2(3)(c) & 4(2)(c); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 3(3)(a) & 7(1)(a); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 14(1)(d) & 14(2); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(a); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(a); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(a); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, ss. 4(3)(a) & 7(1)(a); and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(b) & 7(2)(b).

[64] See *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(l) & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(j.1).

[65] See *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(m) & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(h)(ii).

[66] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, ss. 2(3)(d) & 4(2)(h); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 3(3)(b) & 7(1)(d); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(d) & 14(1)(e); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(b); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(b); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(b); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, ss. 4(3)(b) & 7(1)(d); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(c) & 7(2)(c).

[67] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, ss. 2(3)(e) & 4(2)(i); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 3(3)(c) & 7(1)(e); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(f) & 14(1)(g); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(c); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(c); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(c); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, ss. 4(3)(c) & 7(1)(e); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(d) & 7(2)(d)).

[68] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 2(3)(b). Section 4(2)(b) of Alberta's law also prohibits the respondent from contacting or "associating in any way" with the victim while s. 4(2)(g) restrains the respondent from "making any communication likely to cause annoyance or alarm" to the victim either directly or indirectly through another person, including contact with the employers, employees, or co-workers of the victim or other family members. See also *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 3(3)(d). Section 7(1)(c) restrains the respondent from "making any communication likely to cause annoyance or alarm to the victim, including…contact with the victim and other family members or their employers, employees or co-workers". See also *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(b) & 14(1)(b); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(d); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(d); and the *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(d). See also *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 4(3)(d). Section 7(1)(c) restrains the respondent from "any communication likely to cause annoyance or alarm to the victim". Finally, see *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(a) & 7(2)(a).

[69] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, ss. 2(3)(a) & 4(2)(a); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(b) ; *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(c) & 14(1)(c); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(e); & *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(b). See also *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(e) & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(e) which contemplate orders requiring the respondent to "stay away from any place identified specifically or generally in the order" and s. 14(1)(o) of Manitoba's statute that allows a judge to prohibit the respondent "from entering upon the premises while the subject is residing there" if the victim and respondent reside or have resided in the same premises.

[70] See *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(a) & 14(1)(a).

[71] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, ss. 2(3)(f) & 4(2)(l); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(g), 7(1)(h), 14(1)(h) & 14(1)(i); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(j); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(j); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 4(3)(e); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(g) & 7(2)(h).

[72] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(d); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(f); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, s. 14(1)(j); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(f); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 7(2)(g). The family violence laws of Alberta, Saskatchewan, the Yukon and the Northwest Territories link the possibility of monetary reimbursement to losses suffered as a "direct result" of the violence. Manitoba's s. 14(1)(j) does not refer to losses experienced by children specifically. Rather it refers to compensation "to the subject".

[73] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(e); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(g); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, ss. 7(1)(e) & 14(1)(f); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(f); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(f); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(g); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(g); and *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(e) & 7(2)(e).

[74] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(f); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(h); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, s. 14(1)(k); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(g); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(g); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(h)(i); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(h); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(f) & 7(2)(f).

[75] See *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(j); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(j); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, s. 14(1)(n); & *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(j).

[76] *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4(2)(k); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(i); *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D-93, s. 14(1)(m); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 7(1)(i); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 7(2)(i) & (j). Section 7(2)(j) of the Northwest Territories' family violence statute authorizes an order requiring the respondent to pay for counselling for a child.

[77] See, for example, *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(i); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(i); & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(j).

[78] See *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(k); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(n); & *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(3)(f).

[79] See *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 7(1)(b).

[80] See *Family Law Act*, S.A. 2003, c. F-4.5, ss. 2(3)(g) & 4(2)(m); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 2(3)(e) & 7(1)(k); *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29, s. 8(1)(l); *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1, s. 6(o); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, ss. 4(3)(k) & 7(1)(c); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, ss. 4(2)(f) & 7(1)(k); & *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, ss. 4(3)(h) & 7(2)(k).

[81] *Family Law Act*, S.A. 2003, c. F-4.5, s. 18; *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 24(4); *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 31; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 17(3); *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, s. 17(3); Australia's *Family Law Act 1975*, ss. 43, 60CC & 60CF; New Zealand's *Care of Children Act 2004*, ss. 51, 59 & 60; 1998 *Arizona Revised Statutes*, 25-403.03; California *Family Code,* s. 3011; *Colorado Statutes*, 14-10-124, 1.5(a)(IX) & (X); *Revised Statutes of Louisiana*, Title 9: 364; & *Child Custody Act of 1970*, Act 91 of 1970, Statutes of Michigan, 722.23, Sec. 3(k).

[82] *Arizona Revised Statutes*, 25-403.03D.

[83] *Ibid.*, 25-403.03A.

[84] *Ibid.*, 25-403.03F.

[85] *Ibid.*

[86] *Ibid.*

[87] *Louisiana Revised States*, 9:364A.

[88] *Ibid.*, 9:364C & D.

[89] California *Family Code*, ss. 3020 & 3044.

[90] *Care of Children Act, 2004*, s. 60.

[91] *Ibid.* at s. 61.

[92] *Ibid. at* s. 60(6).

[93] A bond is "An obligation;… [a] written promise to pay money or do some act if certain circumstances occur or a certain time elapses." *Black's Law Dictionary*, 7th ed., *s.v.* "bond."

[94] Family Justice Reform Working Group, *supra* note 9 at 45.

[95] The Family Justice Reform Working Group describes collaborative law as "a way for divorcing or separating couples to work together, with their lawyers, to resolve disputes respectfully and constructively. The couple and their lawyers agree at the start not to resort to the courts and that if either of them starts a contested court action, the process ends and both lawyers withdraw from the case. This means that each person has the support of an advocate who has been hired specifically to help that person resolve matters. Other professionals, including financial advisors and child specialists may be involved as well, depending on the people's needs and the issues involved…" Family Justice Report Working Group, *supra* note 9 at 41 & 42.

[96] *Family Law Act 1975*, *supra* note 43, s. 60I.

[97] California *Family Code*, 3170.

[98] *Utah Code*, 30-3-39.

[99] Mediation is mandatory in Nevada in counties with populations over 100,000: N.R.S., 3.475 & 3.500.

[100] S.D.C.L., 25-4-56.

[101] *Family Code*, 6303(a) & (c).

[102] Jaffe, *et al.*, *supra* note 49 at 36, citing (Hirst, 2002) for the proposition that Californian "[family] mediators held joint sessions in nearly half of the cases in which an independent screening interview had identified allegations of spousal violence, in direct violation of state regulations for separate sessions…"

[103] *Utah Code*, 30-3-39(5).

[104] N.R.S., 3.475 & 3.500.

[105] *Ibid.*

[106] S.D.C.L., 25-4-56.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 10

# Defining Legal Parenthood

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## August 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

This paper focuses on the law used in British Columbia to determine who is a child's legal parent.

It does not examine issues related to parental roles and responsibilities after separation (custody, access and guardianship): those issues are covered in Chapter 6 of this Review.

Legal parentage is not the same as guardianship. Legal parentage is fundamental to establishing a person's identity, including family name; nationality and cultural heritage; family relationships; and inheritance rights. The legal rights and responsibilities flowing from guardianship are less extensive. For example, inheritance rights do not flow from guardianship. Also, while legal parentage establishes a permanent parent-child relationship, guardianship ends when the child reaches adulthood (age 19 in B.C.).

In British Columbia, s. 61 of the *Law and Equity Act* says that, subject to the *Adoption Act* [1] and the *Family Relations Act*,[2] "a person is the child of his or her natural parents."[3] The *Family Relations Act* deals with determining parentage only when it is disputed in a child support case.[4] There is no general authority in the *Family Relations Act* for judges to make declarations of legal parentage.

Section 1 of the *Family Relations Act* does include a definition of "parent."[5] However, its purpose is not to determine legal parentage, but to expand the meaning of "parent" for the purposes of the Act, to include people who are not a child's legal parents, but who have taken on a parenting role. This makes it possible to allocate responsibility for the care and support of a child to people who have assumed a parenting role, even though they are not the child's legal parents. Throughout this paper, "legal parent" or "legal parentage" is distinguished from the broader use of "parent" in the *Family Relations Act*.

Family laws in most provinces and territories have more comprehensive provisions for determining a child's legal parentage than British Columbia's law does.[6]

All provinces and territories, including B.C., also have vital statistics laws that govern how births are recorded.[7] But these laws merely provide for a record of legal parentage, not a determination of who those parents are.

Assisted reproduction, which includes artificial insemination and *in vitro* fertilization, complicates the matter. Now it is possible for more than two people to be involved in the conception and birth of a child. This raises the potential for competing claims of legal parentage based on biology (by the woman who gives birth); genetics (by the person who contributes egg or sperm); and intention (by the person who intends to raise the child). British Columbia's current laws do not address these issues. This is a problem not only in B.C., but to varying degrees across Canada and in other countries.

B.C.'s obligations under the United Nations *Convention on the Rights of the Child*, which Canada signed in 1991, include:

- protecting children from discrimination;
- recognizing that children's best interests are a primary consideration in matters concerning children; and
- ensuring that the status of the parent-child relationship is protected from birth.[8]

The law can best protect the parent-child relationship through a legal framework that provides clarity and certainty of legal parentage for all children at the earliest possible time. All children born in British Columbia are entitled to equal treatment regardless of the circumstances of their conception and birth. They all should have the benefit of the stability and certainty about their family relationships that could be provided by clear rules for determining legal parentage at birth.

In 1992, the Uniform Law Conference of Canada[9] adopted the *Uniform Child Status Act.*[10] This uniform act includes provisions for determining legal parentage where assisted reproduction is used and the birth mother and her husband (or male partner) intend to be the child's parents. It does not deal with how to determine legal parentage where the birth mother is in a same-sex relationship, or where a child is born as a result of a surrogacy arrangement.

Alberta, Quebec, Newfoundland and Labrador, and the Yukon are the only places in Canada with laws that deal specifically with the legal parentage of children born as a result of assisted reproduction. Only Alberta and Quebec have provisions dealing with the legal parentage of children born to same-sex couples, and with surrogacy.

In 2004, Parliament passed the *Assisted Human Reproduction Act* to regulate assisted reproduction and related research. It begins with a set of principles that include:

- the health and well-being of children must be given priority in all decisions regarding the use of assisted reproduction;
- the health and well-being of women must be protected in the use of assisted reproduction; and
- trade in reproductive capabilities and the commercial exploitation of children, women and men raise health and ethical concerns that justify their prohibition.[11]

This federal law prohibits payment for surrogacy, and sets the minimum age for a woman to act as a surrogate at 21 and for a person to donate genetic material (eggs or sperm) at 18. It also has provisions not yet in effect that would require a donor's consent before the donor's genetic material is used and would deal with privacy and access to information. [12]

This paper is divided into four sections. The first discusses general rules for determining who a child's legal parents are at birth; the second covers some issues related specifically to surrogacy arrangements; and the third discusses access to information. The final section asks you to identify any issues not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper, please use the following link to Legislation.

## DISCUSSION

### PART A – A CHILD'S PARENTAGE AT BIRTH

The markers of parentage are biology, genetics, and intention to parent. The challenge in developing a scheme for determining legal parentage that works for both natural and assisted reproduction is to find the appropriate balance among the three markers of parentage so as to meet children's best interests and foster stable family relationships.

#### *Discussion Point (1) – Who is a Child's Mother?*

Under B.C.'s *Law and Equity Act*,[13] the woman who gives birth to a child—the "natural" mother—is the child's legal mother. The act of giving birth establishes a biological connection between mother and child. Until relatively recently, the birth mother has always been both the child's biological and genetic parent. However, advances in assisted reproduction mean that the woman who provides the egg need no longer be the same woman who carries and gives birth to the child. In such cases, who is the child's legal mother?

The Uniform Law Conference of Canada's 1992 uniform act says that a woman who gives birth to a child as a result of assisted reproduction is deemed to be the child's mother, whether or not she is the genetic mother—that is, whether or not her egg is used to conceive the child.[14] In Alberta's family law, "mother" is defined as a woman who gives birth to a child, except in adoption and certain surrogacy cases.[15] It does not say that the birth mother's egg must have been used in the child's conception. New Zealand's law says specifically that the birth mother is the child's legal mother, even if the egg used to conceive the child was donated by another woman.[16]

The traditional exception to the rule that the birth mother is the legal mother has been adoption, where the birth mother consents to give up her parental rights. The effect of an adoption order is that the adoptive parent becomes the child's legal parent and the birth mother's status as the child's legal parent ends. In places that have laws covering surrogacy, surrogacy may be another exception to the general rule that the birth mother is the child's legal mother. This is discussed in Part B.

### *QUESTIONS*

1a. Should the general rule be that a woman who gives birth to a child is the child's legal mother, whether the child is conceived using that woman's egg or a donor's egg? Why or why not?

1b. If no, what would you propose as a general rule?

## *Discussion Point (2) – Who is a Child's Other Legal Parent?*

### Presumptions of Parentage

Under the *Law and Equity Act*, a child's biological ("natural") father is his or her other parent.[17] Of course proving the identity of a father is more difficult than proving who is the birth mother. The biological link between father and child cannot be observed in the same way as between a birth mother and her child. To deal with this problem, before DNA testing, the law created presumptions as a way of determining paternity. The presumptions are based on a man's relationship to the birth mother.

The family laws in most provinces and territories presume that the birth mother's husband (or male partner) is the child's other parent. That presumption may be rebutted by proof that another man is the father, for example by using a DNA test.

The *Family Relations Act* also contains presumptions of paternity, but they apply only to disputes about legal parentage in child support claims. The *Family Relations Act* says:

> 95 (1) If a male person denies responsibility under section 88 (1) [obligation of parents to support their children] on the basis that he is not the father of the child, the court must, unless the contrary is proved on a balance of probabilities, presume that the male person is the father of the child in any one of the following circumstances:
>
> (a) the person is married to the mother of the child at the time of the birth of the child;
>
> (b) the person was married to the mother of the child and the marriage was terminated
>
> (i) by death of the person or judgment of nullity within 300 days before the birth of the child, or
>
> (ii) by divorce if the decree nisi was granted or the divorce took effect within 300 days before the birth of the child;
>
> (c) the person marries the mother of the child after the birth of the child and acknowledges that he is the natural father;

> (d) the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 300 days after the person and the mother ceased to cohabit;
> (e) the person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child;
> (f) the person has acknowledged paternity of the child by having signed a statement under section 3 of the *Vital Statistics Act*;
> (g) the person has acknowledged paternity of the child by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.BC 1979, c. 49.[18]

Originally, presumptions of paternity applied only to a birth mother's husband. In many places, including B.C., they were later extended to include an unmarried birth mother's male partner. In some places, there are now presumptions that apply where a child is born as a result of assisted reproduction. As in other paternity cases, the presumption of fatherhood is based on the relationship between the man and the birth mother. The difference is that the link between father and child is not a presumed genetic connection--because where a donor's sperm is used there will be no such connection. Rather, the link is the intention of the birth mother's male partner to be the child's parent.

For example, where a donor's sperm is used, the *Uniform Child Status Act* presumes that the birth mother's husband (or male partner) is the legal father. To rebut this presumption of paternity, her husband (or male partner) must prove not only that he is not the child's genetic father but also that he did not consent to be the father, or that before conception he withdrew his consent. Or, where the presumed father's sperm was used in the assisted conception, that he did not consent to be the father, or before conception he withdrew his consent, and the child was not conceived as a result of sexual intercourse between him and the birth mother.[19]

The law in Newfoundland and Labrador says that if a child is born as a result of assisted reproduction using the sperm of the birth mother's husband or male partner, that man is the child's legal father, even if his sperm was mixed with another man's sperm. If only another man's sperm is used:

- the birth mother's husband is considered to be the child's legal father if he consented in advance to the use of assisted reproduction; or
- if the couple is not married, the birth mother's male partner is considered to be the child's legal father if he consented in advance to the use of assisted reproduction, unless he proves that he did not consent to assume the responsibilities of parenthood.

However, even if the husband or male partner did not consent to the use of assisted reproduction (and to assume the responsibilities of parenthood, in the case of an unmarried male partner), he will still be considered to be the child's legal father if he demonstrated a "settled intention" to treat the child as his child, unless he proves that he did not know that the child was conceived by means of assisted reproduction.[20] The Yukon has similar provisions in its law.[21]

These laws do not cover the situation of a child born to a female couple.

In 2005, Alberta changed its family law to say that a man is the father of a child if the man is the spouse of the birth mother (or in an interdependent relationship of some permanence with her) and

- his sperm is used in the assisted reproduction, or
- his sperm is not used but he consented before conception to be the child's parent.[22]

This provision was successfully challenged as discriminatory because in cases where donated sperm was used, it applied only to the male partner of a birth mother and not to a female

partner. As a result of the challenge, the provision now applies to a birth mother's female partner as well, which means that if a woman is the spouse of the birth mother (or in an interdependent relationship of some permanence with her) , she is the child's parent if, before conception, she consented to be the child's parent. The judge ruled that the provision be interpreted as saying:

> A person is the parent of the resulting child if at the time of an assisted conception the person was the spouse of or in a relationship of interdependence of some permanence with the female person and
>
> > (a) his sperm was used in the assisted conception even if it was mixed with the sperm of another male person, or
> >
> > (b) the person's sperm was not used in the assisted conception, but the person consented in advance of the conception to being a parent of the resulting child.[23]

In Quebec, a presumption of legal parentage applies both to same-sex female couples and opposite-sex couples if a child is born as a result of assisted reproduction. The married or civil union spouse (as defined in Quebec law) of the birth mother is presumed to be child's other parent.[24] New Zealand's law also applies presumptions of parentage both to opposite-sex couples and female couples.[25]

In British Columbia, as a result of a Human Rights Tribunal decision in 2001, the Vital Statistics Agency changed its birth registration form so that a birth to either an opposite-sex couple or a female couple may be registered naming the birth mother as the child's mother and her spouse of either sex, whether married or not, as the child's co-parent.[26] As of June 1, 2007, the Vital Statistics Agency had registered 134 births to female couples.

In Ontario, a judge recently ruled that a birth mother's female partner was entitled to register as the child's other parent.[27] As a result, Ontario has changed its Vital Statistics Regulation to specifically allow a birth mother's female partner to register as the child's other parent in cases where the child was conceived using assisted reproduction and the genetic father (the sperm donor) is unknown.[28]

Since these presumptions flow from a person's relationship to the child's birth mother, they do not apply to male couples. Determining a child's legal parentage in the case of male couples is discussed in Part B.

### *QUESTIONS*

2. Should the presumption of paternity in the *Family Relations Act* apply generally, not just to paternity disputes in claims for child support? Why or why not?

3a. Should a presumption of paternity apply if a child is born to an opposite-sex couple as a result of assisted reproduction? Why or why not?

3b. If yes, what should it say?

4a. Should a presumption of parentage apply if a child is born to a female couple as a result of assisted reproduction? Why or why not?

4b. If yes, what should it say?

5. If assisted reproduction is used, in what circumstances, if any, should a birth mother's spouse be able to rebut the presumption of paternity or parentage?

## *Discussion Point (3) – What is the Status of Donors?*

Currently in British Columbia, there is no clear legal relationship among the children born as a result of assisted reproduction, donors of genetic material, and the children's intended parents. While B.C.'s Vital Statistics Agency accepts birth registration forms naming a birth mother's

spouse or partner (opposite-sex or same-sex) as the child's parent, this does not determine the legal relationship between the child and that person because it does not extinguish any parental rights that the sperm or egg donor, who is genetically related to the child, may have. Nor does it establish a legal parent-child relationship between the child and a co-parent who is not biologically or genetically related to the child.

Generally speaking, donors do not intend to assume the responsibilities of a legal parent. They donate eggs or sperm to enable others to have children. Laws for determining legal parentage when assisted reproduction is used have recognized this by providing that a donor of genetic material is not a child's legal parent.

The *Uniform Child Status Act* says,

> (1) A woman whose egg is used in an assisted conception and who does not give birth to the child conceived using her egg, is deemed not to be the mother of the child.
>
> (2) A man whose sperm is used in an assisted conception and who is not presumed to be the father of a child pursuant to section 9 [presumptions of paternity] is deemed not to be the father of the child.[29]

Alberta's law says that a sperm donor who is not the spouse of the birth mother (or in a relationship of interdependence of some permanence with her), "is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm"[30] It does not have a similar provision for egg donors. Quebec's law says that contributing genetic material does not create a legal parent-child relationship between the donor and the child.[31]

The issue of access to identifying information about donors is discussed in Part C.

### *QUESTIONS*

6. Should a woman who donates her egg but who does not give birth to the child have any parental rights and obligations to the child based solely on the fact of the donation? Why or why not?
7. Should a man who donates his sperm have any parental rights and obligations to the child based solely on the fact of the donation? Why or why not?

## *Discussion Point (4) – How Many Legal Parents May a Child Have?*

The law in British Columbia has only ever recognized a maximum of two legal parents for a child. The *Law and Equity Act* says that a person is the child of his or her natural parents:[32] when this law was written, these were assumed to be the biological mother and father. Adoption allows for other legal parents, but it extinguishes the child's legal relationship with his or her birth parents. The *Adoption Act* also limits the number of people who can adopt a child to a maximum of two.[33] Under the *Family Relations Act*, it is possible for more than two people to be defined as parents for the purposes of the Act, by taking on a parenting role in relation to a child. But those people do not become legal parents simply by taking on that role.

In a 2005 report, the New Zealand Law Commission considered whether it should be possible for a child to have more than two legal parents. The Commission said that while having more than two legal parents may mean a greater potential for conflict, this was not a sufficient reason to limit the number of parents to two. It noted that there were no restrictions on the number of guardians that could be appointed for a child. The Commission agreed that if relationships break down it could be more difficult to sort out parenting issues if there were more than two parents, but noted that judges already deal with similar problems when step-families separate. The Commission also observed that it is not uncommon for children to have a number of parental figures in their lives, for example through step-parenting. It found that the argument that

children with three parents would have an unfair advantage was not a valid concern because there are already great differences between children's circumstances based on their parents' resources, the involvement of extended family in their parenting and care arrangements, and the quality of parenting.[34]

The Commission proposed a two-stage process for a donor of genetic material to become a legal parent if the donor and the couple who would be the child's legal parents agreed that the donor would also be a legal parent and raise the child jointly with them:

1. Before conception the couple and the donor would file with the court:

    - a sworn statement by the woman and her partner that the donor will be the child's genetic parent and that they want the donor to be a legal parent, along with a sworn statement from the donor that he or she will be the child's genetic parent and wants to be a legal parent;
    - evidence that all of them received independent legal advice, as well as counselling about issues raised by their planned family; and
    - an agreement between the couple and the donor about contact between the donor and the child or the role of the donor in the child's upbringing.

    If satisfied that the evidence is in order, a Family Court registrar would give interim approval to the appointment of the donor as a legal parent.

    2. After the child's birth, with proof of the donor's genetic parentage, the registrar would approve the appointment. The donor would then be allowed to be registered with the Registrar-General of Births, Deaths and Marriages, along with the couple, as a legal parent.[35]

The government of New Zealand has not adopted this recommendation.

However, as a result of a recent decision by the Ontario Court of Appeal, a child in Ontario now has three legal parents. In that case, a female couple in a long-term relationship decided to have a child using sperm donated by a male friend. The two women were to be the child's primary caregivers, but they believed that it would be in the child's interests for the sperm donor to remain involved in the child's life. When the child was born, the birth mother and the sperm donor were registered as the child's parents. The birth mother's partner applied for a declaration that she was also the child's mother. The Court of Appeal stated that it would be contrary to the child's best interests to deprive him of the legal recognition of the parentage of one of his mothers. But if the mothers applied for an adoption order, that would mean extinguishing the parentage of the father, which also would not be in the child's best interests. So, the Court of Appeal declared the birth mother's partner to be a mother of the child. As a result, the child has two legal mothers and a legal father.[36]

### *QUESTIONS*

8a. Should it be possible for a child to have more than two legal parents? Why or why not?

8b. If yes, in what circumstances should it be possible?

## PART B – SURROGACY

### *Discussion Point (5) – Surrogacy Arrangements*

Surrogacy refers to an arrangement between a couple (or an individual) and a woman who agrees to carry and give birth to a child and then give the child to them to raise from birth, as parents. The child is conceived using assisted reproduction, and usually using genetic material provided by one or both of the intended parents. But both egg and sperm could be donated by

third parties. Sometimes the woman who agrees to carry and give birth to the child is also the egg donor. While at least one of the intended parents is usually genetically related to the child, neither will ever be the child's birth mother. This means that some special rules are needed for determining legal parentage of a child born as a result of a surrogacy arrangement.

In some ways, surrogacy is like adoption: after the child's birth, the birth mother gives the child to other people to raise, as the child's parents, and gives up her legal status as a parent. However, in other ways it is quite different, including:

- the intended parents' role: the child would never have been conceived or born but for the efforts of the intended parents who initiated the surrogacy arrangement;
- timing: the planning for the surrogacy arrangement is done before conception;
- intention: the woman who carries and gives birth to the child never intends to be the child's parent, while the intended parents have that intention from before conception; and
- genetics: in most cases, at least one of the intended parents has a genetic link to the child.

In 1985, the Ontario Law Reform Commission supported the use of surrogacy agreements and recommended establishing a scheme to regulate them.[37] A 1989 task force report of the B.C. Branch of the Canadian Bar Association recommended that surrogacy arrangements should not be specifically prohibited, but should not be enforceable against the birth mother. It also recommended that payment to the birth mother or third parties should be prohibited. The report stated, "This recommendation purports neither to prohibit, nor to encourage surrogacy agreements, but to acknowledge their existence and provide an appropriate legal response."[38]

In 1993, the Canadian Royal Commission on New Reproductive Technologies recommended prohibiting commercial surrogacy (paying a woman to carry and give birth to a child for other people, or paying an intermediary to arrange for such a service). It also recommended that non-commercial surrogacy arrangements (where the woman receives no payment, but can be reimbursed for reasonable expenses) not be enforceable against the birth mother.[39] In a December 2001 report, the House of Commons Standing Committee on Health agreed that commercial surrogacy should be prohibited and felt that non-commercial arrangements should be discouraged.[40] In 2004, Parliament passed the *Assisted Human Reproduction Act* to regulate assisted reproduction and related research.[41] This law prohibits commercial surrogacy, but leaves it to each province and territory to decide how to treat non-commercial surrogacy.[42]

Under Quebec law, surrogacy agreements are void, which means that the law does not recognize them.[43] So, there are no special provisions for determining the parentage of a child born as a result of a surrogacy arrangement. This means that in Quebec, if a couple makes an arrangement with a woman to carry and give birth to a child that they will raise from birth, the birth mother will be the child's legal mother, even though that was not her intention. It is not clear whether the intended parents would be able to adopt the child to become the child's legal parents.

Surrogacy agreements are unenforceable in Alberta. This means that if a woman who gives birth to a child under a surrogacy arrangement changes her mind and decides to keep the child, the intended parents cannot rely on the surrogacy arrangement to compel the woman to give them the child.

In surrogacy arrangements in Alberta, if the intended mother provides the egg used to conceive the child, and the woman who carries and gives birth to the child consents after the child's birth, a judge must declare the woman who provided the egg to be the legal mother of the child from birth.[44] Once she is declared to be the mother, her husband (or male partner) can be presumed to be the father, using the presumptions of parentage in Alberta's law.[45]

Alberta's family law does not have special provisions for determining legal parentage if the intended father provides the sperm used to conceive the child and a third party donates the egg, or if third parties donate both egg and sperm. In those cases, the woman who carries and gives birth to the child would be the legal mother. It seems that legal parentage could only be transferred to the intended parents through adoption.

Elsewhere, some different approaches are used, for example:[46]

- Before conception, the intended parents get a judge's approval of the surrogacy arrangement in order to be recognized as the child's legal parents after birth.
- The intended parents, along with the woman who carried and gave birth to the child, and her husband, sign a voluntary acknowledgement that the intended parents are the child's parents. This allows the intended parents to be registered as legal parents on the child's birth certificate.
- After the child's birth, the intended parents apply for a court order to acquire the status of legal parents.

In all three approaches at least one of the intended parents must be genetically related to the child.

Children are born in British Columbia as a result of surrogacy arrangements. The first court ruling in a case involving a surrogacy arrangement was made in 2003. In that case, the intended parents provided the egg and sperm and the embryo was implanted in a second woman who had agreed to carry and give birth to the child for the couple. The intended parents applied to court for a declaration that they were the child's legal parents, because the Vital Statistics Agency would not register them as the mother and father. They could have applied to adopt the child but felt that adoption was inappropriate because they were the child's genetic and intended parents. Since there is no statutory authority for judges to make declarations of legal parentage in these circumstances, the judge used the *parens patriae* authority (a power that superior court judges have to make decisions in a child's best interests) to declare that the intended parents were the child's legal parents. Based on this declaration of legal parentage, the intended parents were able to register the child's birth with the Vital Statistics Agency naming themselves as mother and father. By that time the child was two years old.[47]

Since then, the Vital Statistics Agency has registered intended parents as legal parents in 26 births resulting from surrogacy arrangements. The intended parents apply to court for a declaration of legal parentage after the birth. Using the *parens patriae* authority, a judge makes the declaration based on evidence in an affidavit filed by the woman who gave birth to the child (a sworn statement that includes her consent to give up parentage of the child) and by at least one of the intended parents. Then, based on the declaration of legal parentage, the Vital Statistics Agency registers the intended parents as the child's parents. In all cases so far, at least one of the intended parents has been genetically related to the child.

### *QUESTIONS*

9. Should surrogacy arrangements be enforceable? Why or why not?

10a. Should intended parents be able to acquire legal parentage [check all that apply]

☐ automatically, if certain requirements are met;

☐ by applying to court for a declaration of parentage;

☐ other [please specify]:_____.

10b. If you chose "automatically, if certain requirements are met", what should the requirements be [check all that apply]:

- ☐ evidence of pre-conception intention – for example, before conception, participants declare in writing their intention and their role in the surrogacy arrangement;
- ☐ evidence of birth mother's consent after birth – for example, after the birth, the woman who gave birth to the child under the surrogacy arrangement consents in writing to give up her parental rights and to give the child to the intended parents to raise as the child's parents;
- ☐ evidence that the child is living with the intended parents;
- ☐ other [please specify]:_____.

11a. Should the process for intended parents to acquire legal parentage be different if neither of them is genetically related to the child; that is, if both egg and sperm are donated by other people? Why or why not?

11b. If yes, what should that process be?

## PART C – INFORMATION AND PRIVACY

### *Discussion Point (6) –Information about Genetic Identity*

The importance of genetic lineage to a child's sense of identity is increasingly being recognized internationally.[48] The concerns of people born as a result of donated genetic material are similar to those expressed by people who were adopted under closed adoption schemes. Many who were adopted or conceived with donated genetic material express a need to know their birth origins for many reasons, including to allow them to fill a gap in their sense of identity; to help them compile a complete medical history; and to help them avoid intimate relationships with people to whom they are closely genetically related, such as half-siblings. [49]

On the other side of the debate are concerns about the effect on donors' privacy of disclosing identifying information. However, since donation is a voluntary act, prospective donors may always maintain their privacy by choosing not to donate. While this could lead to shortages of donated genetic material, it is not a certainty. Some studies have shown that while donations decreased initially when schemes for disclosing identifying information about donors were introduced, the number of donations eventually rebounded.[50]

Canadian adoption laws have varying degrees of openness about disclosure of identifying information. More than 10 years ago, B.C.'s *Adoption Act* was changed to make it easier for birth parents and people adopted in British Columbia to get identifying information about each other. At age 19, people who were adopted in B.C. may apply to the Vital Statistics Agency for a copy of their original birth registration, including the names of any birth parents on record, and a copy of their adoption order. To honour past promises of confidentiality, for adoptions that took place before November 1996, adopted children and birth parents who wish to maintain confidentiality may file a disclosure veto. If they do, the Vital Statistics Agency cannot release any information on the birth registration or in the adoption order that identifies the person who filed the disclosure veto. People who were adopted after that time may file a no-contact declaration any time after their 18th birthday. Birth parents may file a no-contact declaration at any time. A no-contact declaration allows the release of birth registration and adoption order information but prohibits personal contact with the person who filed the declaration. The maximum penalty for breaching a no-contact declaration is a $10, 000 fine and 6 months in jail.[51]

The federal *Assisted Human Reproduction Act* has provisions (not yet in effect) for establishing a personal health information registry to be maintained by the Assisted Human Reproduction Agency of Canada. It will keep health reporting information about donors, people who have undergone assisted reproduction, and children conceived using assisted reproduction. The

definition of "health reporting information" will be set out in regulations that have not yet been made.[52] This information will be confidential and may only be disclosed with the consent of the person to whom it relates, except in certain circumstances. Two exceptions are:

- If the person who receives the genetic material, or a person conceived using it, or his or her descendants, requests information about the donor, the Agency must disclose the donor's health reporting information. However, the identity of the donor–or information that can reasonably be expected to be used to identify the donor—must not be disclosed without the donor's written consent;[53] and
- Two people, one or both of whom were conceived using assisted reproduction, and who think they may be genetically related, may apply to the Agency. The Agency must tell them whether it has information that they are genetically related and if so, the nature of the relationship.[54]

In view of the importance of information about their donors to people conceived using assisted reproduction, protecting a donor's identity in this way seems at odds with the first of the principles set out in the federal law: "the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use."[55] Some other countries, such as Australia, New Zealand and England have put systems in place for releasing identifying information about donors of genetic material.[56]

*QUESTIONS*

12. What information about their donors should people born as a result of donated genetic material be entitled to receive?

## PART D – GENERAL FEEDBACK

*QUESTIONS*

13. Are there issues related to legal parentage not covered in this paper that you would like to raise?

Please provide your feedback.

## ENDNOTES

[1] *Adoption Act*, R.S.B.C. 1996, c. 5 [B.C. A.A.].

[2] *Family Relations Act*, R.S.B.C. 1996, c. 128 [B.C. F.R.A].

[3] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61(1)(a) [B.C. L.E.A.].

[4] B.C. F.R.A., *supra* note 2, ss. 94, 95, 95.1.

[5] "parent" **includes**

(a) a guardian or guardian of the person of the child, or

(b) a stepparent of the child if

(i) the stepparent contributed to the support and maintenance of the child for at least one year, and

(ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child [emphasis added].

[6] *Family Law Act*, S.A. 2003, c. F-4.5, Part 1 [Alberta F.L.A.]; *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, Part VI [Saskatchewan C.L.A.]; *Family Maintenance Act*, C.C.S.M. c. F20, Part II [Manitoba F.M.A.]; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, Parts I and II [Ontario C.L.R.A.]; *Civil Code of Quebec*. S.Q. 1991, c. 64, Book 2, Title 2 [Quebec C.C.]; *Child Status Act*, R.S.P.E.I. 1988, c. C-6 [P.E.I. C.S.A.]; *Children's Law Act*, R.S.N.L. 1990, c. C-13, Parts I and II [Newfoundland & Labrador C.L.A.]; *Children's Act*, R.S.Y. 2002, c. 31, Part 1 [Yukon C.A.]; *Children's Law Act*, S.N.W.T. 1997, c. 14, Parts I and II [N.W.T. C.L.A.]; *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, Parts I and II [Nunavut C.L.A.].

[7] See, for example, *Vital Statistics Act*, R.S.B.C. 1996, c. 479.

[8] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, arts. 2, 3, 7.

[9] The Uniform Law Conference of Canada considers both criminal and civil law issues. Its Civil Section is made up of government policy lawyers and analysts, private lawyers and law reformers who examine areas of the law in which the provinces and territories could benefit from harmonization. It develops uniform acts on many different subjects which provinces and territories may choose to follow when developing their own statutes.

[10] Uniform Law Conference of Canada, *Uniform Child Status Act*, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u9> (last accessed May 8, 2007) [Uniform C.S.A.].

[11] *Assisted Human Reproduction Act*, S.C. 2004, c.2, s. 2 [Canada A.H.R.A.].

[12] *Ibid.*, ss. 6, 8, 9, 14-19.

[13] B.C. L.E.A., *supra* note 3.

[14] Uniform C.S.A., *supra* note 10, s. 11.3.

[15] Alberta F.L.A., *supra* note 6, s. 1.

[16] *Status of Children Act 1969* (N.Z.) 1969/18, as am. by *Status of Children Amendment Act 2004* (N.Z.) 2004/91, s. 17 [New Zealand S.C.A.].

[17] Before assisted reproduction became available, a man would have been both the child's biological and genetic father. However, using assisted reproduction means that there is no biological connection (that is, the child is not conceived through sexual intercourse with the birth mother) and there may or may not be a genetic connection between the man and the child, depending on whether the man's sperm is used or a donor's sperm is used to conceive the child.

[18] B.C. F.R.A., *supra* note 2, s. 95(1).

[19] Uniform C.S.A., *supra* note 10, s. 11.2.

[20] Newfoundland and Labrador C.L.A., *supra* note 6, s. 12.

[21] Yukon C.A., *supra* note 6, s. 13.

[22] Alberta F.L.A., *supra* note 6, ss. 1, 13 (2).

[23] *Fraess v. Alberta (Minister of Justice and Attorney General)*, [2005] A.J. No. 1665 (Q.B.).

[24] Quebec C.C., *supra* note 6, art. 538.3.

[25] New Zealand S.C.A., *supra* note 16, s. 18.

[26] *Gill & Maher et al. v. Ministry of Health*, 2001 BCHRT 34. This case involved complaints of discrimination flowing from the Vital Statistics Agency's refusal to register the birth mother's female spouse as the child's other parent. The Human Rights Tribunal ruled that the Vital Statistics Agency had discriminated against the same-sex couples on the basis of sex, sexual orientation and family status and against the children on the same grounds by denying them the right to have both their parents named on the birth registration.

[27] *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (S.C.J.). This case involved several lesbian couples with children conceived through anonymous donor insemination. In all cases, the Deputy Registrar General of Vital Statistics had refused to register the birth mother's partner as a parent along with birth mother on children's birth certificates. The judge ruled that the birth registration provisions of the Ontario *Vital Statistics Act* were invalid because they discriminated against the co-parents on the basis of sex, contrary to the *Charter of Rights and Freedoms*.

[28] *General*, R.R.O. 1990, Reg.1094 (1 of 3), s. 2.

[29] Uniform C.S.A., *supra* note 10, s. 11.4.

[30] Alberta F.L.A., *supra* note 6, s. 13(3).

[31] Quebec C.C., *supra* note 6, art. 538.2.

[32] B.C. L.E.A., *supra* note 3.

[33] B.C. A.A., *supra* note 1, ss. 5, 29, 37.

[34] New Zealand Law Commission, "New Issues in Legal Parenthood" (April 2005) NZLC R 88 at 70-72, online: New Zealand Law Commission <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_91_315_R88.pdf> (last accessed June 21, 2007) [New Zealand Law Commission].

[35] *Ibid.* at 68-69.

[36] *A.A. v. B.B.*, 2007 ONCA 2 at paras. 37, 41.

[37] Ontario Law Reform Commission, "Report on Human Artificial Reproduction and Related Matters" (Toronto: 1985).

[38] Canadian Bar Association, "Report of the Special Task Force Committee in Reproductive Technology of the British Columbia Branch" (1989) at 29.

[39] Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Canada Communications Group, 1993).

[40] Canada, House of Commons Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) at 10-11.

[41] Canada A.H.R.A., *supra* note 11.

[42] *Ibid.*, ss. 6, 7.

[43] Quebec C.C., *supra* note 6, art. 541.

[44] Alberta F.L.A., *supra* note 6, s. 12.

[45] *Ibid.*, s. 8.

[46] New Zealand Law Commission, *supra* note 34. See discussion at 84-87.

[47] *Rypkema v. British Columbia* (2003), 233 D.L.R. (4th) 760 (B.C.S.C.).

[48] This was a recurring theme of presentations at Nobody's Child Everybody's Children, An International Conference on New Reproductive & Genetic Technologies held in Nanaimo, British Columbia, May 24-27, 2007.

[49] See, for example, *Rose v. Secretary of State for Health and Human Fertilisation and Embryology Authority*, [2002] 2 F.L.R. 962 (H.C.J.), an English case in which a woman born as a result of sperm donation sued for the release of information about her genetic father.

[50] Hilary Young, "In Search of Identity: Reconciling the Interests of Gamete Donors and Their Offspring in the Disclosure of Identifying Information About the Donor" (Paper presented to the International Conference on New Reproductive & Genetic Technologies, Nanaimo, British Columbia, May 26, 2007), citing K. Daniels & O. Lalos, "The Swedish Insemination Act and the Availability of Donors" (1995) 10 (7) Human Reproduction 1871.

[51] B.C. A.A., *supra* note 1, Part 5.

[52] Canada A.H.R.A., *supra* note 11, s. 14.

[53] *Ibid.*, s. 18(3).

[54] *Ibid.,* s. 18(4).

[55] *Ibid.*, s. 2(a).

[56] Hilary Young, *supra* note 50.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 11

# Spousal and Parental Support

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## August 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

This paper discusses spousal support and parental support, not child support.

(Child support is not one of the topics being examined in this *Family Relations Act* Review. British Columbia uses the *Federal Child Support Guidelines*[1] for calculating child support amounts under the *Family Relations Act.*[2] The federal government completed a comprehensive review of these guidelines in 2002.[3])

In Canada, both the federal government and provincial or territorial governments can make laws about spousal support,[4] but there are some differences. The federal *Divorce Act* applies only to married spouses who divorce,[5] while B.C.'s *Family Relations Act* applies both to married spouses, and to unmarried spouses who have lived together in a marriage-like relationship for at least two years.[6] The *Family Relations Act* imposes financial obligations between spouses, and lists the factors and objectives to be considered in determining spousal support obligations in a particular case.[7] Support obligations continue after the relationship ends.

The *Family Relations Act* also obliges adult children to support their parents, in certain circumstances.[8] The *Divorce Act* does not. Court applications for parental support have not been common in the past, but this is slowly changing, given our aging population and poverty issues affecting seniors.

Family trends emerging over the last several decades have led to changes in the interpretation of the purpose of financial support in our family law. These changes include our increased life expectancy; the growing percentage of couples who are not legally married; equal treatment of same-sex couples; and the trend away from single-earner families. The resulting shifts in interpretation of the law have led to some uncertainty in how the law should be applied.

Everyone wants rules that are simple, fair, and certain. The challenge is to find a way to achieve each of these goals without sacrificing the others. Certainty is important, because people are encouraged to make their own agreements when they know what the result will be if they go to court. But most people agree that some flexibility is also important, because a set of rules, without exceptions, may be unfair in certain situations. The goal of this review is to find the right balance between flexibility and certainty.

This paper is divided into four sections. The first discusses the principles of spousal support and parental support. The second looks at the uncertainty about continuing support obligations under the *Family Relations Act* when a paying spouse dies. The third discusses the circumstances in which spousal support orders can be changed, or accumulated arrears can be reduced or cancelled. The final section of the paper gives you an opportunity to identify issues not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper please use the following link to Legislation .

# DISCUSSION

## PART A – PRINCIPLES OF SPOUSAL AND PARENTAL SUPPORT

### *Discussion Point (1) –Spousal Support*

### Entitlement to Spousal Support

Entitlement refers to one spouse's right to receive spousal support from the other. To claim support under the *Family Relations Act*, a person must meet the definition of "spouse" in the *Act*.[9] This definition includes married spouses; unmarried spouses in a marriage-like relationship of at least two years (provided the claim is made within one year of separation); and spouses who have been divorced (or whose marriage has been annulled) within the previous two years. (Chapter 13 of this Review discusses time limits for starting a spousal support claim.)

Both the *Divorce Act* and the *Family Relations Act* list a number of factors and objectives for a judge to consider when making an order for spousal support.[10] They suggest different and sometimes conflicting reasons for requiring one spouse to pay support to the other. For the past 20 years judges have tried to reconcile and rank these factors and objectives, often giving priority to principles that support certain objectives over others.

First, the emphasis was on a "clean break" model, which supports the objective that spouses should become financially self-supporting as quickly as possible.[11] Later the focus shifted to a "compensatory" model. [12] Now there are three models, but none has priority over the others. [13] The three models are:

- Compensatory: This model recognizes that spouses who, during the relationship, spend more time caring for the children and the home should be compensated both for the negative impact of this role on their ability to earn an income, and for the positive impact on the other spouse's opportunities to develop skills and build a career;

- Non-compensatory: This model recognizes a right to spousal support based on financial need, even if the need is not caused by the relationship or its breakdown, for example, if a spouse is disabled or seriously ill; [14]

- Contractual: This model is based on an agreement (express or implied) between spouses that one will support the other.

This table summarizes the relevant provisions of the federal and provincial legislation, as reflected in the three models that have been developed over time.

| Divorce Act, s. 15.2(6) | | Family Relations Act, s. 89(1) | |
|---|---|---|---|
| **Objective** | **Model** | **Factor** | **Model** |
| recognize economic advantages or disadvantages arising from the marriage or its breakdown | compensatory | role of each spouse in the family | compensatory |
| allocate between the spouses any financial consequences of child care beyond any obligation for a child's support | compensatory | responsibility for children's care | compensatory |
| relieve economic hardship resulting from the marriage breakdown | compensatory/non-compensatory | economic circumstances | non-compensatory |
| promote economic self-sufficiency | non-compensatory | ability and efforts taken to become self-supporting | non-compensatory |
| | | agreement between the spouses that one will financially support the other | contractual |

Unlike in other countries,[15] entitlement to spousal support in B.C. and the rest of Canada may be based on financial need, which is often found if one spouse has significantly less income than the other. For this reason, the real issue in many cases is not entitlement, but the amount of support to be paid, and for how long.

## Amount and Duration of Spousal Support

The *Family Relations Act* says that in deciding the amount of support, judges may take into account the "needs, means, capacities and economic circumstances of each spouse," including:

- how earning capacity has been affected by the role assumed in the relationship;
- any other source of support for the recipient spouse;
- the desirability of achieving self-sufficiency;
- any other support obligations the paying spouse has; and
- the capacity and prospects of obtaining education and training of the recipient spouse.[16]

These factors are equally important, and no single factor takes priority. Judges cannot consider any misconduct or fault on the part of either spouse:[17] spousal support is awarded to deal with the "economic consequences of marriage and not to reward or punish spousal conduct."[18]

It is difficult to measure how much a spouse has been disadvantaged economically because of his or her role in the relationship. For example, it may be difficult to tell how a spouse's career could have evolved or what income could have been earned, had he or she not taken on the care-giving and homemaking role. Because calculating a spouse's economic loss under the compensatory model is often difficult, it is hard to predict how much spousal support a judge might order if the case went to court.

It is also difficult to predict how much spousal support a judge might order under the non-compensatory model. Even though the basis of this model is financial need, the Supreme Court of Canada has ruled that the amount of support ordered may in fact be something less than the amount of the spouse's need.[19]

How long support should be paid depends on the facts in each case. A judge may order spousal support to be paid for a limited time, or, more commonly, for an unlimited time until a judge decides that the obligation is ended. An important factor the judge will consider in deciding how long spousal support should be paid is how long the spouses were together.

Because it is relatively easy to demonstrate entitlement to spousal support and because orders awarding support for an unlimited time (which may be subject to future review by a judge) are so common, spousal support cases often come down to what amount a judge thinks will meet a spouse's need. The uncertainty around that issue makes it hard for spouses to predict what a judge will award if they go to court, and may result in unfairness.

Two family law professors, with funding from the federal government, have created the *Spousal Support Advisory Guidelines*[20] as a way to simplify calculation of the amount and duration of spousal support to be paid under *the Divorce Act*. These guidelines are also being used in spousal support cases under the *Family Relations Act*. They do not deal with the issue of entitlement, but once entitlement has been established, they provide a tool to help calculate the amount of spousal support and how long it should be paid. The guidelines aim to bring consistency and predictability to spousal support decisions. They are advisory only and are not part of the law in Canada.

The guidelines offer two formulas – one for cases where there is also child support, and one for cases where there is no child support. These formulas provide a range for the amount of spousal support to be paid and for how long, based on the length of the spouses' relationship and the differences in the spouses' incomes. They provide exceptions for shorter marriages, illness and disability, debt payments and prior support payments. These guidelines have been criticized by some as being inflexible and sacrificing individual fairness,[21] but B.C. courts have endorsed them as a useful tool.[22]

Another way to bring more consistency and predictability to spousal support decisions might be to change the spousal support factors and objectives in the *Family Relations Act*. For example, the *Family Relations Act* could say that compensatory factors must be considered first, and then, only if a spouse is still found to be in financial need, non-compensatory objectives.

This approach is used in the Northwest Territories and Nunavut.[23] There, when a relationship ends, spousal support is based on the spouses' needs and means and their obligation to fairly share in the advantages and disadvantages of the relationship (a compensatory objective). In determining how those advantages and disadvantages should be shared, judges must consider a set of compensatory objectives and factors in deciding the amount of support and how long it

should be paid. At that point, if a spouse is still found to be in financial need, spousal support can be ordered to satisfy non-compensatory objectives. The laws list additional factors for judges to consider in these cases.

Another option is to change the law on entitlement to spousal support. The factors and objectives listed in s. 89 of the *Family Relations Act* could be refined or reduced to limit the reasons for awarding spousal support. Priority could then be given to a particular model, for example, the compensatory model.

However, because of the overlapping responsibility for spousal support between the *Divorce Act* and the *Family Relations Act*, any significant changes to the law of spousal support in B.C. could mean a different result for spouses in similar circumstances, depending on which law was used.

### *QUESTIONS*

1a. Should the *Family Relations Act* provision covering entitlement to spousal support be changed? Why or why not?

1b. If yes, for what reason or reasons do you think a spouse should be entitled to spousal support? [check all that apply]

- ☐ agreement between the spouses that one will support the other;
- ☐ to compensate for the role taken on during the relationship, such as childrearing;
- ☐ to compensate for missed career opportunities as a result of the relationship;
- ☐ to relieve economic disadvantage caused by the relationship;
- ☐ need;
- ☐ need, in exceptional circumstances only, such as significant illness or disability;
- ☐ lower income than the other spouse;
- ☐ entitlement should be assumed if the factors used to calculate the amount of spousal support result in an amount payable by the other spouse;
- ☐ other [please specify]: _____.

2. Should the *Family Relations Act* explicitly set out three separate models of spousal support, that is, compensatory, non-compensatory and contractual? Why or why not?

3. Should the *Family Relations Act* say that, when determining an amount of spousal support, compensatory factors must be considered first, and only if the spouse is still in financial need, should non-compensatory objectives be used? Why or why not?

4. Have you ever used the Spousal Support Advisory Guidelines? ☐ Yes ☐ No ☐ Don't know

5. Do you think that the Spousal Support Advisory Guidelines

- make it easier to resolve spousal support disputes? ☐ Yes ☐ No ☐ Don't know
- result in fair amounts of spousal support? ☐ Yes ☐ No ☐ Don't know
- are a better way than previously available for determining the amount and duration of spousal support? ☐ Yes ☐ No ☐ Don't know

Please explain your answers: _____

6. Should some form of spousal support guidelines be made part of the law in British Columbia? Why or why not?

7. Do you have any other comments about how the determination of spousal support could be improved?

## *Discussion Point (2) – Parental Support*

Section 90 of the *Family Relations Act* says that an adult child is responsible for supporting a parent who is dependent on that child because of age, illness, infirmity or economic circumstances.

The B.C. Law Institute recently produced a report that examines this section. *http://www.bcli.org/* The report discusses the origin of section 90 and other parental support provisions, their modern day use, the pros and cons of their use, and suggested reforms. It says that parental support laws were developed as a way of limiting the government's responsibility to support the poor, and that parental support claims have always been rare. In Canada, claims for parental support have been very low compared to child and spousal support claims, but have been increasing in recent years. This trend is expected to continue due to our aging population and a decrease in seniors' incomes relative to other segments of society.

The Law Institute's report analyzes the most common arguments for and against retaining parental support laws. Supporters of retaining them suggest that these laws:

- can be a "last line of defence" against abject poverty;
- can strengthen the bonds between family members where "natural generosity" does not otherwise exist; and
- can have a beneficial impact on government finances when they are enforced.

Those who argue for the elimination of parental support laws suggest that they:

- do not provide adequate and sustainable assistance;
- harm family relationships by raising legal disputes; and
- are less efficient than direct government support for the poor because of enforcement costs (for example, legal aid applications and the use of the Family Maintenance Enforcement Program) and the potential for more people representing themselves in court.

The report recommends that section 90 of the *Family Relations Act* be repealed. It does, however, identify issues to consider if the parental support provision is retained, including:

- whether a parent's conduct should be a disqualifying factor;
- whether the concept of need should replace the current concept of dependency;
- whether the parent should be required to become self-sufficient;
- whether there should be a legislated time limit to parental support awards;
- whether there should be parental support guidelines;
- whether entitlement should be limited to an adult child's legal parents as opposed to others who may have acted like a parent to the child;
- whether agreements providing for or excluding parental support obligations should be allowed; and
- whether the law should deal with allocating legal responsibility for supporting a parent between two or more adult children.

### *QUESTIONS*

8a. Should the *Family Relations Act* continue to allow parents to claim support from their adult children? Why or why not?

8b. If yes, which of the following should apply? [check all that apply]

- ☐ Parental conduct should be a disqualifying factor.
- ☐ The concept of dependency should be kept.
- ☐ The concept of dependency should be replaced with the concept of need.
- ☐ The parent should be required to become self-sufficient.
- ☐ There should be a time limit to parental support orders. [please specify what the time limit should be]:_____
- ☐ There should be guidelines for determining the amount of parental support.
- ☐ Parental support should be restricted to legal parents.
- ☐ Agreements between adult children and their parents for paying parental support or waiving a claim to parental support should be recognized.
- ☐ It should be possible to allocate legal responsibility for parental support between two or more adult children.
- ☐ Other [please specify]: _____.

## PART B – CONTINUING SUPPORT AFTER THE PAYER'S DEATH

### *Discussion Point (3) – What Happens to Spousal Support if the Payer Dies?*

A spouse's need for financial support does not necessarily end when the paying spouse dies. However, there is no specific provision in either the *Divorce Act* or the *Family Relations Act* that authorizes a judge to order that support be paid out of the paying spouse's estate. Several other provinces do allow judges to make a support order binding on the paying spouse's estate. For example, the laws of Ontario and Prince Edward Island automatically presume that support orders are binding on the paying spouse's estate and will continue after the paying spouse dies, unless the order says differently.[24] In Manitoba, New Brunswick, Newfoundland and Labrador, and the Yukon, judges can make a support order that is binding on the paying spouse's estate so that the spousal support is a debt owed by the estate.[25]

In B.C., spouses can agree that support will continue after the payer's death, but it is unclear whether a judge has authority to make such an order. Since there is no specific provision in the *Family Relations Act*, judges have been left to decide this issue on a case-by-case basis. Case law suggests that the duration of the marriage and significant and ongoing need of the recipient are the determining factors.[26]

There is also no provision in the *Family Relations Act* that permits a paying spouse's estate to apply to vary a spousal support order. The B.C. Supreme Court has ruled that an application to vary a spousal support order can only be made by a spouse or a former spouse and not by the estate of a spouse or a former spouse.[27] Some provinces that provide for support orders to be binding on the paying spouse's estate also allow the estate to apply to vary a support order.[28]

Some agreements between separated spouses require the paying spouse to acquire a life insurance policy naming the other as the irrevocable beneficiary for as long as spousal support is payable. Then, if the paying spouse dies, the recipient receives spousal support in the form of life insurance proceeds. This is based on the assumptions that the paying spouse qualifies for life insurance at a reasonable cost, and will not let the policy lapse. Some provincial family laws

specifically authorize judges to order a paying spouse who already has a life insurance policy to name the recipient spouse as the beneficiary of the policy and to continue to pay the premiums.[29]

While making a support order binding on the paying spouse's estate protects the recipient, there are some disadvantages to making such orders. It complicates administration of the estate because spousal support obligations can continue indefinitely, and the deceased's assets cannot be distributed to the beneficiaries until the total amount of the obligation is known. And, an ongoing, unquantifiable support obligation could make the estate insolvent, to the prejudice of the other beneficiaries and creditors of the estate.

The purpose of making support orders binding on paying spouses' estates is to achieve certainty, predictability and consistency for separated and divorced couples. However, the interests of financially dependent former spouses must be balanced against those of the other beneficiaries and creditors of the estate. Ways to balance these competing interests could include:

- limiting the time that a spousal support order binds a paying spouse's estate (for example a fixed number of months or years after the paying spouse's death or until the recipient spouse begins receiving retirement benefits);
- making a spousal support order that binds a paying spouse's estate subject to variation if a judge later makes an award from the estate to other beneficiaries;[30]
- allowing a paying spouse's estate to apply to vary the spousal support order;
- requiring a paying spouse to name the recipient spouse as an irrevocable beneficiary under a life insurance policy for as long as spousal support is payable.

*QUESTIONS*

9a. Should the *Family Relations Act* be changed to allow judges to make support orders binding on the estate of the paying spouse? Why or why not?

9b. If yes, what factors should be taken into consideration? [check all that apply]

| Factors to be considered | Comments |
|---|---|
| ☐ the recipient spouse's ongoing or significant need—or both—which is likely to continue after the paying spouse's death | |
| ☐ duration of the relationship | |
| ☐ age of recipient spouse | |
| ☐ health of recipient spouse | |
| ☐ recipient spouse's prospects for self-sufficiency | |
| ☐ value or nature of the assets the recipient spouse received on separation or divorce | |
| ☐ size of paying spouse's estate | |
| ☐ existence of other beneficiaries (that is, children from this or another relationship, and previous or subsequent spouses) | |
| ☐ existence of a life insurance policy naming the recipient spouse as a beneficiary | |
| ☐ other [please specify]:_____ | |

## PART C – CHANGING A SPOUSAL SUPPORT ORDER

### *Discussion Point (4) – Increasing or Decreasing the Court-Ordered Amount*

The *Divorce Act* authorizes judges to vary, cancel or suspend a spousal support order if there has been "a change in the condition, means, needs or other circumstances" since the previous order was made. An order may operate prospectively (changing future obligations) or retrospectively (affecting past obligations).[31] The objectives in varying a spousal support order are the same as in making the original order.[32]

When varying or cancelling a spousal support order under the *Family Relations Act*, judges must consider "changes in the needs, means, capacities and economic circumstances of each person affected by the order".[33] As well, if the judge finds that a spouse is not making reasonable efforts to become self-sufficient, the amount of spousal support may be reduced.[34] Laws in some other parts of Canada allow judges to also consider other factors, including whether there is new evidence that was not available at the previous hearing[35] or certain conduct of one of the spouses, such as frustrating child access.[36]

To succeed in varying a spousal support order, an applicant must prove a "material change in circumstances." This is a significant and unforeseen change that, if known at the time of making the order, would have likely resulted in a different order being made.[37] For example, a spousal support order might be reduced if there is a material change in a paying spouse's ability to pay due to ill health[38] or retirement.[39] On the other hand, it might be increased if there is a material change in a recipient spouse's needs[40] resulting, for example, from the ill health or disability[41] of either the recipient or a dependent child. In either case, minor or temporary changes are usually not enough to get the order changed.

### *QUESTIONS*

10a. Should the *Family Relations Act* list specific factors to be considered in deciding whether to vary a spousal support order? Why or why not?

10b. If yes, what should those factors be? [check all that apply]

- ☐ evidence that was not available at the previous hearing;
- ☐ failure of the recipient spouse to become self-sufficient;
- ☐ conduct of the recipient spouse that has unreasonably prolonged or increased the need for support;
- ☐ misconduct of the recipient spouse such as denying access, alienating the children from the support paying parent, etc.;
- ☐ ill health or disability of the recipient spouse;
- ☐ retirement of the paying spouse;
- ☐ ill health or disability of the paying spouse;
- ☐ other [please specify]: _____.

## *Discussion Point (5) – Reducing or Cancelling Arrears of Spousal Support*

"Arrears" refers to the amount of the shortfall, when spousal support payments are not made as ordered. A spouse who asks a judge to reduce or cancel arrears must show significant, long-lasting reasons for falling behind that were beyond his or her control, and that he or she was making efforts to comply with the order while the arrears were accumulating.[42]

Reducing or cancelling arrears is, in effect, a variation of a spousal support order, but the test for doing so under the *Family Relations Act* is different.[43] In an application to reduce or cancel arrears, there is no requirement to prove a material change in circumstances. Instead, the applicant must show it would be "grossly unfair not to do so," after considering the paying spouse's efforts to comply with the order; the explanation for any delay in making the application; and any special circumstances the judge considers relevant. [44] Proving gross unfairness, the B.C. Supreme Court has said, is a "heavy" and "substantial" burden. [45]

B.C. is the only place in Canada that has a separate test for reducing or cancelling support arrears. Under the *Divorce Act* and in the other provincial and territorial laws, the test for reducing or cancelling arrears is the same as the test for varying a support order.

### *QUESTIONS*

11a. Should the *Family Relations Act* continue to have a separate test for reducing or cancelling support arrears? Why or why not?

11b. If yes, what should the test be? [check one]

- ☐ grossly unfair not to reduce or cancel the arrears (the current test);
- ☐ other [please specify]: _____

## PART D – GENERAL FEEDBACK

### *QUESTIONS*

12. Are there issues related to spousal support or parental support and the *Family Relations Act* not covered in this paper that you would like to raise?

13. Excessive process and procedure are widely recognized as a barrier to access to justice. Can you suggest anything that could be done to streamline the resolution of issues in spousal support cases?

Please provide your feedback.

## ENDNOTES

[1] Federal Child Support Guidelines, S.O.R./97-175.

[2] *Family Relations Act*, R.S.B.C. 1996, c. 128 [B.C. F.R.A.].

[3] Canada, Department of Justice, *Children Come First: A Report to Parliament on the Provisions and Operation of the Federal Child Support Guidelines* (2002), online: Department of Justice <http://canada.justice.gc.ca/en/ps/sup/pub/rp/report2002.html> (last accessed June 8, 2007).

[4] Spousal support is sometimes referred to as spousal maintenance, or alimony in the United States and several other countries.

[5] *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 [D.A.].

[6] B.C. F.R.A., *supra* note 2, s. 1 (definition of spouse).

[7] B.C. F.R.A., *supra* note 2, ss. 89, 93(4).

[8] B.C. F.R.A., *supra* note 2, s. 90.

[9] B.C. F.R.A., *supra* note 2.

[10] D.A., *supra* note 5, s. 15.2; B.C. F.R.A., *supra* note 2, ss. 89, 93(4).

[11] *Pelech v. Pelech,* [1987] 1 S.C.R. 801, *Richardson v. Richardson,* [1987] 1 S.C.R. 857, *Caron v. Caron,* [1987] 1 S.C.R. 892 [*Pelech* Trilogy].

[12] *Moge v. Moge*, [1992] 3 S.C.R. 813.

[13] *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [*Bracklow*].

[14] *Ibid.*

[15] See for example, Australia, *Family Law Act 1975* (Cth.) at Part VIII; New Zealand, *Family Proceedings Act 1980* (N.Z.), 1980/94 (as amended); United Kingdom, *Matrimonial Causes Act* 1973 (U.K.), 1973, c. 18; Finland, *Marriage Act* 1929 (as amended); Norway, *Marriage Act* 1991; Spain, *Spanish Civil Code* at Articles 90-107; and see also American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Philadelphia: Executive Office, American Law Institute, 2002) (Lexis Nexis).

[16] B.C. F.R.A., *supra* note 2, s. 93(4).

[17] D.A., *supra* note 5, s. 15.2(5). While this provision is in the *Divorce Act*, judges in B.C. have uniformly applied this "conduct is irrelevant" principle to spousal support applications under the *Family Relations Act*. But see *Leskun v. Leskun*, [2006] 1 S.C.R. 920, an appeal from the B.C. Court of Appeal, where the wife was so traumatized by the husband's infidelity that her emotional state made her unable to become self-sufficient and spousal support continued. While the Supreme Court of Canada was careful to distinguish between the emotional consequences of misconduct and the misconduct itself, this case may cast doubt on whether conduct is irrelevant for the purposes of a spousal support order.

[18] James G. McLeod & Alfred A. Mamo, *Annual Review of Family Law 2006* (Toronto: Thomson Carswell, 2006) at 341.

[19] *Bracklow*, *supra* note 13. See also discussion in Laura C. Selby, ed., *Family Law Source Book for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2006) at 6.18-6.25.

[20] Professors C. Rogerson & R. Thompson, *Spousal Support Advisory Guidelines: A Draft Proposal* (Ottawa: Department of Justice, 2005), online: Department of Justice <http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html> (last accessed July 4, 2007).

[21] Professors C. Rogerson & R. Thompson, "The Advisory Guidelines 20 Months Later" (2006), online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/documents/rogerson/spousal_20Months_en.pdf> (last accessed July 4, 2007).

[22] *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748 (C.A.). See also *Tedham v. Tedham*, [2005] B.C.J. No. 2186 (C.A.); *Toth v. Kun*, [2006] B.C.J. No. 739 (C.A.); *W. v. W.*, [2005] B.C.J. No. 1481 (S.C.).

[23] *Family Law Act*, S.N.W.T. 1997, c. 18, ss. 15, 16; *Family Law Act* (Nunavut), S.N.W.T. 1997, c. 18, ss. 15, 16 [Nunavut F.L.A.].

[24] *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(4) [Ontario F.L.A.]; *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 34(3) [P.E.I. F.L.A.].

[25] *Family Maintenance Act*, C.C.S.M. c. F20, s. 10(1)(h) [Manitoba F.M.A.]; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 116(1)(l) [New Brunswick F.S.A.]; *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 40(1)(i) [Newfoundland & Labrador F.L.A.]; *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 38(4) [Yukon F.P.S.A.].

[26] See for example: *Waters v. Conrod*, 2007 BCCA 230; *Hillhouse v. Hillhouse*, [1992] B.C.J. No. 2409 (C.A.); *Ripley v. Ripley* (1991), 52 B.C.L.R. (2d) 362 (C.A.); *Tyerman v Tyerman*, [1999] B.C.J. No. 2327 (S.C.); *Paton v. Paton*, [1995] B.C.J. No. 1998 (S.C.); *Leckie v. Leckie*, [1995] B.C.J. No. 671 (S.C.); *Koch v. Koch*, [1992] B.C.J. No. 2029 (S.C.); *Jackh v. Jackh*, [1981] B.C.J. No. 1773 (S.C.).

[27] *Crain v. Crain*, [1996] B.C.J. No. 1155 (S.C.).

[28] *Family Law Act*, S.A. 2003, c. F-4.5, s. 77(3)(c) [Alberta F.L.A]; Newfoundland & Labrador F.L.A., *supra* note 25, s. 47(1); Ontario F.L.A., *supra* note 24, s. 37(1)(c); P.E.I. F.L.A., *supra* note 24, s. 37(1)(c).

[29] Manitoba F.M.A., *supra* note 25, s. 10(1)(i); New Brunswick F.S.A., *supra* note 25, s. 116(1)(m); Newfoundland and Labrador F.L.A., *supra* note 25, s. 34(1)(i); Ontario F.L.A., *supra* note 24, s. 34(1)(i); Yukon F.P.S.A., *supra* note 25, s. 38(1)(h).

[30] See for example: Newfoundland & Labrador F.L.A., *supra* note 25, s. 40(5) and Yukon F.P.S.A., *supra* note 25, s. 38(4).

[31] D.A., *supra* note 5, s. 17(1).

[32] *Ibid.,* s. 17(7).

[33] B.C. F.R.A., *supra* note 2, s. 96(1).

[34] *Ibid.,* s.96(5).

[35] Alberta F.L.A., *supra* note 28, s. 77(5)(b); New Brunswick F.S.A., *supra* note 25, s. 118(1)(b); Newfoundland & Labrador F.L.A., *supra* note 25, s. 47(1)(d); P.E.I. F.L.A., *supra* note 24, s. 37(2); Yukon F.P.S.A., *supra* note 25, s. 44(2); Nunavut F.L.A., *supra* note 23, s. 23(2).

[36] New Brunswick F.S.A., *supra* note 25, s. 118(1); Newfoundland & Labrador F.L.A., *supra* note 25, s. 47(1)(c). See also *Ungerer v. Ungerer*, [1998] B.C.J. No. 698 where the B.C. Court of Appeal held that for spousal support to be terminated due to misconduct, it had to be "of such a morally repugnant nature as would cause right-thinking persons to say that the spouse is no longer entitled to support from her former husband, or to the assistance of the court in compelling the husband to pay".

[37] *Willick v. Willick*, [1994] 3 S.C.R. 670 [*Willick*].

[38] *Qureshi v. Qureshi*, [1999] B.C.J. No. 839 (S.C.).

[39] *Richardson v. Richardson*, 2001 BCSC 1258; *Cramer v. Cramer*, 2000 BCCA 272. But see also *Koch v. Koch,* [1993] B.C.J. No. 1949 and *Vennels v. Vennels*, [1993] B.C.J. No. 378 which say that judges must carefully consider the circumstances of retirement to ensure the payer's motivation to retire is not to avoid the support order.

[40] *Santoro v. Santoro*, [2006] B.C.J. No. 453.

[41] *O'Neill v. Wolfe*, 2004 BCSC 524.

[42] *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.).

[43] *Jones v. Anhorn*, 2000 BCCA 213.

[44] B.C. F.R.A., *supra* note 2, s. 96(2) & (3).

[45] *Willick*, *supra* note 37. See also *Sandhals v. Lorette*, 2001 BCSC 31.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 12

# Co-operative Approaches

# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## August 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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## SETTING THE SCENE

In its 2005 report, the Family Justice Reform Working Group recommended making British Columbia's family justice system less adversarial. The Working Group reviewed the many family law reports and studies that have been done in B.C. and elsewhere over the past three decades and noted that these reports have consistently recommended "that family cases not be treated as potential trials but be managed through processed designed to address the relationship issues and underlying emotions which actually drive family conflict." [1] Still, the family justice system steers people with family disputes to court. For that reason, the Working Group focused primarily on family justice programs and services. Chapter 5 of this Review describes work now underway to respond to some of its recommendations.

The Working Group also noted that in some respects the *Family Relations Act* [2] and the *Divorce Act* [3] stand in the way of reform because they:

- imply that the courtroom is the primary forum for resolving family law disputes;
- are built on an adversarial foundation that can escalate conflict and cause emotional harm by encouraging an "attack and defend" approach;
- frame parenting issues in language that tends to pit parents against each other; and
- do not go far enough to encourage people to work towards agreement through consensual dispute resolution processes, such as mediation or collaborative law. [4]

The Working Group recommended changes to the *Family Relations Act* to promote a different approach to resolving family law issues. It recommended:

- allowing a spouse to preserve legal rights without having to start a court case.[5] This is discussed in Chapter 13 of this Review;
- allowing spouses to set a "triggering event" (the date fixing a non-owning spouse's interest in family assets) by agreement.[6] This is discussed in Part D of Chapter 2 of this Review;
- allowing unmarried spouses to make agreements about dividing their family property on separation, without "opting in" to the *Family Relations Act* provisions that cover division of family assets.[7] This is discussed in Part B of Chapter 2 of this Review; and
- limiting judges' authority to interfere with private agreements.[8] This is discussed in Part C of Chapter 2 of this Review.

The Working Group also made a general recommendation that the *Family Relations Act* be reformed to better reflect the co-operative values and principles identified in its report.[9] Other chapters of this Review discuss some ways that the *Family Relations Act* could be changed to meet this recommendation:

- Chapter 2 discusses the benefit of clear rules in the *Family Relations Act* to encourage separated spouses to make their own arrangements for dividing family property, as well as the importance of some flexibility because it is impossible to design a set of rules that will be fair in every situation. It points out the challenge of finding the right balance between flexibility and certainty.
- Chapter 6 discusses the power of words and the potential for changing terminology to promote a shift towards co-operative parenting arrangements. It also looks at provisions that would allow a judge, when making a family law order, to include a requirement that parties use a dispute resolution process such as mediation if they have a disagreement about the order, before going back to court.

- Chapter 8 discusses a less adversarial trial process for disputes over parenting arrangements that is used in Australia.

Some laws contain an introduction, called a preamble, or a statement of purpose. For example:

- Ontario's *Family Law Act*, which covers family property, support obligations, and domestic contracts, starts with a preamble setting out the reasons for making that law, including "to encourage and strengthen the role of the family" and "to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership".[10]
- Washington State's family law includes a statement of policy, which says in part: "Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. . . . The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care . . . ."[11]

A preamble or statement of purpose sets out the values underlying the law. To the extent that this helps people understand a law's purpose, it might help them to resolve their disputes without going to court. On the other hand, using preambles and purpose statements is risky because it is hard to predict with certainty how they will affect the interpretation of the legal principles contained in the law. For that reason, they are usually not used in B.C.

This paper looks at some other ways that the *Family Relations Act* could reflect co-operative values and principles. The paper is divided into three sections. The first two look at ways the *Act* could encourage people to try to resolve family law disputes co-operatively. The final section asks you to tell us which issues you believe are the most important, and to identify any issues not covered in the paper that you feel should be discussed. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper, please refer to the following link to Legislation.

## DISCUSSION

## PART A – PROVIDING INFORMATION

### *Discussion Point (1) – Obligation to Provide Information*

Information can be a powerful dispute resolution tool. The Family Justice Reform Working Group noted that: "Want of information leads to ill-informed choices, unexpected outcomes and lost time. Relevant information can reduce fear, frustration and conflict, and minimize the expense of working out solutions."[12]

Information is available from a variety of sources in B.C. about ways to resolve family law disputes, and lawyers and others who work with separating and divorcing couples do inform them about dispute resolution options. But, unlike some family laws elsewhere, the *Family Relations Act* does not require that certain information be provided to people before they file court documents to start a claim.

The *Divorce Act* requires lawyers to advise their clients about negotiation as an option for resolving custody and support disputes and about mediation services that might be able to help them. Lawyers must certify that they have complied with this requirement when they file the

documents to begin an application for a divorce.[13] In Saskatchewan, both *The Children's Law Act, 1997* and *The Family Maintenance Act, 1997* have similar requirements.[14]

Bill C-22 (2002) would have expanded the requirement in the *Divorce Act* to require lawyers to advise their clients of other family justice services, in addition to mediation, that might help them resolve their disputes.[15] That bill died on the order paper when Parliament adjourned before the 2004 election.

Alberta's family law requires lawyers to discuss dispute resolution options with their clients and to inform them of "collaborative processes, mediation facilities and family justice services" that might help clients resolve their disputes.[16]

In New Zealand, lawyers must make sure that their clients know about services available for promoting "reconciliation and conciliation" and must take any other steps that they think "may assist in promoting reconciliation, or if reconciliation is not possible, conciliation."[17]

Australia's family law has quite detailed requirements. If a person consults a lawyer about starting a family law claim, the lawyer must give the person written information about:

> (a) the legal and possible social effects of the proposed proceedings (including the consequences for children whose care, welfare or development is likely to be affected by the proceedings);
>
> (b) the services provided by family counsellors and family dispute resolution practitioners to help people affected by separation or divorce;
>
> (c) the steps involved in the proposed proceedings;
>
> (d) the role of family consultants; and
>
> (e) the arbitration facilities available as an alternative to court.[18]

If the dispute involves parenting arrangements, the lawyer must also include information about family counselling services that can help parents and children adjust to any parenting order that a judge makes.[19]

Australia's law also places a duty on advisers who are consulted about parental responsibility for a child to inform parents of the option of making a parenting plan and to let them know where they can get help to make a plan. ("Advisers" include lawyers, family counsellors, family dispute resolution practitioners and family consultants.) An adviser who gives advice about making a parenting plan has a duty to inform the parent:

- that decisions made in developing a parenting plan should be made in the children's best interests;
- what items may be included in a parenting plan; and
- the specific parenting arrangements parents could consider, such as spending equal time or "substantial and significant time" with the child, if it is practical and in the child's best interest.[20]

### *QUESTIONS*

1a. Do you think it would encourage people to co-operate in resolving family law disputes, if the *Family Relations Act* required that they be given certain information before starting a court case? Why or why not?

If yes to 1a,

1b. what information should be given?

1c. who should give it?

1d. when should it be given?

## PART B – ENCOURAGING CO-OPERATION

### *Discussion Point (2) – Encouraging Agreements*

Many people in British Columbia are able to resolve their family law disputes without going to court. The *Family Relations Act* recognizes several different types of agreements, including separation agreements and marriage agreements, but it does not specifically encourage people to reach agreements like some family laws elsewhere do.

New Zealand's *Care of Children Act 2004* says that the Act "encourages agreed arrangements for, and provides for the resolution of disputes about the care of children."[21]

Australia's *Family Law Act 1975* says,

> The parents of a child are encouraged:
>
> a) to agree about matters concerning the child; and
>
> b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
>
> c) to use the legal system as a last resort rather than a first resort; and
>
> d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
>
> e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.[22]

Part of Australia's family law covers courts' powers in relation to court and non-court based family services. One of its stated objectives is "to encourage people to use dispute resolution mechanisms (other than judicial ones) to resolve matters in which a court order might otherwise be made under this Act . . . ."[23]

Another part of Australia's law covers parental responsibility, parenting plans, and parenting orders. One of its underlying principles is that parents should agree about future parenting of their children.[24]

Ontario's *Family Law Act* has several sections specifically authorizing different types of domestic contracts. The section covering separation agreements says,

> Two persons who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,
>
> a) ownership in or division of property;
>
> b) support obligations;
>
> c) the right to direct the education and moral training of their children;
>
> d) the right to custody of and access to their children; and
>
> e) any other matter in the settlement of their affairs.[25]

Washington and Oregon require parents to make agreements—called parenting plans—setting out parenting arrangements for their children. If parents are not able to agree, a judge will make

an order setting out a parenting plan. Parenting plans are discussed in Part C of Chapter 6 of this Review.

*QUESTIONS*

2. If the *Family Relations Act* specifically encouraged people to try to resolve disputes by agreement, would that help promote co-operative dispute resolution? Why or why not?

3a. Should the *Family Relations Act* specifically encourage people to try to resolve disputes by agreement? Why or why not?

3b. If yes, what should the *Family Relations Act* say?

## *Discussion Point (3) - Promoting Consensual Dispute Resolution*

Some family laws have provisions that deal with consensual dispute resolution. For example, Ontario's law authorizes a judge to appoint a mediator, if the parties agree.[26] Alberta's law authorizes a judge to appoint a mediator (without requiring the parties' agreement) and to allocate the cost between the parties.[27] Washington and Oregon also allow for referring contested cases to mediation.[28]

In British Columbia, these provisions would go in court rules or other regulations, rather than in the *Family Relations Act*. The *Court Rules Act* authorizes rules to be made to govern procedures in Provincial Court and Supreme Court, including rules to:

> (a) permit or require, or provide to the court or to the parties to a proceeding the ability to permit or require, mediation to be included as part of a proceeding, whether or not the mediation is provided by or in the court, and
>
> (b) govern the conduct of, and all procedures relating to, the mediation.[29]

Both courts have some rules to promote early settlement of cases, and in most family cases a meeting with a judge is required before a contested hearing can be held.[30] In four Provincial Court registries, the rules require that most people with disputes about parenting or family support meet with a family justice counsellor before going to court. The family justice counsellor may refer them, at their request, to mediation or another service to help them resolve their disputes.[31] In 13 Provincial Court registries, people with parenting disputes must attend the Parenting After Separation Program before going to court. That program provides information about the impact of separation on children and adults, dispute resolution options, and child support guidelines.[32] The rules also allow Provincial Court judges to refer people to mediation with a family justice counsellor (in four registries) or, if the people agree, to private mediation (in all registries).[33]

A Family Rules Working Group that includes representatives from both courts, and the Ministry of Attorney General, as well as family lawyers, is working under the direction of the B.C. Justice Review Task Force on developing new court rules for family cases. That work is separate from this review of the *Family Relations Act* and will have its own consultation process.

### Mandatory Dispute Resolution

The Family Justice Reform Working Group noted that the increasing availability of mediation has not led to as many people choosing mediation as might have been expected given the high levels of resolution in mediated disputes. That, coupled with research findings that settlement rates and satisfaction levels are about the same whether people choose mediation or are compelled to try it, led the Working Group to recommend that people with family law disputes be required to attend a consensual dispute resolution session, such as mediation, before being allowed to take a

first contested step in court, unless exempted.[34] Chapter 9 of this Review discusses exemptions to mandatory dispute resolution based on the presence of family violence.

California and Australia both have mandatory dispute resolution for family cases. In Quebec, mediation is not mandatory, but people are required to attend an information session that explains the nature and objectives of mediation, the mediation process and the role of the mediator, before they can go to court in contested family cases.[35]

Under California's family law, people are required to go to mediation in most contested cases involving children.[36] The requirement arises once documents have been filed with the court. The law describes the purposes of mediation as being to reduce hostility between the parents; to develop an agreement that ensures the child will have close and continuing contact with both parents, if that is best for the child; and to settle access disputes in a way that is best for the child.[37]

Australia's family law requires people to "make a genuine effort" to resolve parenting disputes before applying to court for an order.[38] As of July 1, 2007, an applicant for a parenting order must file, with the application, a certificate from a family dispute resolution practitioner, unless exempted. The certificate certifies either that:

- the applicant did not attend family dispute resolution because the other person failed or refused to attend; or
- the applicant did not attend because the dispute resolution practitioner determined that family dispute resolution was not appropriate; or
- the applicant attended family dispute resolution with the other person and they made a genuine effort to resolve their dispute; or
- the applicant attended but the applicant or the other person did not make a genuine effort to resolve the dispute.

The judge will take the kind of certificate into account in considering whether to make an order referring the parents to family dispute resolution or in deciding whether to order that one parent pay some of the other parent's court costs. [39]

As a first step toward introducing mandatory dispute resolution, the Ministry of Attorney General is going to establish a pilot project in the Supreme Court in Nanaimo to test the use of the Notice to Mediate in family cases. The Notice to Mediate, which has been used in other types of cases in the Supreme Court for nearly 10 years, allows either party to require the other to attend a single mediation session. Attendance at the session is mandatory, but reaching an agreement is not. The Notice to Mediate process for family cases would be contained in a regulation under the *Law and Equity Act*.[40] To learn more about the Notice to Mediate, go to the Dispute Resolution Office website.

### *QUESTIONS*

4. The Family Justice Reform Working Group recommended that B.C. adopt mandatory consensual dispute resolution, such as mediation, for family disputes. If B.C. were to follow this recommendation, what, if any, provisions should be included in the *Family Relations Act* to support mandatory consensual dispute resolution?

5. If B.C. were to adopt mandatory consensual dispute resolution for family disputes, when should people be required to try consensual dispute resolution? [choose one]

   ☐ before being allowed to file the court documents to start a claim

   ☐ after filing the documents to start a claim, but before taking a first contested step in court

☐ other [please describe]

## PART C – GENERAL FEEDBACK

*QUESTIONS*

6. Are there issues related to co-operative approaches not covered in this paper that you would like to raise? If yes, please describe.
7. Are there ways not covered in this paper that the *Family Relations Act* could be amended to help reduce conflict, steer families away from court and support consensual dispute resolution processes?
8. In your opinion, what are the three most important things that the *Family Relations Act* could do to promote co-operative resolution of family disputes?

Please provide your feedback.

## ENDNOTES

[1] British Columbia, Family Justice Reform Working Group, *A New Justice System for Families and Children* (B.C. Justice Review Task Force, 2005) at 5 [Working Group Report].

[2] *Family Relations Act*, R.S.B.C. 1996, c. 128.

[3] *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 [D.A.].

[4] Working Group Report, *supra* note 1 at 78.

[5] *Ibid.,* recommendation 22 at 79.

[6] *Ibid.*, recommendation 23 at 80.

[7] *Ibid.*, recommendation 24 at 80.

[8] *Ibid.*, recommendation 25 at 81.

[9] *Ibid.,* recommendation 27 at 81.

[10] *Family Law Act*, R.S.O. 1990, c. F.3, preamble [Ontario F.L.A].

[11] R.C.W. tit. 26 § 26.09.002 (2007) [R.C.W.].

[12] Working Group Report, *supra* note 1 at 24.

[13] D.A., *supra* note 3, s. 9(2), (3).

[14] *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 11; *The Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, s. 16.

[15] Canada, Bill C-22, *An Act To Amend The Divorce Act, The Family Orders And Agreements Enforcement Assistance Act, The Garnishment, Attachment And Pension Diversion Act And The Judges Act And To Amend Other Acts In Consequence*, 2nd Sess., 37th Parl., 2003, cl. 7.

[16] *Family Law Act*, S.A. 2003, c. F-4.5, s. 5 [Alberta F.L.A.].

[17] *Family Proceedings Act 1980* (N.Z.), 1980/94 [N.Z. F.P.A.].

[18] *Family Law Act 1975* (Cth.), s. 12B(2) [Australia F.L.A.].

[19] *Ibid.*, s. 12D.

[20] Ibid., s. 63DA.

[21] *Care of Children Act 2004* (N.Z.), 2004/90, s. 3(2)(d) [N.Z. C.C.A.].

[22] Australia F.L.A., *supra* note 18, s. 63B.

[23] Australia F.L.A., *supra* note 18, s. 13A(1)(b).

[24] Australia F.L.A., *supra* note 18, s. 60B(1), (2)(d).

[25] Ontario F.L.A., *supra* note 10, s. 54.

[26] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 31; Ontario F.L.A., *supra* note 10, s. 3.

[27] Alberta F.L.A., *supra* note 16, s. 97.

[28] R.C.W., *supra* note 11, 26.09.015; O.R.S. § 107.765 (2005) [O.R.S.].

[29] *Court Rules Act*, R.S.B.C 1996, c. 80, s. 1.

[30] See B.C. Reg. 146/2007, R. 60E [SC Rules] and B.C. Reg. 417/98, R. 5, 7 [PC Rules].

[31] PC Rules, *ibid.*, R. 5.

[32] PC Rules, *ibid.*, R. 21.

[33] PC Rules, *ibid.*, R. 5(7), 6(3).

[34] Working Group Report, *supra* note 1 at 45.

[35] Arts. 814.3, 814.6 C.C.P.

[36] Cal. Fam. Code § 3170.

[37] *Ibid.,* § 3161.

[38] Australia F.L.A., *supra* note 18, s. 60I.

[39] *Ibid.*

[40] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 68.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 13

# Time Limits and Definitions
# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## August 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.

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## SETTING THE SCENE

Time limits play a role in the definitions of "parent" and "spouse" that are contained in the *Family Relations Act* [1]. These time limits serve two purposes:

1. they establish when certain rights and obligations arise; and
2. they set deadlines for bringing certain claims.

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*, as one component of its justice reform and law reform strategy. The paper looks at ways these time limits—often called "limitation periods"—might be changed to make the legislation simpler, fairer and more certain.

The paper is divided into five sections. The first three discuss time limits for claiming spousal support, division of family property, and child support. The fourth section discusses ways those time limits can be extended. The final section asks you to tell us which issues you believe are the most important, and to identify any issues not covered in this paper that you feel should be discussed.

Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper, please refer to the following link to Legislation.

## DISCUSSION

### PART A – SPOUSAL SUPPORT

Both the federal *Divorce Act* and provincial and territorial laws govern a person's right to receive, or obligation to pay, spousal support. The *Divorce Act* only applies to married spouses who divorce. Provincial and territorial laws apply to both married and unmarried spouses.[2] Before examining the time limits for claiming spousal support, we will discuss the criteria one must meet to be considered an unmarried spouse.

#### *Discussion Point (1) - Unmarried Spouses*

The *Family Relations Act* includes people who are not married in its definition of spouse, except for the purpose of dividing family property or pension entitlement.[3] Unmarried spouses[4], for the purposes of spousal support, are people who have lived together in a marriage-like relationship for at least two years, if a claim under the *Act* is made within one year after separation.[5] The definition also applies to same-sex relationships.

The requirement of a minimum cohabitation period may serve to screen out unstable and uncommitted relationships that are not sufficiently permanent and interdependent.[6] This requirement may also operate unfairly because it does not take into account whether the people actually intended to support each other.[7] The Supreme Court of Canada has said that the decision to live together is not enough to indicate an intention to contribute to and share in each other's assets and liabilities after the end of the relationship. While people who marry can be said to freely accept mutual rights and obligations, the same is not true for unmarried cohabitants.[8]

Other provinces also require a minimum cohabitation period to qualify as an unmarried spouse, ranging from "a relationship of some permanence"[9] to three years.[10] Most provinces require either two or three years of cohabitation.

Family laws in Alberta, Saskatchewan, Ontario, New Brunswick, Prince Edward Island and the Northwest Territories shorten the required cohabitation period for unmarried couples who have a

child together. The reasoning is that a child brings about a certain extent of interdependency in a couple and a relationship between parents of a child is more likely to be marriage-like.[11] Generally, in provinces with such a provision, cohabiting "in a relationship of some permanence" is sufficient to qualify as an unmarried spouse.[12] British Columbia does not have such a provision.

## Calculating the Cohabitation Period

Often the beginning and end dates of a "marriage-like relationship" are unclear, which can make it difficult to determine whether the minimum cohabitation period has been met. Judges in British Columbia have ruled that the phrase "ceased to live together" does not necessarily determine the date that a marriage-like relationship ended for the purposes of the definition of "spouse."

Instead, judges have looked to see when the "marriage-like" quality of the relationship ended, taking into account objective factors including the absence of sexual relations; a clear statement by one of the spouses of a desire to end the relationship; physical separation, either into different rooms of the same house or different residences; or the couple no longer presenting themselves to the outside world as a couple. Also, the method used by a spouse to file income tax returns may be a relevant consideration; [13] for example, whether or not a spouse has checked the "living common-law" box on the return.

The British Columbia Law Institute, in its 1998 *Report on Recognition of Spousal and Family Status*,[14] considered this issue. The Report recommended changing the *Family Relations Act* and other Acts to set out rules for determining when a person is no longer considered to be a spouse, to help determine the end of a relationship.[15]

Unlike family laws in other provinces such as Ontario,[16] the *Family Relations Act* does not specify that the required cohabitation period must be continuous. A period of cohabitation may be interrupted for many reasons, such as holidays which have been taken apart, or temporary separations when one person moves out for a period of time. It is unclear whether it is sufficient for an unmarried couple to have cohabited for a total of two years, or whether the period must be uninterrupted, for them to qualify as unmarried "spouses" under the *Family Relations Act*.[17]

### *QUESTIONS*

1a. Should an unmarried couple's status as spouses continue to be based on the length of time they have lived together? Why or why not?

1b. If yes, how long should they have to live together before they are considered to be spouses under the *Family Relations Act*? [check one]

- ☐ no set length of time, but in a "relationship of some permanence"
- ☐ 2 years
- ☐ 3 years
- ☐ other [please specify]: _____

1c. Should the *Family Relations Act* specify that the length of time be continuous? Why or why not?

2. If a couple has had a child together, should the *Family Relations Act* consider them to be spouses [check one]

- ☐ if they have been in a "relationship of some permanence"
- ☐ if they meet the same minimum cohabitation period as unmarried spouses who have not had a child together
- ☐ other [please specify]: _____

3a. Should the *Family Relations Act* specify indicators of the end of a marriage-like relationship? Why or why not?

3b. If yes, what should those indicators include? **[**check all that apply**]**

- ☐ absence of sexual relations
- ☐ a clear statement by one of the spouses of a desire to end the relationship
- ☐ physical separation of the spouses, either into different rooms of the same house or different residences
- ☐ the couple no longer presenting themselves to the outside world as a couple
- ☐ the method used by the spouses to file income tax returns
- ☐ other **[**please specify**]**: _____

## *Discussion Point (2) – Timing of Spousal Support Claims*

The limitation period for starting a spousal support claim varies across Canada. The federal *Divorce Act* sets no time limit on when a spousal support claim can be started. This approach is followed in Alberta[18], Saskatchewan[19], Manitoba[20], Ontario[21] and Nova Scotia[22]. Others impose time limits that are the same for married and unmarried spouses – generally two years from separation.[23] British Columbia, New Brunswick and the Yukon are unique in setting different time limits for spousal support claims for married and unmarried spouses. In British Columbia, a claim must be brought within two years after divorce (or judicial separation or annulment) for married spouses, and within one year after separation for unmarried spouses.[24] New Brunswick and the Yukon have no time limit for spousal support claims by married spouses, but unmarried spouses in New Brunswick must start a claim within one year of separation[25] and in the Yukon, within three months.[26]

Even though the *Family Relations Act* does not provide for an extension of the one year limitation period for an unmarried spouse to apply for spousal support, some courts have extended it in certain situations if a person has continued to pay spousal support more than a year after separation. The rationale is that the support-paying spouse has, by his or her conduct, led the other to believe that he or she will not rely on the strict definition of "spouse" contained in the *Act*.[27]

## Application of the *Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms*[28] is relevant in considering whether married and unmarried spouses should be subject to the same limitation periods for spousal support actions. The Supreme Court of Canada has stated that the characteristics of being unmarried represent a ground of discrimination under the equality provisions of the *Charter*, which guarantee every individual the right to equal treatment by the state without discrimination.[29]

New Brunswick's superior court has found that the province's law discriminated against unmarried spouses because it required a spousal support claim by an unmarried spouse to be started within one year of separation, but placed no limitation on married spouses.[30] In contrast, the Supreme Court of Canada has found that federal pension plan law, which automatically removes spousal status from unmarried spouses at separation, but not from married spouses, is not discriminatory.[31]

The possibility of a successful *Charter* challenge is an important factor to consider in deciding whether the limitation period for married and unmarried spouses should be the same.[32]

### *QUESTIONS*

4a. Should there be a time limit for starting a claim for spousal support? Why or why not?

4b. If yes, how long should the time limit be for married spouses? [check one]

- ☐ 1 year after divorce
- ☐ 2 years after divorce
- ☐ 3 years after divorce
- ☐ other [please specify]: _____

4c. If yes, how long should the time limit be for unmarried spouses? [check one]

- ☐ 1 year after separation
- ☐ 2 years after separation
- ☐ 3 years after separation
- ☐ other [please specify]: _____

## PART B – PROPERTY DIVISION

When a relationship breaks down, family assets need to be divided. For a discussion of the different approaches to property division please refer to Chapter 2 of this Review. This section focuses on the different time limits for married and unmarried spouses to apply to court for a share of the family assets. In the *Family Relations Act*, those time limits are found in the definition of "spouse."

### *Discussion Point (3) – Property Division for Married Spouses*

Under the *Family Relations Act*, a married spouse has two years to apply to court for a division of family property after the occurrence of one of the following events:

- a court order for divorce (or judicial separation, which is rarely, if ever, requested); or
- an annulment (a declaration by a judge that the marriage was never valid in the first place).[33]

If married spouses separate but never get a divorce (or a judicial separation or an annulment) it appears that there is no time limit for claiming a division of family property.[34]

Across Canada, these time limits vary from before an order of divorce or annulment[35] to no more than six years after separation.[36] Within this range, two years after divorce,[37] and either two[38] or six[39] years after separation are the most common time limits. Some provinces set out different time limits for each event.[40] For example, in Ontario, a claim for division of property must be started by the earliest of:

- two years after divorce or annulment,
- six years after separation, or
- six months after the spouse's death.[41]

### Timeframes for Reviewing Agreements

Married couples can make agreements for the division of family property under the *Family Relations Act*. Such agreements include "marriage agreements," which are defined in s. 61, and "separation agreements,"[42] which are not defined in the *Act*. A married spouse has the right to apply to court to change an agreement on the grounds that it is unfair.[43] Different sections of the *Act* apply, depending on the type of agreement being challenged.

To have a marriage agreement reviewed, an application must be brought under s. 65 within two years of a divorce (or a judicial separation or an annulment), while the applicant is still a "spouse" for the purposes of the *Act*. There is no extension available for this limitation period.[44]

The law is not as clear for separation agreements.[45] In some cases judges have reviewed separation agreements under s. 65, applying the two year limitation period;[46] and in other cases they have reviewed separation agreements under s. 68, which applies to "ante nuptial" (before marriage) and "post nuptial" (after marriage) settlements. Section 68 includes a provision for extending the two year time limit for making an application.[47]

The different approaches taken by judges in reviewing separation agreements, and the availability of an extension in s. 68 but not in s. 65, leads to uncertainty and arguably, unfairness. Questions have been raised about why there is a difference between the limitation periods, and whether British Columbia should eliminate this difference.

### *Questions*

5a. Should there be a time limit for married spouses to apply for a division of family assets? Why or why not?

5b. If yes, how long should the time limit be? [check one]

- ☐ 1 year after divorce
- ☐ 2 years after divorce
- ☐ 3 years after divorce
- ☐ the earlier of 2 years after divorce and 6 years after separation
- ☐ other [please specify]: _____

6a. Should the *Family Relations Act* be amended to remove the difference between the time limits in s. 65 and s. 68? Why or why not?

6b. If yes, how should this be done? [check one]

- ☐ allow judges to extend the two year time limit under s. 65
- ☐ remove the authority for judges to extend the two year time limit under s. 68
- ☐ other [please specify]: _____

## *Discussion Point (4) – Property Division for Unmarried Spouses*

Only married people are defined as spouses for the purposes of family property division.[48] However, unmarried spouses —people who have lived in a marriage-like relationship for at least two years—can "opt-in" to the *Family Relations Act* property division scheme by making an agreement under s. 120.1.[49] How unmarried spouses are treated under family property law differs in other provinces and territories. For a detailed discussion of the different approaches see Chapter 2 of this Review.

Section 120.1 says that if unmarried spouses make an agreement (for example a cohabitation agreement or separation agreement), the *Family Relations Act* applies to that agreement and to any family assets covered by the agreement. This section only applies if the couple makes an agreement while they are still spouses under the *Act*, which means either before separation or within one year after. And, if they have a dispute about the property division set out in the agreement, or wish to change the agreement, they must start a court action within that same time period.[50]

It has been said that it is impractical and unfair to require unmarried couples to enter into agreements in order to "opt in" to the property division scheme under the *Act*. People are often not emotionally prepared to make agreements about their personal relationships. When starting a new relationship often couples do not want to think about the relationship ending. Once a relationship has ended, it may be difficult for them to come together to make an agreement dealing with familial rights and obligations.[51] Further, the one year time limit limits the usefulness

of the provision allowing unmarried spouses to apply for property division, because it can be difficult for couples to come to an agreement so soon after separation.

If an unmarried couple without an agreement wants to take a property division dispute to court, they cannot use the *Family Relations Act*. Instead, they must base their claim on common law principles such as unjust enrichment[52], which are often difficult to prove. The limitation period for this type of claim is found in the *Limitation Act.*[53] A person has six years from the end of the marriage-like relationship to start a court action.[54]

### Application of the *Charter*

The Supreme Court of Canada has ruled that excluding unmarried spouses from property division schemes does not violate the equality guarantees in the *Charter.*[55] Although excluding unmarried spouses draws a distinction based on marital status, the Supreme Court said that the different treatment of married and unmarried spouses was not discriminatory. The Court reasoned that unmarried spouses had chosen to avoid the consequences of marriage and therefore should not have the obligations of marriage imposed on them, at least for property law purposes.[56] Professor Nicholas Bala, a family law expert, has said that by distinguishing marriage from common-law relationships, the Supreme Court could be seen as upholding the importance of marriage, and as exercising judicial restraint by not "making new social policy" on unmarried relationships.[57] In the future, this decision could mean that provincial laws that contain different property division schemes for married and unmarried spouses will likely withstand *Charter* challenges, but it does not prevent provinces from treating the two groups the same.

#### *QUESTIONS*

7a. Should there be a time limit for unmarried spouses who "opt in" to the *Family Relations Act* to apply for the division of family assets? Why or why not?

7b. If yes, how long should the time limit be? [check one]

- ☐ 1 year after separation
- ☐ 2 years after separation
- ☐ 3 years after separation
- ☐ other [please specify]: _____

## PART C – CHILD SUPPORT

The family law of each province and territory sets out the obligation of parents to financially support their children.[58] The *Divorce Act* also requires spouses to support their children.[59]

Child support is the right of the child and the obligation for child support arises out of a person's status as a parent.[60]

### *Discussion Point (5) – Qualifying as a Stepparent*

The *Family Relations Act's* definition of "parent" includes a stepparent who:

- was or is married to a parent of the child, or lived in a marriage-like relationship with the parent of the child for at least two years; and
- contributed to the support of the child for at least one year.[61]

This definition of stepparent differs from the rest of Canada's provincial and federal family laws, as no other jurisdiction requires a person to do something for a specified period of time before qualifying as a parent.[62]

Other Canadian family laws use different terms than British Columbia to describe who qualifies as a "stepparent." Generally, the definitions include a person who stands in the place of a parent[63]

or a person who demonstrates a settled intention to treat the child as his or her own.[64] Once such a relationship is established, the "parent" acquires obligations to support the child that are similar to a legal parent's. The breakdown of a marriage (or marriage-like relationship) does not give the person who qualifies as a stepparent the right to unilaterally withdraw from that relationship with a child.[65]

Alberta's *Family Law Act* provides a list of factors to aid in determining when a person has demonstrated a settled intention to treat a child as his or her own. They are:

- the child's age;
- the duration of the child's relationship with the person;
- the nature of the child's relationship with the person, including:
    - the child's perception of the person as a parental figure,
    - the extent to which the person is involved in the child's care, discipline, education and recreational activities, and
    - any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's father or mother;
- whether the person has considered:
    - applying for guardianship of the child,
    - adopting the child, or
    - changing the child's surname to that person's surname;
- whether the person has provided direct or indirect financial support for the child;
- the nature of the child's relationship with another parent; and
- any other factor that the court considers relevant.[66]

British Columbia's definition of stepparent does not require specific proof that a person intended to treat the child as his or her own. Regardless, when deciding whether a person qualifies as a stepparent, a judge considers all aspects of the relationship with the child, including financial provision, social interaction, and the adult's role in discipline and education.[67]

It has been said that British Columbia's approach to child support by stepparents could discourage a person from entering into a relationship where he or she is not the child's parent, as it could lead to supporting the partner's children until the age of majority, or longer (as the obligation to pay child support can extend past age 19 if the child is attending post-secondary education, disabled or ill). Further, it could potentially allow an action for child support to be brought against a former stepparent who has not had contact with the child for a significant period of time.

Some have questioned whether British Columbia should move away from determining a stepparent relationship based solely on the duration of both the marriage-like relationship and the support of the child, and towards a determination based on a number of factors, similar to the model used in Alberta.

### *QUESTIONS*

8. What factors should the *Family Relations Act* include in order to determine whether a person is a stepparent? [check all that apply]

☐ the child's age

☐ the duration of the child's relationship with the person [please specify how long]:_____

☐ the nature of the relationship between the person and the parent of the child

☐ the nature of the relationship between the person and the child:

☐ the child's perception of the person as a parental figure

☐ the extent to which the person is involved in the child's care, discipline, education and recreational activities

☐ any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's father or mother

☐ whether the person has considered applying for guardianship of the child, adopting the child, or changing the child's surname

☐ whether the person has provided indirect or direct financial support [please specify for how long]:_____

☐ the nature of the child's relationship with any other parent

☐ other [please specify]: _____

### *Discussion Point (6) – Time Limits for Child Support Claims Involving Stepparents*

Under the *Family Relations Act*, a claim for child support by or against a stepparent must be started within one year of the last time the stepparent contributed to the support of the child.[68] British Columbia is the only place in Canada that includes a time limit for starting an action for child support by or against a stepparent. There is no time limit if the claim is by or against a legal parent or guardian.

#### *QUESTIONS*

9a. Should there be a time limit for child support claims involving a stepparent? Why or why not?

9b. If yes, how long should the time limit be? [please specify]: _____

9c. If yes, when should the time limit begin? [check one]

☐ after the last support payment

☐ after the last contact with the child

☐ other [please specify]: _____

## PART D –EXTENDING A TIME LIMIT

When there is a time limit for making a claim, some people feel compelled to start a court action even though they hope to come to an agreement, simply to preserve their right should they eventually need to ask for a court order.

The Family Justice Reform Working Group looked at this issue in its 2005 report on the family justice system in British Columbia.[69] To encourage people to genuinely try to resolve their disputes before applying to court, the Working Group recommended changing the *Family Relations Act* to give people a way to preserve their rights without starting a court action. The Working Group suggested two ways of doing this:

- let people agree in writing to extend the time limit; and
- allow a person to file with the court a short form called a "Notice to Preserve Limitation", identifying the people involved and their relationship. The form would then be served on the other person to stop the time period from running.[70]

Either of these options would give people the time they might need to come to an agreement on support issues and division of property. Both would remove the pressure to go to court just to retain the right to use the *Family Relations Act* later if agreement is not possible.

### *QUESTIONS*

10a. Should there be a way, other than starting a court action, to preserve the right to start a claim under the *Family Relations Act*? Why or why not?

10b. If yes, what do you think would work? [check all that apply]

- ☐ allow people to agree in writing to extend the time limit
- ☐ allow people to file and serve a form, such as a "Notice to Preserve Limitation," to stop the time period from running
- ☐ other [please specify]: _____

11a. Should there be a limit on how long the right to start an action can be extended? Why or why not?

11b. If yes, what should the limit be? [please specify]:_____

## PART E – GENERAL FEEDBACK

12. Are there any other issues related to time limits in the *Family Relations Act*, which are not covered in this paper, that you would like to raise?

13. In your opinion, what are the three most pressing issues related to time limits in the *Family Relations Act?*

Please provide your feedback.

## ENDNOTES

[1] *Family Relations Act*, R.S.B.C. 1996, c. 128 [B.C. F.R.A.].

[2] *Family Law Act*, S.A. 2003, c. F-4.5, s. 56 [Alberta F.L.A.]; *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, ss. 2 ("spouse"), 5 [Saskatchewan F.M.A.]; *Family Maintenance Act*, C.C.S.M. c. F20, s. 4 [Manitoba F.M.A.]; *Family Law Act*, R.S.O. 1990, c. F.3, ss. 29 ("spouse"), 30 [Ontario F.L.A.]; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112 [New Brunswick F.S.A.]; *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 5 [Nova Scotia M.C.A.]; *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 30 [P.E.I. F.L.A.]; *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 36 [Newfoundland & Labrador F.L.A.]; *Family Property and Support Act*, R.S.Y. 2002, c. 83, ss. 31, 37 [Yukon F.P.S.A.]; *Family Law Act*, S.N.W.T. 1997, c. 18, ss. 1 ("spouse"), 15 [N.W.T. F.L.A.]; *Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3.

[3] B.C. F.R.A., *supra* note 1, s. 1 ("spouse").

[4] A variety of terms are used to refer to unmarried spouses, including common law couple, partner or spouse, and adult interdependent partner. For consistency, the term unmarried spouse will be used throughout this paper.

[5] B.C. F.R.A., *supra* note 1, s. 1 ("spouse").

[6] Winifred H. Holland & Barbro E. Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada* (Ontario: Carswell, 2006) at 9.7.

[7] *Ibid*. at 9.7.3.

[8] *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 [*Walsh*].

[9] Yukon F.P.S.A., *supra* note 2, s. 37.

[10] *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s. 3 [Alberta A.I.R.A.]; Manitoba F.M.A., *supra* note 2, s. 1 ("common-law partner"); Ontario F.L.A., *supra* note 2, s. 29 ("spouse"); New Brunswick F.S.A., *supra* note 2, s. 112; P.E.I. F.L.A., *supra* note 2, s. 29 ("common-law partner").

[11] *Supra* note 6 at 9.7.4.

[12] Alberta A.I.R.A., *supra* note 10, s. 3; Saskatchewan F.M.A., *supra* note 2, s. 2 ("spouse"); Ontario F.L.A., *supra* note 2, s. 29 ("spouse"); New Brunswick F.S.A., *supra* note 2, s. 112; P.E.I. F.L.A., *supra* note 2, s. 29 ("common-law partner"); N.W.T. F.L.A., *supra* note 2, s. 1 ("spouse").

[13] *Eisener v. Baker*, [2007] B.C.J. No.88 (B.C.S.C.) (Q.L.). See also: *W.A.S. v. D.W.T.*, [2003] B.C.J. No. 1302 (B.C.S.C.) (Q.L.) [*W.A.S.*]; *Markin v. Gysel*, [2004] B.C.J. No. 560 (B.C.S.C.) (Q.L.) [*Markin*].

[14] British Columbia Law Institute, *Report on Recognition of Spousal and Family Status* (November, 1998).

[15] British Columbia Law Institute, *ibid*. at 21-22. See also: Part IV – Annotated Tables. In addition to proposals for amendments to the *Family Relations Act*, the B.C.L.I. recommended changes to other B.C. statutes to ensure that B.C. laws apply fairly to traditional and non-traditional family relationships.

[16] Ontario F.L.A., *supra* note 2 at s.29.

[17] See *Hourie v. Petti* (1974), 15 R.F.L. 210 (Man. C.A.). Compare with *Smart v. Wiewior* (1987), 7 R.F.L. (3d) 172 (B.C.S.C.), rev'd (1990), 28 R.F.L. (3d) 225 (B.C.C.A.) and *Burke v. Waldron* (1989), 91 N.S.R. (2d) 204 (N.S. Fam. Ct.). For a discussion of this issue see Winifred H. Holland, *supra* note 6 at 3.5.6.1.

[18] Alberta F.L.A., *supra* note 2.

[19] Saskatchewan F.M.A., *supra* note 2, s. 26.

[20] Manitoba F.M.A., *supra* note 2, s. 63.

[21] *Limitations Act, 2002*, S.O. 2002, c. 24. Sch. B, s. 16 [Ontario L.A.].

[22] Nova Scotia M.C.A., *supra* note 2.

[23] P.E.I. F.L.A., *supra* note 2, s. 49; Newfoundland F.L.A., *supra* note 2, s. 60; N.W.T. F.L.A., *supra* note 2, s. 32.

[24] B.C. F.R.A., *supra* note 1, s. 1 ("spouse").

[25] New Brunswick F.S.A., *supra* note 2, s. 112.

[26] Yukon F.P.S.A., *supra* note 2, s. 37.

[27] *Pierce v. Pierce* (1997), 29 B.C.L.R. (3d) 111 (B.C.S.C.) [*Pierce*]. See also: *W.A.S.*, *supra* note 13. However decisions conflict on this issue. See Catherine J. Branch & Laura C. Selby, eds., *Family Law Agreements- Annotated Precedents: 2006 Update* (The Continuing Legal Education Society of British Columbia: Vancouver, 2006) at §6.18 [2006 Update]. In *Kravensky v. Haggard*, [1997] B.C.J. No. 222 (B.C.S.C.) (Q.L.), supplementary reasons, [1997] B.C.J. No. 1824 (B.C.S.C.) (Q.L.), the court held that no rights of support remained when the one year period ended. See also: *Markin, supra* note 13 which did not follow *Pierce*.

[28] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

[29] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 160 [*Miron*]. The equality provisions are set out in subsection 15(1) of the *Charter*, *ibid.*:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[30] *Grover v. MacIntosh*, 2001 NBQB 107, 202 D.L.R. (4th) 134 [*Grover*].

[31] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60 (Q.L.). See also 2006 Update, *supra* note 27 at §4.1C.

[32] While the issue of different limitation periods for married and unmarried spouses has not been decided in B.C., it is interesting to note the majority's reasons for judgement in *Miron, supra* note *29* at para. 155: "Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the amicus curiae has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship... Other provinces have adopted similar benefit thresholds. ...All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married."

[33] B.C. F.R.A., *supra* note 1, s. 1 ("spouse"); *Suckau v. Suckau*, 2002 BCCA 300, 2 B.C.L.R. (4th) 67.

[34] *A.(E.S.J.) v. A.(J.D.)*, [2003] B.C.J. No. 2197 (B.C.C.A.) (Q.L.).

[35] Yukon F.P.S.A., *supra* note 2, s. 15.

[36] Ontario F.L.A., *supra* note 2, s. 7; P.E.I. F.L.A., *supra* note 2, s. 7; Newfoundland & Labrador F.L.A., *supra* note 2, s. 21.

[37] See e.g. Ontario F.L.A., *supra* note 2, s. 7; P.E.I. F.L.A., *supra* note 2, s. 7; Newfoundland & Labrador F.L.A., *supra* note 2, s. 21; N.W.T. F.L.A., *supra* note 2, s. 38.

[38] See e.g. *Matrimonial Property Act*, R.S.A. 2000, C. M-8, s. 6 [Alberta M.P.A.]; The *Family Property Act*, S.S. 1997, c. F-6.3, s. 2 [Saskatchewan F.P.A.]; N.W.T. F.L.A., *supra* note 2, s. 38.

[39] See e.g. Ontario F.L.A., *supra* note 2, s. 7; P.E.I. F.L.A., *supra* note 2, s. 7; Newfoundland & Labrador F.L.A., *supra* note 2, s. 21.

[40] See e.g. Ontario F.L.A., *supra* note 2, s. 7; Newfoundland & Labrador F.L.A., *supra* note 2, s. 21.

[41] Ontario F.L.A., *supra* note 2, s. 7.

[42] The term "separation agreement" is not defined in the *Family Relations Act*, but the term has been judicially defined. See *Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 at 346 (B.C.C.A.).

[43] B.C. F.R.A., *supra* note 1, ss. 61, 65.

[44] B.C. F.R.A., *supra* note 1, ss. 1 ("spouse"), 65. See *Campbell v. McRudden*, [2001] B.C.J. 676 (B.C.S.C.) (Q.L.) [*Campbell*]; *Miura v. Miura* (1990), 27 R.F.L. (3d) 329 (B.C.S.C.), aff'd on other grounds (1992), 40 R.F.L. (3d) 43 (B.C.C.A.) [*Miura*].

[45] 2006 Update, *supra* note 27 at §2.29, §2.30.

[46] *Clark v. Clark*, 2000 BCSC 395, supplementary reasons 2000 BCSC 824. See also *Elliott v. Elliott*, [2007] B.C.J. No. 108 (B.C.S.C.) (Q.L).

[47] *Campbell*, *supra* note 44. See also *Speed v. Speed*, [1994] B.C.J. No. 2740 (B.C.S.C.) (Q.L.); *Miura*, *supra* note 44.

[48] B.C. F.R.A., *supra* note 1, s. 1 ("spouse").

[49] B.C. F.R.A., *supra* note 1, s.1 ("spouse"). See *C.L.W. v. S.U.R.*, [2007] B.C.J. No. 677 (B.C.S.C.) (Q.L) at para. 57 [*C.L.W.*].

[50] B.C. F.R.A., *supra* note 1, ss. 1 ("spouse"), 120.1; See *C.L.W.*, *ibid.*

[51] Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003), 29 Queen's L.J. 41 at para. 27, citing Ira Mark Ellman, "Unmarried Partners and the Legacy of *Marvin v. Marvin*: 'Contract Thinking' Was *Marvin's* Fatal Flaw" (2001) 76 Notre Dame L. Rev. 1365.

[52] Unjust enrichment means: "The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected." *Black's Law Dictionary*, 7th ed., *s.v.* "unjust enrichment." An unmarried spouse seeking a remedy for unjust enrichment must establish a benefit to one person, a corresponding detriment to the other person and no legal reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[53] *Limitation Act*, R.S.B.C. 1996, c. 266.

[54] *Ibid.* at s. 3(6).

[55] *Walsh*, *supra* note 8.

[56] *Walsh*, *supra* note 8.

[57] Nicholas Bala, *supra* note 51 at para. 28.

[58] B.C. F.R.A., *supra* note 1, s. 88; Alberta F.L.A., *supra* note 2, s. 49; Saskatchewan F.M.A., *supra* note 2, s. 3; Manitoba F.M.A., *supra* note 2, s. 36 (1); Ontario F.L.A., *supra* note 2, s. 31; New Brunswick F.S.A., *supra* note 2, s. 113; Nova Scotia M.C.A., *supra* note 2, s. 8; Newfoundland and Labrador F.L.A., *supra* note 2, s. 37 (1); P.E.I. F.L.A., *supra* note 2, s. 31; Yukon F.P.S.A., *supra* note 2, s. 32; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 58 [N.W.T C.L.A.]; *Children's Law Act* (Nunavut), S. N.W.T. 1997, c.14, s. 58 [Nunavut C.L.A.].

[59] *Divorce Act*, *supra* note 2, s. 15.1.

[60] James G. McLeod & Alfred A. Mamo, *Annual Review of Family Law 2006* (Ontario: Thomson Canada Ltd., 2006) at 125.

[61] B.C. F.R.A., *supra* note 1, s. 1 ("parent" and "spouse").

[62] B.C. F.R.A., *supra* note 1, s. 1 ("parent" and "spouse").

[63] *Divorce Act*, *supra* note 2, s. 2; Alberta F.L.A., *supra* note 2, s. 48; Manitoba F.M.A., *supra* note 2, s.36 (person standing in loco parentis); N.W.T. C.L.A and Nunavut C.L.A., *supra* note 58, s. 57 ("parent").

[64] Alberta F.L.A., *supra* note 2, s. 48; Saskatchewan F.M.A., *supra* note 2, s. 2; Ontario F.L.A., *supra* note 2, s. 1 ("parent"); New Brunswick F.S.A., *supra* note 2, s. 1 ("parent"); P.E.I. F.L.A., *supra* note 2, s. 1 ("parent"); Newfoundland and Labrador F.L.A., *supra* note 2, s. 2 ("parent"); Yukon F.P.S.A., *supra* note 2, s. 1 ("parent").

[65] *Chartier v. Chartier*, [1999] 1 S.C.R. 242 [*Chartier*].

[66] See Alberta F.L.A., *supra* note 2, s. 48.

[67] *Chartier*, *supra* note 65.

[68] B.C. F.R.A., s*upra*, note 1, s. 1 ("parent").

[69] British Columbia, Family Justice Reform Working Group, *A New Justice System for Families and Children* (B.C. Justice Review Task Force, 2005), online: B.C. Justice Review Task Force <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> (last accessed: May 1, 2007).

[70] *Ibid.*, recommendation 22 at 79.

# Ministry of Attorney General
# Justice Services Branch
# Civil and Family Law Policy Office

# Family Relations Act Review

# Chapter 14

# Relocating Children
# Discussion Paper

## Prepared by the Civil and Family Law Policy Office

## August 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.

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# SETTING THE SCENE

## Background

British Columbians are increasingly mobile: between 1996 and 2001, almost half of us moved.[1] Most of these moves were within B.C., but a small number were to a different province or country.[2]

Separation or divorce may trigger a move.[3] The precise number of children affected by these moves is unknown, but there would be many involved.

When a child moves with one parent, the level of contact with the parent left behind is often affected. As a proposed move of the child by the custodial parent is frequently contested, disputes between separated or divorced parents over relocation often go to court.[4] Deciding whether to permit a parent to take a child to live in another location, away from the other parent is a difficult issue for judges. Because guidance for resolving cases is unclear, outcomes in individual cases may seem unpredictable and uncertain.

## Evolution of Relocation Law in Canada

The law that applied to these relocation cases was clear until the late 1980s: a custodial parent was allowed to move with the child, unless there was some agreement or court order to the contrary.[5] Then the law shifted in the 1990s to a more flexible approach, in which the courts applied the "best interests of the child" test.[6]

In 1996, a Supreme Court of Canada decision changed the law once again.[7] The court rejected any legal presumption in favour of the custodial parent in a relocation case.[8] Instead, the court said that "the views of the custodial parent... are entitled to great respect and the most serious consideration."[9] Rather than relying on burdens of proof, courts were directed to undertake "a fresh inquiry" in each case.[10] The court provided a list of factors that should be considered. The custodial parent's reason for moving must not be considered, except in extraordinary circumstances.[11] The court ruled that in the end, the ultimate question for judges to consider is: "what is in the best interests of the child in all the circumstances, old as well as new?"[12]

This continues to be the law governing parental relocation issues in Canada. In the ten years since that decision, the Supreme Court has refused to hear appeals from Court of Appeal decisions in seven relocation cases.[13] Law professor D.A. Rollie Thompson writes that since the Supreme Court's 1996 decision, relocation cases have frequently ended up in provincial appeal courts and the results have been unpredictable. He says that this highlights the need for more guidance in the law.[14]

## Outline of this Paper

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*[15], which is one component of its justice reform and law reform strategy. The paper looks at ways the *Act* could be amended to make it easier to resolve relocation disputes.

The paper does not discuss the abduction of a child from one place to another in contravention of a court order or agreement. Chapter 7 discusses preventing the wrongful removal of children from B.C. In addition, while important, the issue of restructuring a child's contact with the parent who stays behind is beyond the scope of this paper.[16]

The paper is divided into five sections. The first four discuss defining "relocation," settling relocation disputes out of court, making the law of relocation more certain and predictable, and covering the costs of maintaining contact between the child and the parent who stays behind. The final section asks you to tell us which issues you believe are the most important, and to identify any issues not covered in this paper that you feel should be discussed.

Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper, please use the following link to Legislation.

## DISCUSSION

### PART A – WHAT IS "RELOCATION"?

#### *Discussion Point (1) – Definition of "Relocation"*

Currently, the *Family Relations Act* does not define "relocation." A definition could guide parents, judges, mediators, lawyers and others in determining which cases should be classified as relocation cases.

Some American states use distance or the crossing of borders as a trigger for the operation of their relocation laws. For example, a relocation case in Louisiana where there is no custody order involves a move either out of state or farther than 150 miles (241.5 km) from the parent staying behind; where there is a custody order it involves a move farther than 150 miles from the previous residence.[17] This definition does not take into account that the impact of distance (or the crossing of borders) may be different depending on the place or the circumstances of the parents.

Another approach to defining relocation could focus on travel time. This would take into account how a particular distance could take more or less time to travel, depending on geography: for example, consider the time it takes to travel the 100 km between Vancouver and Chilliwack compared to the same distance between Vancouver and Sooke. Travel times can also depend on financial circumstances: for example, compare travel times over a given distance for a parent who can afford air travel, compared to one who must travel by bus.

Australia has recently rejected both distance and time approaches, in favour of a focus on the impact on the parent/child relationship. In May 2006, Australia's Family Law Council published the findings of a public consultation on relocation. In its report, the Council concluded that a specific relocation provision should be inserted into Australia's *Family Law Act 1975*[18], including a preamble that contained a definition of relocation:

> ...a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development...[19]

Another definition that the Council reviewed but did not ultimately accept was: "changes to the child's living arrangements that make it significantly more difficult for the child to have a meaningful relationship with one parent."[20] For example, a move from Vancouver to Seattle would have a significantly greater impact if the parent remaining in Vancouver is unable to cross the border due to immigration issues.[21] Adding this phrase to the definition might be a way to emphasize the impact of relocation on a child's relationship with his or her parents.

#### *QUESTIONS*

1a. Should the *Family Relations Act* include a definition of "relocation"? Why or why not?

1b. If yes, what should the definition include? [check all that apply]

- ☐ a specified distance
- ☐ the crossing of a border

- ☐ a specified travel time
- ☐ a change in where a child lives that substantially affects the child's ability to live with or spend time with a parent or another person who is significant to the child's care, welfare, and development
- ☐ a change to the child's living arrangements that makes it significantly more difficult for the child to have a meaningful relationship with one parent
- ☐ other [please specify]: _____

## PART B – RESOLVING RELOCATION ISSUES OUT OF COURT

In its 2005 report, the Family Justice Reform Working Group discussed the benefits of arriving at settlements by handling family disputes outside of the courtroom, including minimizing both the expenses and the harmful conflict to the people involved.[22] The following section explores out-of-court processes that may benefit families and improve resolution of relocation cases.

### *Discussion Point (2) – Notice of an Intended Move*

Often an initial separation includes a move. It might be helpful to include provisions in the *Family Relations Act* to address how future intended moves would be handled. Some family laws elsewhere allow judges to include in an order a requirement that a parent notify the other if he or she intends to move. This requirement could have a number of benefits. It may promote respect by one parent for the other, encourage them to adjust their parenting arrangements in preparation for a move, and allow them time to resolve any disputes that the planned move may cause. The *Family Relations Act* does not provide for a notice requirement for a proposed move.

There are some circumstances in which a notice requirement might not be in the best interests of the child: for example, if a parent fears for his or her safety or for his or her children's safety because of family violence, or if a parent is in a controlling relationship in which there is an imbalance of power or a history of abuse.

In some places, the law is permissive (the judge *may* order that a parent give notice of a move), in others it is mandatory (the judge *must* make the order). There are also differences in the circumstances under which notice must be given, and the length of the notice period. This table summarizes various notice provisions.

| Proposed or Enacted Legislation/ Recommendation | Mandatory or Permissive | Circumstances for Notice | Notice Period |
|---|---|---|---|
| *Divorce Act*[23] (Canada) | permissive | custodial parent intends to move child | at least 30 days |
| *Children's Law Act, 1997*[24] (Saskatchewan) | mandatory | custodial parent intends to move child | at least 30 days |
| Bill C-22 (2nd Sess., 37th Parl.)[25] (Canada) | permissive | either parent moving with or without child | at least 60 days |
| *Family Law Act*[26] (Alberta) | permissive | either parent moving with or without child | at least 60 days |
| "For the Sake of the Children"[27] (Government of Canada Report) | mandatory[28] | custodial parent intends to move child | at least 90 days |

Australia's *Family Law Act 1975* does not include a minimum notice period. During Australia's public consultation on relocation some submissions to Australia's Family Law Council suggested that a notice provision should be inserted into the *Act*; however, the Council found this to be

unnecessary due to the *Act's* parenting order provisions. Section 61DA requires a judge, with certain exceptions, to make a presumption of shared parental responsibility in parenting orders.[29] The exercise of shared parental responsibility requires decisions about "major long-term issue[s] in relation to the child" to be made jointly. A change in a child's place of residence would qualify as such a decision.[30]

While none of these family laws requires notice to be in writing, written notice could prevent disputes over whether or not notice was actually given. As well, none vary the required notice period according to the nature of the move. To allow enough time to resolve issues arising from a planned move, it might be helpful to require 30 days' notice of an intended move within B.C., 60 days for an intended move outside the province but inside Canada, and 90 days for an intended international move.

## *QUESTIONS*

2a. Should the *Family Relations Act* include a notice to move provision? Why or why not?

2b. If yes to 2a, how long should the notice period be? [check one]

- ☐ at least 30 days
- ☐ at least 60 days
- ☐ at least 90 days
- ☐ differing periods of time, depending on the extent of the move
- ☐ other [please specify]: _____

2c. If yes to 2a, should written notice be required? Why or why not?

2d. If yes to 2a, should the provision apply to both a custodial parent who intends to move with the children, and to an access parent who intends to move away from the children? Why or why not?

2e. If yes to 2a, should the provision be mandatory, or should judges be able to decide whether or not to include it in an order? Please explain your answer.

## *Discussion Point (3) – Mediated Settlement & Co-operative Approaches*

The *Family Relations Act* does not have a provision that encourages parents to try to settle relocation issues without going to court, even though the disadvantages of taking this type of dispute to court are well known. The Family Justice Reform Working Group's report notes that "[w]hat families need is help to find better ways to communicate and to work out the arrangements that work best for them."[31] As relocation cases increase in number, it may be helpful to look at other ways to help parents keep more control over the decisions that will affect their lives and the lives of their children.

A number of tools are available in B.C. to help parents resolve disputes. These include collaborative law, child-inclusive mediation, and the Family Justice Services Centre pilot project in Nanaimo (and will soon include the Notice to Mediate pilot project slated to start this fall in Nanaimo). Chapter 5 contains more information about these services.

Relocation disputes can be particularly emotional and challenging to resolve. Still, out-of-court dispute resolution options present "a process that encourages, empowers, and commands parents to reach joint decisions."[32] They allow parents to be autonomous and creative throughout the dispute resolution process. While judges have a certain amount of flexibility in their decision-making, parents are better able to tailor agreements that are just right for their children and for themselves. For these reasons, it might be beneficial to include a provision in the *Family Relations Act* to encourage parents to use out-of-court processes to resolve relocation disputes.

### *QUESTION*

3. What, if anything, could be added to the *Family Relations Act* to encourage out-of-court settlement of relocation disputes? Please explain your answer.

## PART C – IS THERE A WAY TO MAKE RELOCATION LAW MORE CERTAIN?

There are no presumptions in Canadian relocation law, either in favour of or against a move.[33] There is no "general rule that one of the parties will be unsuccessful if he or she fails to satisfy a specified burden of proof."[34] Rather, the question is: "what is in the best interests of the child in all the circumstances, old as well as new?"[35]

An American judge writing about relocation decisions and the best interests standard states:

> Best interests are values, not facts. They are not susceptible to scientific demonstration or conclusive proof. The same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. There is not always only one right answer.[36]

The discretionary nature of the best interests' test makes uniformity in relocation cases "almost impossible to obtain."[37] Comparing outcomes of the best interests principle in relocation decisions in Australia, Canada, New Zealand and the U.S., the American judge writes: "...although the same or substantially similar legal standard is used to decide a relocation issue, the approach and the outcome can be surprisingly (even alarmingly) different."[38]

This seems equally applicable to relocation decisions made in different provinces and territories across Canada and even to those made by different judges within the same province. Different judges will balance the best interests' factors in different ways.

For this reason, some say the law of relocation is a mess.[39] Parents may just as well play rock-paper-scissors as go to court.[40] Because the law sets no clear ground rules, relocation disputes are hard to settle out of court. Parents are simply unable to assess the strength of their respective (and usually opposite) proposals. Each parent thinks his or her proposal to move, or to block the move, is in the child's best interests. And, critics say, the uncertainty does not end at trial. Professor Thompson, who reviewed ten years of Canadian relocation decisions from 1996 to 2006 found that appeal court judges overturned decisions by trial judges in about 45% of cases.[41]

On the other side of the debate, it is argued that the flexibility of the best interests' approach is essential to allow judges to take into account each family's circumstances when deciding relocation disputes, and that it maintains the proper focus - that of the child's interests rather than the parents'.[42] Also, rather than fuelling litigation, uncertainty associated with the fact-driven best interests' test could discourage parents from going to court because the outcome remains a gamble.

The best interest of the child standard applies not just to relocation but to other decisions involving children under the *Family Relations Act*, including custody, access, and guardianship. So, its strengths and weaknesses are not limited to relocation cases. Rather, the tension between flexibility and certainty is part of a larger debate in family law.

### *Discussion Point (4) – The Burden of Proof & Prioritizing Certain Factors*

Lawmakers outside of Canada have attempted to create more certainty in relocation cases by:

- assigning the burden of proof to a particular party; or
- giving greater weight to certain best interests' factors.

## A) Burden of Proof

Louisiana's law states:

> The relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child. In determining the child's best interest, the court shall consider the benefits which the child will derive either directly or indirectly from an enhancement in the relocating parent's general quality of life.[43]

Louisiana is considered to be against relocation because the burden of proof is on the person wishing to relocate. That person must prove to the judge that the move is more likely than not to be in the child's best interests.

Louisiana's burden of proof is one of three burden of proof options set out in the *Model Relocation Act* developed by the American Academy of Matrimonial Lawyers in 1997:

> § 407. Burden of Proof
> [Alternative A]
> The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child.
>
> [Alternative B]
> The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that relocation is not in the best interest of the child.
>
> [Alternative C]
> The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the non- relocating person to show that the proposed relocation is not in the best interest of the child.[44]

There was considerable debate among the lawyers involved the development of the model law:

> After considerable analysis and discussion, there was significant approval for every section of this proposed act, except for this particular, intractable section. As is apparent from the three alternatives submitted, there was no agreement on the placement of the burden of proof in a relocation dispute.[45]

Making such an amendment to the *Family Relations Act* would mark a radical change in the law of relocation as set out by the Supreme Court of Canada in its 1996 decision. The Supreme Court rejected the argument that because the right to determine where a child lives is an incident of custody, the access parent bears the burden of proving that the relocation is not in the child's best interest. McLachlin J. (as she then was), for the Court, wrote that such a presumption:

- "has the potential to impair the inquiry into the best interests of the child... Every child is entitled to the judge's decision on what in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected...";[46]
- would tend to make the inquiry before the court "more technical and adversarial than necessary. The effect of the presumption might be to deflect the inquiry from the facts relating to the child's needs and the parents' ability to meet them, to legal issues relating to whether the requisite burden of proof has been met...";[47] and
- would tend "to shift the focus from the best interests of the child to the interests of the parents."[48]

McLachlin J. also discussed and rejected the idea that the imposition of a presumption in favour of relocation in the form of a burden of proof on the staying parent would increase the predictability of the law and thus reduce parental conflict that can harm children. She wrote that the wording of the *Divorce Act* did not contemplate the imposition of general rules at the

expense of individual justice. And even if judges interpreted the *Divorce Act* to include a policy in favour of relocation that could be shown to reduce lawsuits, a reduction in conflict between parents would not necessarily result:

> 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 in custody disputes.[49]

Even if the *Family Relations Act* were amended to adopt a policy in favour of or against relocation by imposing a specific burden of proof on one parent or the other, the change would not apply to all relocation cases. In a case that is brought under the federal *Divorce Act*, the law as set out by the Supreme Court of Canada would still apply.

In its consultations on the law of relocation, the Australia Family Law Council asked for comment on the use of presumptions in favour of or against relocation that impose a burden of proof on one parent.[50] In its May 2006 report to the Attorney General, the Council rejected the use of presumptions on the basis that they are too blunt a tool to deal with the complexities involved in relocation cases.[51] In reaching this conclusion, the Council agreed with Canada's Supreme Court that a presumption could potentially impede the inquiry into the best interests of the child.[52]

It gave three other reasons against enacting presumptions in favour of or against relocation in Australia's *Family Law Act 1975*:

- proponents of a presumption in favour of relocation were likely to prefer no presumption at all to a presumption against relocation, and vice versa;
- a presumption would have to apply to both parents (that is, if there were a presumption against a custodial parent moving away with the child, there would also need to be a presumption against an access parent moving away); and
- maintaining a case-by-case approach to relocation decisions would keep Australian law in line with the majority of common-law countries, namely, the United Kingdom, Canada, New Zealand, some American states, and also with Australian case law.[53]

## B) Ranking Certain Factors

Instead of imposing a specific burden of proof, the Family Law Council recommended a *Family Law Act 1975* amendment to divide the considerations a judge is to weigh in a relocation cases into two categories: mandatory and permissive (those factors a judge *must* consider and those the judge *may* consider).[54] So far, Australia has not changed its family law in this way.

This approach would make it clear which considerations are most important in a relocation decision. This added information might make it easier for parents and their lawyers to assess the strengths of differing proposals.

Second, it might inject more consistency into the law in that the legal framework to be applied by judges would not be completely open. Judges in Canada are applying the same best interests' standard to relocation applications in various parts of the country, but in spite of having the same law, the appeal courts of certain provinces, such as Alberta and Saskatchewan, are considered to be more in favour of relocation while appeal courts in Quebec, Nova Scotia, and Newfoundland are considered to be more against relocation.[55] Outcomes vary not only province to province but also over time: Professor Thompson writes that since 2000, there has been a "gentle, but noticeable" drop in "yes-decisions" at trial.[56]

Finally, it would clarify the law. In the absence of legislation, case law elevates the importance of certain considerations over others. For instance, the main (implicit) consideration in the leading English case on relocation is the well-being of the primary caregiver. In this 2001 Court of Appeal decision, one judge summarized the previous 30 years of relocation law as follows:

a) the welfare of the child is the paramount consideration; and

b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.[57]

Although the President of the appeal court stressed in her reasons in that case that England's *Children Act 1989*[58] did not create a presumption in favour of relocation,[59] one commentator has quipped that this characterization "does not pass the walks-like-a-duck-test."[60] This same commentator concluded: "[T]he message is loud and clear in [the leading English case] that the contented primary caretaker is the top consideration in relocation cases."[61]

The contented caregiver argument also appears in Canadian relocation cases,[62] though it is not applied as vigorously as in England. In his review of Canadian relocation case law, Professor Thompson writes that "it is only isolated as a consideration in a few cases."[63] Consequently, unlike England, Canada is not considered to be a jurisdiction in favour of relocation.[64]

## C) None of the Above - Changing the Law Isn't Going to Help

Some feel that regardless of what the law says, relocation disputes are always going to be difficult to decide. A family court judge from New York stated bluntly: "I don't care how many word formulations appellate courts or legislatures come up with, family court judges are in deep rock-paper-scissors territory on this question."[65] This is because in his experience, very few parents seek to move for reasons directly related to the child. The real decision before judges in these cases is what would be the least detrimental alternative."[66]

Some family lawyers also share this view although for different reasons. The lawyers who developed the three burden-of-proof alternatives in the 1997 *Model Relocation Act* commented:

> [S]ome might argue that the controversy over the burden of proof is more a hypothetical problem than a realistic hurdle, given the fact that ultimately each turns on an adjudication of the best interest of the child. Thus, the burden of proof in practice may be little more than a hypothetical legal concept. The trier of fact may first decide the relocation issue based on an evaluation of the best interest of the child and thereafter find whether the burden of proof has been met. In short, relocation is extraordinarily subject to result-oriented analysis by the trier of fact, thereby perhaps making the allocation of the burden of proof less relevant than it might first appear.[67]

For some, the most promising "solution" to relocation disputes is to empower parents to reach agreement outside of the adversarial court process.[68]

### *QUESTIONS*

4a. Would a presumption in the *Family Relations Act* – either in favour of or against relocation - help resolve or prevent relocation disputes by placing the burden of proof on one parent or the other? Why or why not?

4b. If yes, which of the following options would you prefer? [check one]

☐ The parent seeking to relocate with the child has the burden of proving that the proposed move is being made in good faith and in the best interest of the child.

☐ The staying parent has the burden of proving that the objection is made in good faith and that the move is not in the best interest of the child.

☐ The parent seeking to relocate with the child has the burden of proving that the proposed move is being made in good faith. If that burden is met, the burden shifts to the staying parent to prove that the move is not in the best interest of the child.

☐ Other [please explain]: _____

Please explain your choice of option: _____

5. Would a provision in the *Family Relations Act* setting out which considerations are to be given the most weight help resolve or prevent relocation disputes? Why or why not?

## *Discussion Point (5) – A More Specific Test?*

Some have suggested that a legislated set of factors to be considered in relocation cases could add predictability to the process, by guiding decision-makers (judges, mediators, lawyers and parents) in their analysis. It has been argued that the Supreme Court has not provided much structure or guidance with its "open-textured" best interests' test that makes everything and nothing critical to the outcome.[69] Adding a list of factors to the *Family Relations Act* might reduce the unpredictability and uncertainty surrounding relocation cases.

The Supreme Court's approach is based on an individualized best interests test, requiring the judge to consider each case in light of the child's best interests - not the parents' rights or interests. The Supreme Court has given decision-makers a set of factors that a judge *should* consider in determining the best interests of the child, including:

- the existing custody arrangement and the relationship between the child and the custodial parent;
- the existing access arrangement and the relationship between the child and the access parent;
- the desirability of maximizing contact between the child and both parents;
- the views of the child;
- the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- disruption to the child of a change in custody; and
- disruption to the child consequent on removal from family, schools, and the community he or she has come to know.[70]

The Supreme Court did not include the principle of promoting the economic self-sufficiency of each former spouse within a reasonable period of time, although it said that judges often look at this (for example, a parent may wish to move to take up a better paying job).[71] Including this principle as a factor might help decision-makers in relocation cases.

In Australia, following its public consultation, the Australia Family Law Council recommended amending the *Family Law Act 1975* to set out mandatory considerations in relocation hearings. The following are some of the proposed factors:

- the details of each proposal, including:
  - alternatives to the proposed move;
  - the possibility of the opposing parent also moving, to be closer to the child, if the relocation were permitted; and
  - whether the person opposing the move is willing and able to assume responsibility as the child's primary caregiver.
- the objects of Part VII of the *Family Law Act 1975*, meant to ensure the best interests of children, including:

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;
- protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

- all relevant factors in determining the child's best interests that are listed in s. 60CC, including:
  - the benefit to the child of having a meaningful relationship with both parents; and
  - the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. (For a list of all factors in s.60CC see: http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html)
- the child's age and developmental level and whether moving the child would interference with his or her ability to strong attachments with both parents;
- what arrangements could be made… to ensure a meaningful relationship between child and both parents and with other people who are significant to the child;
- how the increased costs should be allocated; and
- the effect on the child of the emotional and mental state of either the parent wishing to move or the parent opposing the move if their proposals (to move/ to oppose the move) are not accepted.

In England, judges give the primary caregiver's well-being top priority in child relocation cases. While this consideration is not applied as vigorously in Canada as in England, it may be of value to include it in a list of factors that a decision-maker is required to consider.

After examining the leading American cases and state laws on relocation, an American judge has proposed several factors that should be required to be considered in these cases, to add some predictability to the process. These include:

- age, maturity, and special needs of the child;
- the advantages of the move to the moving parent and child;
- the disadvantages of the move to the staying parent and child;
- travel time and cost of travel;
- any agreement between the parents about relocations;
- the expected permanence of the new custodial environment;
- continuation of the child's cultural and religious heritage;
- ability of the parents to cooperate with each other
- ability of the moving parent to foster the child's relationship with the staying parent;
- the effect on the child of any domestic violence;
- whether the moving parent will comply with the access order;

- whether a change of custody is practical; and
- the reason for the move.[72]

## Reason for the Move

Although in its 1996 decision the Supreme Court of Canada said that the reason for the move is irrelevant, this proposition has largely been ignored. As Professor Thompson points out, after reading hundreds and hundreds of trial decisions in the years following the Supreme Court's decision, the likelihood of a proposed move being approved is linked to the reason given for the move. What matters to the judge is that the relocating parent demonstrates the necessity or benefit of the move.[73] According to Professor Thompson, judges closely scrutinize the reason given for the move. Vague plans, undue haste, lack of necessity, no job and dubious economic benefits are commonly found in cases where the move is not allowed.[74]

Elsewhere, legislation provides that judges are to consider the reason for the move, or caselaw confirms its importance. Australia's Family Law Council recommends that the reason for the move be included as a factor that judges are permitted to consider, in a proposed set of factors for the *Family Law Act 1975*.[75] Louisiana's relocation legislation includes each parent's reason for seeking or opposing the relocation among the factors that the court must consider before making a decision.[76]

In England, even though the *Children Act 1989* does not set out the factors that judges are required to consider, court decisions have established several guidelines that may be applied. One guideline is that the judge must look at whether the relocation is reasonable. In analyzing "reasonableness," the judge may look at the reason for the move.[77] As well, the law in both New Zealand and in the state of New York allow the reason for the move to be considered in determining the child's best interests in relocation cases.[78]

## *QUESTIONS*

6a. Should the *Family Relations Act* include factors to be considered in relocation cases? Why or why not?

6b. If yes, what factors should be included? **[**check all that apply**]**

- ☐ the existing custody arrangement and the relationship between the child and the custodial parent
- ☐ the existing access arrangement and the relationship between the child and the access parent
- ☐ the views of the child
- ☐ the custodial parent's reason for moving, but only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child
- ☐ disruption to the child of a change in custody
- ☐ disruption to the child resulting from removal from family, schools, and the community he or she has come to know
- ☐ promoting the economic self-sufficiency of each former spouse within a reasonable time
- ☐ the reason for the move
- ☐ the details of each proposal, including:
  - alternatives to the proposed move;
  - the possibility of the opposing parent also moving, to be closer to the child, if the relocation were permitted; and

- whether the person opposing the move is willing and able to assume responsibility as the child's primary caregiver.

☐ the objects of Part VII of Australia's *Family Law Act 1975* that are meant to ensure the best interests of children, including:

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;
- protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

☐ all relevant factors in determining what is in the child's best interests that are listed in s. 60CC of Australia's *Family Law Act 1975*, including:

- the benefit to the child of having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. (For a list of all factors in s.60CC see: http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html)

☐ the child's age and developmental level and whether the move would interfere with his or her ability to form or maintain strong attachments with both parents

☐ how the increased costs should be allocated

☐ the effect on the child of the emotional and mental state of either the parent wishing to move or the parent opposing the move if their proposals (to move/ to oppose the move) are not accepted

☐ the primary caregiver's well-being

☐ the advantages of the move to the moving parent and child

☐ the disadvantages of the move to the staying parent and child

☐ travel time and cost of travel

☐ any agreement between the parents about relocations

☐ the expected permanence of the new custodial environment

☐ continuation of the child's cultural and religious heritage

☐ ability of the parents to co-operate with each other

☐ ability of the moving parent to foster the child's relationship with the staying parent

☐ the effect on the child of any domestic violence

☐ whether the moving parent will comply with the access order

☐ whether a change of custody is practical

☐ other [please specify]: _____

Please explain your choice of factors: _____

### *Discussion Point (6) – Factors Not To Be Considered*

Some have argued that one of the reasons for the lack of consistency of decisions in relocation cases is that judges consider questionable and irrelevant factors.

For example, since the 1996 Supreme Court of Canada decision, many judges across Canada ask whether the relocating parent would make the move without the children if the relocation request should be rejected. Critics of this approach argue that this question places the one seeking to relocate in a classic double bind. A parent who is unwilling to stay behind with the children is regarded as self-interested and discounting the children's best interests in favour of his or her own. But a parent who will not move without the children can be seen as proposing a move that is not critical to either the parent's or child's well-being, making the *status quo* an attractive option for a judge.[79] Professor Thompson argues that if the question is not asked, no information is lost because we already know that few custodial parents will choose to live without their children. By asking the question the judge places the custodial parent in an unfair position.[80]

### *QUESTIONS*

7a. Should the *Family Relations Act* include factors that must not be considered in relocation cases? Why or why not?

7b. If yes, what should these factors include? [check all that apply]

- ☐ the custodial parent's reason for the move, except where it is relevant to that parent's ability to meet the needs of the child (as set out by the Supreme Court of Canada)
- ☐ whether the custodial parent would move without the child
- ☐ other [please specify]: _____

Please explain your choice of factors: _____

## PART D- COSTS OF MAINTAINING CONTACT AFTER THE MOVE

### *Discussion Point (7) –Travel Costs and Other Expenses*

Once the move has either been agreed to, or approved by a judge, the staying parent's increased costs of maintaining contact with the children often need to be addressed. In such cases, judges have limited ability to decrease child support to offset increased access costs. Section 10 of the *Child Support Guidelines*[81] permits judges to reduce child support where it would cause undue hardship to the paying parent given "unusually high expenses in relation to exercising access to a child." However, proving "undue hardship" is a complicated process with a high threshold to meet.[82]

One of the ways B.C. judges deal with the costs of maintaining contact after a move is to attach terms to a custody or access order under section 35(4) of the *Family Relations Act*.[83] This section gives judges wide discretion not only to restructure access to accommodate the move, but to address the increased access costs of the non-moving parent, for example, by:

- requiring that access transportation costs be paid by one parent or shared between the parents;
- requiring that parents share the access travel where the children are too young to travel unaccompanied; and
- requiring one of the parents to be responsible for the costs of long distance, cell phone or video-cam expenses.

The costs of maintaining contact after a move is not an issue unique to B.C. parents. A New York State judge has recommended that access parents be given a dollar for dollar reduction in child support to offset the costs of exercising access after a move.[84] The Australian Family Law Council recommended in its May 2006 report that Australia's family law be reformed to specifically deal with how the increased costs of maintaining contact after a move should be shared.[85]

### *QUESTIONS*

8a. Would it be helpful to amend the *Family Relations Act* to say that a judge may allocate between parents the costs of maintaining contact between the child and the staying parent? Why or why not?

8b. Do you have other suggestions for amendments to the *Family Relations Act* that would help to resolve disputes about relocation-related costs?

## PART E- GENERAL FEEDBACK

9. Are there any other issues related to relocation not covered in this paper that you would like to raise?

10. In your opinion, what are the three most pressing issues related to relocation, in the *Family Relations Act*?

11. Excessive process and procedure are widely recognized as a barrier to access to justice. Can you think of anything that could be done to streamline the resolution of relocation issues?

Please provide your feedback.

## ENDNOTES

[1] Statistics Canada, *2001 Census of Population*, catalogue 97F0024XIE2001004.

[2] *Ibid.*

[3] See: Department of Justice Canada, *Moving On: The Expansion of the Family Network After Parents Separate*, "The Impact of Parents' Family Transitions on Children's Family Environment and Economic Well-Being: A Longitudinal Assessment", 2004-FCY-9E, at chapter 1, online: http://www.justice.gc.ca/en/ps/pad/reports/2004-FCY-9/chap1.html#1 (last accessed: August 27, 2007) for a discussion of life transitions of families following separation and the repercussions on children. For example, a study of children aged 0-13 years, in 1996-97, whose parents were living apart, indicates that 52% of these children experienced a new parental union of either the mother or father or both. While less documented, a parent's new union may involve moving to a new home, although the percentage of moves is unknown.

[4] Thompson, Rollie D.A., "Movin' On: Parental Relocation in Canada" (2004) 42:3 *Family Court Review*, 398 at 398 ["Movin' On"].

[5] *Wright v. Wright*, [1973] O.J. No. 2170 (Ont. C.A.) at para. 5, online: QL.

[6] See, for example: *Levesque* v. *Lapointe,* [1993] B.C.J. No. 23 (B.C.C.A.), online: QL; *Heinrichs* v. *Lee*, [1994] B.C.J. No. 2295 (B.C.S.C.), online: QL; *Roberts* v. *Roberts, [1994]* B.C.J. No. 1408 (B.C.S.C.), online: QL.

[7] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27, online: QL [Gordon].

[8] Gordon, *supra* note 7 at para. 48.

[9] *Ibid*.

[10] *Ibid.* at para. 47.

[11] *Ibid*. at para. 49.

[12] *Ibid*. at para. 50.

[13] Thompson, Rollie D.A., "Ten Years After Gordon: No Law, Nowhere" (2007) 35 *Reports of Family Law* (6th) 307 at 307 ["Ten Years"].

[14] *Ibid*. at 308.

[15] *Family Relations Act*, R.S.B.C. 1996, c.128.

[16] Where moves are allowed, courts often allow the access parent to extend access over holidays and school breaks. See, for example: *Wainwright* v. *Wainwright*, [1995] B.C.J. No. 2471 (B.C.S.C.), online: QL; *H.H.L.* v. *J.T.S.*, [2006] B.C.J. No. 3304 (B.C.S.C.), online: QL.

[17] *La. Rev. Stat. Ann. §*. 9:355.1.

[18] *Family Law Act 1975*, CWLTH [Australia].

[19] Australia Family Law Council, "Relocation: A Report to the Attorney-General" (May 2006), Recommendation 4, online: http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications_Reports_to_the_AG_All_Reports_Relocation_-_A_report_to_the_Attorney-General_prepared_by_the_Family_Law_Council_-_MAY_2006 (last accessed: August 5, 2007) ["Relocation"].

[20] *Ibid*. at para. 2.47.

[21] In light of the increasingly restrictive policies and passport requirements for travel to the U.S. (and other countries), a relocation across the border could result in the access parent being unable to visit their child in their new place of residence. This scenario could have significant impacts on the child's relationship with the access parent.

[22] Family Justice Reform Working Group Report, presented to the B.C. Justice Review Task Force, "A New Justice System for Families and Children," (May 2007) at 7 [Working Group Report].

[23] *Divorce Act*, R.S.C. 1985 (2nd. Supp.), c.3, s. 16(7).

[24] *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, ss. 6(5) & (6) [Saskatchewan].

[25] Bill C-22, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence*, 2nd Sess., 37th Parl., 2002, cl. 16(10). The Bill died in November 2003.

[26] *Family Law Act*, S.A. 2003, c. F-4.5, s. 33(2) [Alberta].

[27] Parliament of Canada, "For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access", (December 1998), Recommendation 30.

[28] The Committee recommended (at Recommendation 30) that the *Divorce Act* be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time.

[29] Australia, *supra* note 18, s. 61DA.

[30] *Ibid.*, s. 65DAC. Section 65DAC(3) states:

> The [parenting] order is taken to require each of those persons [who share parental responsibility for a child]:
> (a) to consult the other person in relation to the decision to be made about that issue; and
> (b) to make a genuine effort to come to a joint decision about that issue.

[31] Working Group Report, *supra* note 22 at 5.

[32] Duggan, Hon. W. Dennis, "Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation" (2007) 45:2 *Fam. Ct. Rev.* 193 at 210.

[33] *Gordon*, *supra* note 7 at paras. 48-50.

[34] *Ibid.* at para. 47.

[35] *Ibid.* at para. 50.

[36] Carmody, Hon. Justice Tim, "Child Relocation: An Intractable International Family Law Problem" (2007) 45:2 *Fam. Ct. Rev.* 214 at 215.

[37] *Ibid.*

[38] *Ibid.*

[39] Thompson, "Ten Years", *supra* note 13 at 307 & Carmody, *supra* note 36 at 215.

[40] Duggan, *supra* note 32 at 193.

[41] Thompson, "Ten Years", *supra* note 13 at 193.

[42] This idea is reflected in the majority decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 46.

[43] *La. Rev. Stat. Ann. §.* 9:355.13.

[44] *Model Relocation Act*, §407 as adopted by the Board of Governors of the American Academy of Matrimonial Lawyers (March 9, 1997), online: http://www.aaml.org/files/public/Model_Relocation_Act.htm (last accessed: August 3, 2007).

[45] *Ibid.*

[46] *Gordon*, *supra* note 7 at para. 44.

[47] *Ibid.* at para. 43.

[48] *Ibid.* at para. 46.

[49] *Ibid.* at para. 38.

[50] Australia Family Law Council, "Discussion Paper – Relocation" (February 2006), at para. 6.50, online: http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications_Discussion_and_Consultation_Discussions_Discussion_Paper_on_Relocation (last accessed: August 5, 2007).

[51] Australia Family Law Council, "Relocation", *supra* note 19 at para. 6.26.

[52] *Ibid.* at para. 6.27.

[53] *Ibid.* at para. 6.30.

[54] *Ibid.* at para. 6.47.

[55] Thompson, "Ten Years", *supra* note 13 at 311.

[56] Thompson, "Movin' On", *supra* note 4 at 404.

[57] *Payne v. Payne*, [2001] EWCA Civ 166 at para. 26 [Payne].

[58] *Children Act 1989*, c.41 [England].

[59] Payne, *supra* note 57 at paras. 84-85.

[60] Duggan, *supra* note 32 at 205.

[61] *Ibid.*

[62] Thompson, "Ten Years", *supra* note 13 at 317, 318.

[63] *Ibid.* at 318.

[64] Australia Family Law Council, "Relocation", *supra* note 19 at paras. 5.4-5.9 & 5.17-5.19.

[65] Duggan, *supra* note 32 at 198.

[66] *Ibid.*

[67] *Model Relocation Act*, *supra* note 38 at § 407.

[68] Duggan, *supra* note 32 at 193.

[69] Thompson, "Movin' On", *supra* note 4 at 404.

[70] Gordon, *supra* note 7 at para. 49.

[71] *Karpodinis* v. *Kantas*, [2006] B.C.J. No. 1209 (B.C.C.A.), online: QL.

[72] Duggan, *supra* note 32 at 209-210.

[73] Thompson, "Movin' On", *supra* note 4 at 406.

[74] *Ibid.*

[75] Australia Law Council, "Relocation", *supra* note 19 at para. 6.69.

[76] *La. Rev. Stat. Ann. §.* 9:355.12.

[77] *M* v. *A (Wardship: Removal from Jurisdiction)* [1993] 2 F.L.R. 715.

[78] New Zealand: *Stadniczenko* v. *Stadniczenko* [1995] NZFLR 493 at 500 (C.A.); New York: *Tropea* v. *Tropea*, 87 N.Y. 2d 727 (1996).

[79] *Spencer* v. *Spencer*, [2005] A.J. No. 934 (Alta. C.A.) at para. 18, online: QL.

[80] Thompson, "Ten Years", *supra* note 13 at 320.

[81] *Federal Child Support Guidelines*, SOR/97-175 as amended to SOR/2005-400, ss. 1 to 7, effective May 1, 2006.

[82] See for example: *Llewellyn v. Llewellyn*, [2002] B.C.J. No. 542 (B.C.C.A.), online: QL where the court accepted that there would be hardship due to access costs of $350 incurred three to four times per year

and the payor's net income was $1,278 per month after payment of child support, however that hardship was not "undue" and therefore child support was not reduced.

[83] Section 35(4) states:

> An order for custody or access may include terms and conditions the court considers necessary and reasonable in the best interests of the child.

[84] Duggan, *supra* note 32 at 211.

[85] Australia Family Law Council, "Relocation", *supra* note 19 at para. 6.66.