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EXECUTIVE SUMMARY

British Columbia's *Family Relations Act* has not been comprehensively reviewed since its introduction in the late 1970s. Since 2006, the British Columbia Ministry of Attorney General has been researching and consulting on how best to modernize this important area of the law. The draft legislation discussed in this white paper reflects the results of its policy review.

The main features of the proposed new family statute are:

TOPIC	RECOMMENDED POLICY
Overall Approach	Promote co-operation to the extent possible. For example: • Structure the law so that court is not the only implied starting point. • Promote a broader range of non-court dispute resolution options. • Adopt a conflict prevention approach to family law disputes. • Increase the law's ability to deal with family violence and safety issues. • Use less adversarial terminology. • Meet the overall goals of the <i>Family Relations Act</i> review.
Non-Court Dispute Resolution and Agreements	Promote non-court dispute resolution. For example: • Require family justice professionals to provide early information to clients on dispute resolution options. • Enable parenting coordination by agreement or court order. • Amend the <i>Commercial Arbitration Act</i> to address family arbitrations. • Provide for regulation-making authority to define practice standards/qualifications for family dispute resolution practitioners, as and if required. Encourage agreements by providing greater clarity regarding when and how an agreement may be set aside: • Parenting agreements may be set aside if they are not in the best interests of the child. • Child support agreements may be set aside if they fail to comply with the <i>Federal Child Support Guidelines</i>. • All agreements may be set aside for lack of procedural fairness, such as significant failure to disclose or where one party has taken unfair advantage of the other. • Property and support agreements can be set aside for non-procedural reasons in limited circumstances where it would be clearly unfair.
Legal Parentage	Include a comprehensive scheme to determine a child's legal parents, including in situations where reproductive technology has been used.
Children's Best Interests	Make children's best interests the only consideration in parenting disputes and identify children's safety as an overarching objective of the best interests of the child test. Add further best interests' factors, including the history of the child's care, family violence, and consideration of civil or criminal proceedings relevant to the safety or well-being of the child. Provide for consideration of a child's views "unless it would be inappropriate" to encourage greater inclusion of children's views.
Guardianship	Enact reforms to the Act's treatment of guardianship, including the following: • Replace the terms "custody" and "access" with "guardianship" and "parenting time". • Define "guardianship" through a list of "parental responsibilities" that can be allocated to allow for more customized parenting arrangements.

	• Provide that parents retain responsibility for their children upon separation if they have lived together with the child after the child's birth. (Note: this does not mean that the law presumes an automatic 50-50 split of parental responsibilities or parenting time.) If they have not, the parent with whom the child lives is the guardian. • Consolidate guardianship of children into the new law by including testamentary and standby guardianship.
When Orders or Agreements for Time with a Child are not Respected	Include a new range of tools and remedies to address non-compliance with orders and agreements for time with a child: • Remedies range from moderate to extraordinary remedies depending on the facts of the situation and history of non-compliance. • Provide different remedies for failure to allow parenting time/contact and failure to exercise parenting time/contact.
Relocation	Introduce a relocation regime that aims to increase certainty and predictability of the law of relocation, the highlights of which are: • Include a mandatory 60-day notice-of-move provision, to provide an opportunity for parties to try to resolve any disputes about the proposed move. • List factors that must be considered (e.g. the reasons for the proposed move and whether the proposed move is likely to enhance the general quality of life of the child and the guardian planning the move) and factors that must not be considered (e.g. whether the guardian would be willing to move without the child in any event). • Include presumptions to be applied where the proposed move is contested.
Children's Property	Add provisions relating to children's property that would: • Enable a child's guardian(s) to manage property below a certain monetary threshold without a court order. • Provide court oversight of larger children's trusts, including the appointment of private trustees.
Property Division	Enact major reforms to the law's property division regime, that would: • Extend it to common-law spouses who have lived together for two years in a marriage-like relationship or who are in marriage-like relationship of some permanence and have children together. • Exclude certain types of property (e.g. pre-relationship property, gifts, and inheritances) from the pool of family property to be divided 50-50. • Limit judicial discretion to reapportion family property or to divide excluded property to circumstances where it would be clearly unfair not to do so. • Provide that debts are subject to equal division. • Set as defaults: the date of separation as the triggering event and the date of the court order or agreement as the valuation date. • Limit the ability of judges to set aside or change property division agreements. • Enable interim orders, including for the distribution of property for the purposes of funding litigation or dispute resolution. • Enact conflict of laws provisions to address property outside of British Columbia.
Pension Division	Enact most of the major and housekeeping recommendations made by the British Columbia Law Institute in its 2006 report on the division of pensions. Extend the pension division scheme to unmarried spouses who meet the definition of spouse.
Support	Minor changes to the child support provisions to ensure consistency with new Act's language and

	structure. Minor changes to spousal support provisions: • Align provincial spousal support factors and objectives more closely with the <i>Divorce Act</i>. • Explicitly permit periodic reviews. • Permit variation applications in light of the spousal support objectives and factors where there has been a change in circumstances, new evidence or a failure to make full and frank disclosure. • Limit consideration of a spouse's alleged misconduct to that which "arbitrarily or unreasonably" affects the need for support or the ability to provide it. • Provide that spousal support obligations continue after the death of the paying spouse unless otherwise agreed or ordered. • Clarify that spousal support should be awarded only where spousal support objectives have not already been met through property division. • <i>Spousal Support Advisory Guidelines</i> will not be referred to in the Act and will remain advisory. Eliminate parental support obligations.
Case Management and Enforcement Tools	Include a broader range of case management and enforcement tools for judges. In particular: • Provide for a new type of order called "conduct orders" and corresponding remedies for non-compliance to manage behaviour and facilitate resolution, for example, through referrals to a service, program, counselling or non-court dispute resolution process, providing for a party to pay the other's reasonable expenses incurred as a result of the non-compliance, and limiting frivolous or vexatious litigation. • Establish a general duty to disclose information, and provide for a greater range of remedies for failure to comply with an order to disclose.
Protection Orders	Replace existing family law restraining orders with "protection orders" enforceable under the <i>Criminal Code</i>.
Court Jurisdiction and Procedural Matters	The new family statute will carry forward many of the jurisdictional provisions from the <i>Family Relations Act</i>. Proposed procedural changes include the following: • Lawyers must certify that information about non-court dispute resolution options has been provided prior to filing court documents. • Family cases are to be conducted, to the extent possible, in a way that minimizes delay, cost and formality, reduces conflict and promotes co-operation, protects those involved, and is proportionate to the dispute. • Children who are 16 or older or who are parents, spouses or former spouses will be able to conduct court cases without a litigation guardian.
Transition	Where a court action has been started but not yet resolved before the effective date, the <i>Family Relations Act</i> applies unless the parties enter into a written agreement stating that the new Act governs. Cases that have already been time-barred under the <i>Family Relations Act</i> are not revived by the new Act. Where a court action has been started on or after the effective date, the new Act applies. Orders and declarations made under the previous law continue in force according to their terms, but subsequent applications made on or after the effective date (e.g., to vary or enforce) are governed by the new Act.

CHAPTER 1: INTRODUCTION

I. The Overall Context of Family Law Reform

The British Columbia *Family Relations Act*¹ is the statute that deals with matters arising out of separation and divorce, including the division of family property, guardianship, custody of and access to children, and support. The reforms discussed in this paper address these matters insofar as they are within provincial jurisdiction. This paper does not address the *Divorce Act*² (the federal statute that governs divorce and which also deals with child custody and access, and support, but not guardianship or division of family property). Nor does it address matters of child protection law or policy which fall under a separate provincial statute, the *Child, Family and Community Service Act*.³

In 2006, the British Columbia Ministry of Attorney General (“the Ministry”) began its first comprehensive review of the *Family Relations Act* since its passage in 1978. The scope and scale of social change in Canada in the more than 30 years since it was introduced has been enormous. Marriage, for example, is no longer a prerequisite for cohabitation, nor is it limited to opposite-sex unions. Increasing numbers of children are living with single parents or step-parents in both opposite-sex and same-sex households. The “traditional” family structure of female homemaker and male breadwinner has given way to many more women working outside the home.

The frequency of family transitions has also fundamentally altered. Divorce has evolved from a rare event to a common occurrence. According to Statistics Canada data, as of 2002, 41 per cent of British Columbia marriages ended in divorce before their 30th anniversary.⁴ There has also been a dramatic increase in the number of common-law relationships, which typically end even more frequently and sooner than married relationships.⁵ These trends are reflected in court caseload statistics: family cases account for a quarter of the litigation files in the British

¹ *Family Relations Act*, R.S.B.C. 1996, c. 128, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01 (last accessed: July 6, 2010).

² *Divorce Act*, R.S.C. 1985, (2nd Supp.), c. 3, online CANLII: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html> (last accessed: July 6, 2010).

³ *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96046_01 (last accessed: July 6, 2010).

⁴ Statistics Canada, “Divorces – 2001 and 2002” from *The Daily* (May 4, 2004), online: <http://www.statcan.gc.ca/daily-quotidien/040504/dq040504a-eng.htm> (last accessed: July 8, 2010).

⁵ From 2001 to 2006, the number of common-law relationships in Canada grew by 18.9 per cent while the number of marriages grew by only 3.5 per cent. Statistics Canada, “Family Portrait: Continuity and Change in Canadian Families and Households in 2006 – Common-law Couple Families Increasing Much Faster than Married-Couple Families,” online: <http://www12.statcan.ca/english/census06/analysis/famhouse/cenfam1.cfm> (last accessed: July 8, 2010).

Columbia Supreme Court (about 13,000 new files in 2009), with a similar number of new files (12,000-13,000) each year in the Provincial Court.⁶

In addition to social changes, processes for managing family law issues have also evolved significantly. Before Canada's first *Divorce Act* was introduced in 1968, divorce required an investigation by a special committee of the Senate and an Act of Parliament. When divorce through the courts first became available in 1968, family disputes were framed in adversarial terms and were managed using existing rules and procedures that had been designed to resolve property, commercial, contract and tort issues. The assumption was that family issues could be treated as just another species of civil dispute. Almost immediately, those working in the family justice system in Canada (and throughout the world for that matter) began to recognize that the adversarial model is not well suited to family disputes. Mediation, interest-based negotiation, collaborative law, parenting programs and judicial settlement processes arose as simpler procedural options intended to reduce polarization of the parties and to resolve conflicts earlier and with less cost.

Society's understanding of the social or personal impacts and the behavioural consequences of divorce and separation has grown as well. For example, much more is understood now about the nature and frequency of family violence and about the impact of conflict on children.

Of course, case law has also evolved enormously in the last 30 years. Trial and appeal courts are continually responding to these many social changes and adapting the law to the changing needs and circumstances of families.

Why Change the *Family Relations Act*?

It is time to modernize and update British Columbia's family statute in order to bring it more into line with social, legal and procedural changes, and with research and policy developments of the last three decades. At the same time, reform of the Act provides an opportunity to clarify the law so that it is more understandable and results are more predictable. The reforms will improve the organization of the Act and, where possible, consolidate the law pertaining to families into one statute.

The proposed new statute will also be written with an eye to supporting the following general policy values:

- supporting fair, early, efficient, flexible and proportionate resolution of disputes;
- reducing the emotional and financial costs of family break-up;
- using out-of-court dispute resolution processes, where appropriate;
- using public resources wisely and efficiently;
- encouraging families to resolve their disputes in co-operative ways; and

⁶ Court Services Branch, Civil Management Information System (CMIS), Trends Cube, July 5, 2010. Note: the proportion of new Supreme Court family cases as a total of all non-criminal Supreme Court cases does not include probate-related cases.

- maximizing the ability to discover and effectively apply children's best interests while encouraging parents to reduce conflict and the effect of conflict on children.

Family Law is Unique

There has been growing recognition that family law disputes are fundamentally very different from other civil conflicts. This view was articulated in some detail by the Family Justice Reform Working Group in its 2005 report, *A New Justice System for Families and Children*.⁷ In that report, the Working Group observed that the family justice system needs to continue to steer away from litigation as the primary dispute resolution option and that it must continue to maximize out-of-court settlement opportunities for families.⁸ The Working Group warned against "legislated litigation,"⁹ meaning statutory frameworks premised primarily on adversarial values and the presumption that court is the starting point for resolution of family problems. While there has been a significant shift in the last 20 years toward innovations such as mediation, collaborative law, settlement conferences and parent education programs, they remain largely add-ons to what is still, essentially, an adversarial format.¹⁰ The Working Group report ultimately recommended that the law more overtly support co-operative rather than adversarial approaches¹¹ and that it more closely reflect the reality that the vast majority of family disputes settle short of trial. This means that to the extent possible, the proposed statute will be drafted to help support non-court processes.

This is not to suggest that courts are not needed. The courts are essential for overseeing cases involving an ongoing risk of violence, for resolving otherwise intractable disputes, for clarifying the legal principles upon which negotiated settlements are based, for managing unprincipled or uncooperative parties and for enforcing obligations.¹² Where possible, the statute will be drafted to provide greater clarity in the law so that, where court processes are engaged, judges have more appropriate tools for managing family cases.

A further concern informing the legislation will be the limited access British Columbians have to the family courts. Families need a justice system that is as accessible, simple and affordable as

⁷ The 2005 report of the Family Justice Reform Working Group, a committee with representatives from the judiciary, the Law Society of British Columbia, the Canadian Bar Association and the provincial government, noted that since the early 1970s there have been 16 reports making recommendations touching on family justice in British Columbia. The Working Group observed that a consistent recommendation from these past reports is that court should be regarded as the last resort and that the presumption should be that all family cases will be managed through collaborative processes. British Columbia, Family Justice Reform Working Group, *A New Justice System for Children and Families* (B.C. Justice Review Task Force, May 2005) at Executive Summary, 13, 14 and 40, online British Columbia Ministry of Attorney General: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last accessed: July 6, 2010).

⁸ Family Justice Reform Working Group, Above Note 7 at 13.

⁹ *Ibid.* at 12.

¹⁰ *Ibid.* at 13.

¹¹ *Ibid.*, Recommendation 27 at 81.

¹² See e.g., Family Justice Reform Working Group, Above Note 7 at 13.

possible. Unfortunately, research suggests that many citizens are not using the courts to resolve their civil and family conflicts¹³ and that unresolved problems can cluster and compound over time.¹⁴ As the Chief Justice of the Supreme Court of Canada, the Honourable Beverly McLachlin, said in reference to family litigants, "(t)heir options are grim: use up the family assets in litigation; become their own lawyers; or give up."¹⁵

Research also shows that divorce can trigger other social and economic problems, including physical and mental health issues, substance abuse problems as well higher rates of unemployment.¹⁶ Other negative consequences include juvenile crime, decreased school performance/acting out for children, and greater demand for income support.¹⁷ Given the broad impact that the experience of separation and divorce can have on children and their parents, it is important that court and non-court processes are effective and responsive to families' needs.

Key Themes in the Proposed New Act

The context and concerns described above are reflected in the proposed Act in the following ways:

¹³ See e.g. A. Currie, Research and Statistics Division, Department of Justice Canada, "Justiciable Problems and Access to Justice in Canada" (Osgoode Hall Roundtable on Legal Aid, Toronto, November 2007) at 1-2, 6-8. This study found that a relatively high number of Canadians had experienced a serious problem with legal aspects to it within the previous three years (44.6% from a 2006 survey and 47.7% from a 2004 survey). Two thirds of people did not receive assistance to resolve their problem. Relationship breakdown was identified as a trigger in both the 2004 and 2006 data to further legal, and potentially further non-legal, problems. See also: Ipsos Reid for the Legal Services Society of British Columbia, "Legal Problems Faced in Everyday Lives of British Columbians" (2 December 2008) at 3-5 and 12, online Legal Services Society of British Columbia: http://www.lss.bc.ca/assets/aboutUs/reports/legalAid/IPSOS_Reid_Poll_Dec08.pdf (last accessed: July 6, 2010). In a survey of 1,189 British Columbians with household incomes under \$50,000, 32% of respondents reported having had a family relationship problem, of which 30% remained unresolved.

¹⁴ Compounding legal and non-legal problems are linked to the destructive spiral of social exclusion: A. Currie, Above Note 13, at 9 and 10. See also Canadian Forum on Civil Justice, "Social, Economic and Health Problems Associated with a Lack of Access to the Courts," (March 2006) online Canadian Forum on Civil Justice: <http://cfjc-fcjc.org/docs/2008/cjsp-socialproblems-en.pdf> (last accessed: July 6, 2010), which states at page 20: "One of the strongest indicators of mounting social problems appears to be the failure to successfully and permanently resolve legal issues. This is well illustrated in the family law examples given throughout this report...Escalation in these cases invariably impacts children, and often other extended family members."

¹⁵ Remarks of the Right Honourable Beverley McLachlin, P.C., "The Challenges We Face," (Presented at the Empire Club, Toronto, March 8, 2007), online Supreme Court of Canada: <http://www.scc-csc.gc.ca/court-court/ju/spe-dis/bm07-03-08-eng.asp> (last accessed: June 23, 2010).

¹⁶ See Focus Consultants, for Ministry of Attorney General, Justice Services Branch, *The Family Justice System: A Review of the Metrics and Impacts of Separation and Divorce*, (March 2006), at viii and ix, online British Columbia Ministry of Attorney General: <http://www.ag.gov.bc.ca/justice-services/publications/fjsd/divorce/metrics.pdf> (last accessed: July 6, 2010). See also 33, which references studies by E. Mavis Hetherington and M. Stanley-Hagan, "The adjustment of children with divorced parents: a risk and resiliency perspective" (1999) 40 *Journal of Child Psychology and Psychiatry* at 129-140 and A.M. Ambert, "Divorce: Facts, Causes and Consequences" (Vanier Institute: 2005) for the proposition that divorced adults experience higher levels of unemployment.

¹⁷ Focus Consultants, Above Note 16 at ix.

Not Making Court a Presumptive Starting Point

The Family Justice Reform Working Group said that courts are needed but not a court-centered system and that the substantive law should not imply that the courtroom is the primary forum for resolving family law disputes.¹⁸ Examples of moving away from an implicit court-based model include the use of triggering events (e.g., the date of separation) that do not require a judge's involvement as well as provisions which aim to support the use of agreements.

Broader Range of Dispute Resolution Options

The proposed legislation will be drafted to recognize a full continuum of dispute resolution options, not only adjudication by a judge. Inclusion of specific statutory references to consensual forms of dispute resolution, such as mediation and collaborative law, will raise public awareness about the range of options available for resolving family issues while affirming their status and signalling the important role these non-court dispute resolution processes already play.

Increased safeguards will form part of the legislative support for agreements and non-court based dispute resolution processes. The proposed Act will provide for a regulation-making authority to set minimum qualification requirements and practice standards for practitioners, either directly in a regulation or through a roster or other organization. This is consistent with the observation of the Family Justice Reform Working Group that the more the law promotes the use of consensual dispute resolution, the greater the system's responsibility to ensure those services are offered by qualified practitioners who meet recognized standards of practice.¹⁹

Conflict Prevention

One theme that arose consistently in the consultations was the desirability of preventative approaches to family law disputes. Rather than dealing solely with what parties should do when a dispute crystallizes, the proposed new Act will build in reference to processes that aim to avoid or de-escalate conflict. Requirements for early dissemination of information about the consequences of non-compliance with family orders or what to do if an order is not working are intended to reduce conflicts later in the process. Similarly, allowing judges to require family members to attend counselling or meet with a parenting coordinator should help to avoid or reduce conflict. It is well recognized that if the underlying issue or conflict is not resolved, parties are likely to cycle through the family justice system again and again.

¹⁸ Family Justice Reform Working Group, Above Note 7 at 10-14 and 77-81.

¹⁹ *Ibid.* at 49.

Safety

Research shows that separation and divorce are events that increase the risk of family violence occurring.²⁰ The proposed changes to the law will increase the court's ability to deal with family violence by:

- identifying children's safety as an overarching objective in the best interests of the child test;
- including the impact of family violence and consideration of civil or criminal proceedings relevant to the safety or well-being of the child as best interests factors;
- defining family violence and legislating risk factors to be considered in parenting cases that involve violence; and
- clarifying the grounds for protection orders and providing for criminal law sanctions for breaches.

Non-adversarial Language

Some terms in the draft legislation are framed in less adversarial language. For example, many find words like "custody" and "access" unhelpful and suggest the words characterize non-residential parents as visitors and children as property. Others say the terms promote a feeling of winning and losing and tend to divide separating parents rather than uniting their attention on their common responsibility for their children's upbringing.

Challenges and Limitations in Reforming the *Family Relations Act*

The Value of Programs and Services

The justice system consists of not just the law that governs family relationships and the judges and lawyers that use it. It also includes programs and services that help families respond to and manage issues related to separation and divorce. In British Columbia these include the Parenting After Separation Program, the many services available through the network of provincial family justice centres and justice access centres, as well as programs and services provided through a range of non-government organizations.

The last three decades have clearly demonstrated that programs and services have a potentially enormous role to play in helping families to better understand and negotiate the family justice system. While it is clear that an increase in such services would be broadly welcomed, it is unlikely in the near term and in the current fiscal environment that additional programs and services can be implemented.

²⁰ Risk is greatest "just before, during and immediately after separation": British Columbia Ministry of Public Safety and Solicitor General, "Violence Against Women in Relationships Policy," at 11, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: June 23, 2010). See also Canadian Centre for Justice Statistics, Statistics Canada, *Spousal Violence After Marital Separation*, by T. Hotton, (June 2001) at 2 and 3. This study shows that family violence begins after separation in just over 1/3 of relationships.

That said, the Ministry accepts the advice of the Family Justice Reform Working Group and the feedback widely received during the *Family Relations Act* review that family justice programs and services are extremely helpful, effective and necessary for families. The proposed legislation will be drafted with the potential role of family services firmly in mind, and it will establish a structure that is sufficiently flexible to permit government to expand programs and services in the future.

Culture and Change

In many respects, the players in the family justice system have been highly innovative over the last 20 years. Judges, lawyers, service providers and court administrators have led the way in the use of practices like mediation, collaborative law and judicial case conferences. To a certain extent, other areas of civil law have been following in the path of the innovations made in the family system. At the same time, lawyers, judges and administrators can be cautious about change. This conservatism is valued as a safeguard and check on changes that will have consequences for broad sectors of society. However, in the end, a balance must be struck between conservatism and innovation.

In this context, the Ministry observes that the range of issues raised by a new family statute is extremely broad and far-reaching and that stakeholders are rarely unanimous on what the law should say. Commonly, there are diverse and opposing views – often strongly held – on all sides of a policy question. The proposals in this paper sometimes represent a significant shift from the current legal regime, and such shifts can be inconvenient for some who work in the system and have acquired expertise in the current law. They may also require some spouses to revisit their financial planning arrangements and consider how the changes in the law could affect their lives should they separate. In other words, some of the proposed changes will come at a cost for some lawyers and citizens. These are important concerns and need to be balanced against the opportunity to modernize a critical provincial law that could be in place for decades to come.

Rules and Procedure

New British Columbia Supreme Court civil and family rules of procedure were implemented on July 1, 2010. The sequence and timing of the new family procedures and the new substantive family law is not ideal. It would have been preferable had the major rules reform followed – and had the opportunity to respond to – legislative reform. When these two projects were started, it was not clear exactly how long each would take. The Supreme Court rules project had a life and a timeframe of its own, and in the end, it was decided that it was not viable to hold back both the civil and family rules changes to wait for new family legislation.

It is important to note in this respect that the Ministry has approached drafting the proposed new Act with the view that it should not be constrained by the content of existing court rules. Rules are subservient to legislation, and the family procedural rules should flow from the substantive legal framework. Thus, some of the suggestions in this paper are different from and sometimes inconsistent with positions reflected in the new Supreme Court rules.

It follows that further work will ultimately be required to bring both the Supreme Court family rules and the Provincial Court family rules into line with the new substantive law. Issues to be considered will include:

- how changes in terminology will affect the court rules;
- how new powers in the draft Act will be reflected in court rules;
- whether new processes may be required in the rules to allow parties to seek new types of orders; and
- how best to resolve inconsistencies that may arise between the rules and the new law.

In considering the relationship between the legislation and the rules, the Ministry was also mindful of the need to ensure that Provincial Court judges have the statutory power they need to implement the reforms effectively.

II. The Family Relations Act Review

In order to explore the recommendations for law reform made by the Family Justice Reform Working Group, the Ministry initiated a comprehensive review of the *Family Relations Act* beginning in 2006. In 2007, the Ministry published discussion papers that identified a range of policy issues and reviewed the law in British Columbia and other jurisdictions in order to serve as a foundation for consultation. Following extensive consultations in 2008, Ministry staff reviewed the feedback, and in 2009, and with the help of panels of subject area experts, formulated policy recommendations for Ministry Executive and Cabinet. The project is now in its final phase, which involves the translation of those policy recommendations into a new family statute.

Consultations

External Stakeholders

Several different kinds of consultations have taken place as part of the *Family Relations Act* review. First, online public consultations took place in 2007 with the publication of the 12 discussion papers on the Ministry's website.²¹ This was done in three phases as set out below.

PHASE	TOPIC
Phase 1: February to May 2007	• Division of Property • Division of Pensions • Judicial Separation
Phase 2: April to August 2007	• Parenting Apart • Meeting Access Responsibilities • Children's Participation • Family Violence

²¹ British Columbia Ministry of Attorney General, online: Legislation and Policy Consultation Archive Homepage, <http://www.ag.gov.bc.ca/legislation/archive.htm> (last accessed: July 8, 2010).

PHASE	TOPIC
Phase 3: August to November 2007	• Legal Parenthood • Spousal and Parental Support • Co-operative Approaches to Resolving Disputes • Time Limits and Definitions • Relocating Children

In addition, between March 2007 and January 2008, in-person meetings were held with key legal stakeholders, including:

- the Law Society of British Columbia,
- the Family Law Advocates' Group, and
- the following sections of the British Columbia Branch of the Canadian Bar Association:
 - the Family Law sections in Kelowna, New Westminister, Vancouver, Victoria, and Nanaimo,
 - the Collaborative Law sections in Vancouver and New Westminister, and
 - the Sexual Orientation and Gender Identity Conference section.

A further opportunity for feedback occurred in March 2008 when the Law Courts Education Society (now the Justice Education Society of British Columbia), with funding from the Law Foundation of British Columbia, hosted a community forum in Vancouver on the two topics that garnered the most attention during the online consultations: family violence and children's participation in family law processes. The report summarizing the event is available online.²²

Another non-profit organization, the Social Planning and Research Council of British Columbia (SPARC BC), consulted 30 youth from North Vancouver, Burnaby, Vancouver and Victoria on children's participation policy.²³ The same body organized focus groups with specific citizens' groups in 21 communities across the province including men's and women's groups, community-based organizations as well as multicultural and aboriginal family services organizations.²⁴ Close to 150 people gave feedback in this process.²⁵ In addition, SPARC BC surveyed 223 family advocacy and support organizations.²⁶ It also sent written questions to the

²² Justice Education Society of British Columbia, *Reforming the Family Relations Act: A Dialogue for Change* (2008), online: <http://www.justiceeducation.ca/resources/Family-Relations-Act%20> (last accessed: May 20, 2010).

²³ C. Reeves, Social Planning and Research Council of British Columbia, *Youth Included!* (May 2008) at 7, online Social Planning and Research Council of BC: <http://www.sparc.bc.ca/resources-and-publications/category/39-family-law> (last accessed: July 10, 2010).

²⁴ C. Reeves, Social Planning and Research Council of British Columbia, *Family Relations Act Reform Project* (March 2008) at 16, online Social Planning and Research Council of BC: <http://www.sparc.bc.ca/resources-and-publications/category/39-family-law> (last accessed: July 8, 2010).

²⁵ *Ibid.*

²⁶ *Ibid.* at 11-13 and 20.

nine Family Court Committees and Family Court/Youth Justice Committees.²⁷ Members of three such committees provided comments, mainly on the topic of family violence.

Finally, the Ministry had the benefit of expert advice. It formed an advisory group of senior family lawyers and mediators that it consulted in the development of its discussion papers at the beginning of the project. The Ministry also held expert panel meetings with senior family lawyers, mediators, and family law academics on the following five topics: property and support, children's issues, parentage, non-court dispute resolution and family violence. Law enforcement agencies and community organizations were also consulted on the topic of family violence.

Government and Public Bodies

All of the government employees that offer family mediation services had the opportunity to comment as did the policy staff in Family Justice Services Division of the Ministry. The following public bodies also gave feedback:

- Ministry of Aboriginal Relations and Reconciliation,
- Ministry of Children and Family Development,
- Ministry of Housing and Social Development,
- Ministry of Public Safety and Solicitor General (Victim Services Division),
- Office of the Public Guardian and Trustee, and
- British Columbia Vital Statistics Agency.

Summary of Public Consultations

For further detail on the public consultations held as part of the *Family Relations Act* review, please see the *Report of Public Consultations* dated February 2009.²⁸

III. Family Law White Paper

Purpose

The Ministry has issued this white paper to offer interested persons the opportunity to comment on the proposed new family statute. Feedback from the white paper will be considered in finalizing the legislation, which will be prepared as a bill for consideration by the Legislative Assembly.

²⁷ Family Court Committees are unpaid committees created by municipalities under s. 5 of the *Provincial Court Act*, R.S.B.C. 1996, c. 379 that include people with expertise in "education, health, probation or welfare". They may provide advice to the Attorney General and/or the court. Sometimes, they are operated jointly with Youth Justice Committees, citizen committees created under s. 18 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1. Those that operate jointly to advise on both family and youth criminal matters are called Family Court / Youth Justice Committees.

²⁸ British Columbia Ministry of Attorney General, *Report of Public Consultations* (February 2009), online: <http://www.ag.gov.bc.ca/family-relations-act/pdf/FRAConsultationSummary.pdf> (last accessed: May 20, 2010).

Structure

This paper has 14 chapters. For each policy topic, it summarizes the major themes from the consultations, the recommended policy and rationale, as well as a preliminary draft of what the legislation could look like. Because this paper is presented in chapters, not all legislative provisions are included. For example, some definitions and most consequential amendments are not included in this paper. Please bear this in mind when providing comments.

The feedback the Ministry receives on this white paper will doubtless continue to reflect the many differing perspectives that were articulated during the consultation period. The Ministry's main interest at this time is to receive final feedback now that certain policy positions can be defined. In this respect, it is hoped that the draft statutory text will assist in clarifying and illustrating the policy decisions. However, it is important to note that the Ministry is not yet delivering a final product; the statutory language in this paper is still preliminary. While comments identifying technical and editorial changes are welcomed, readers are encouraged to bear in mind that the legislative provisions included in the paper are a work in progress and do not reflect a final draft.

Invitation to Comment

Comments may be mailed, faxed or e-mailed to:

FAMILY LAW WHITE PAPER
Civil Policy and Legislation Office
Justice Services Branch
British Columbia Ministry of Attorney General
PO Box 9222 Stn Prov Govt
Victoria, British Columbia V8W 9J1
Facsimile: (250) 387-4525
E-mail: CPLOFamilyLaw@gov.bc.ca

Unless clearly marked to the contrary, the Ministry will assume that comments received are not confidential and that respondents consent to the Ministry attributing their comments to them and to the release or publication of their submissions. Requests for confidentiality or anonymity will be respected to the extent permitted by freedom of information legislation.

Please note that the deadline for providing feedback is **October 8, 2010**.

CHAPTER 2: NON-COURT DISPUTE RESOLUTION AND AGREEMENTS

The *Family Relations Act* has few references to the resolution of disputes other than by a judge in a courtroom. Court remains a vital dispute resolution mechanism and is the most appropriate option for certain kinds of disputes. However, most family law disputes are resolved short of adjudication, and non-court dispute resolution options, such as mediation and collaborative family law are increasing in use.

1. A Broader Range of Dispute Resolution Options

Consultation Feedback

Feedback in response to the Ministry's discussion papers suggested that more and better use of cooperative approaches to resolving disputes should be encouraged. Respondents also said that it is important that people receive information about such processes as early as possible. Overall, most respondents liked the idea of including a duty to give early information about dispute resolution options to would-be litigants and believed that lawyers are best positioned to provide this service. Respondent lawyers, however, were less enthusiastic. Some thought the idea had merit, but others said it would not be useful.

Feedback was also received expressing strong reservations about encouraging the use of dispute resolution processes. Those reservations were largely based on concerns that in circumstances where power imbalances or family violence are present, parties may be encouraged to enter these processes at the risk of potentially dangerous or unfair outcomes.

Another common theme was that non-disclosure of information is a barrier to fair and effective out-of-court dispute resolution. Respondents called for mechanisms for full, frank and early disclosure of information to facilitate dispute resolution.

Recommended Policy

It is proposed that the new statute encourage, where appropriate, the use of non-court dispute resolution processes in the expectation that non-court settlement options will offer simpler, speedier, and less costly ways to resolve post-separation disputes and will further the best interests of children.

The proposed Non-Court Dispute Resolution and Agreements part begins with a purposes section, modelled on Australian legislation,²⁹ that aims to:

- ensure that people are informed of all dispute resolution options available to them;
- encourage the use of agreements and non-court dispute resolution processes if appropriate; and
- encourage parents to use these processes to create post-separation parenting arrangements that are in the best interests of their children.

²⁹ *Family Law Act 1975*, Cwlth, ss. 12A and 63B, online AUSTLII:
http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/ (last accessed: July 9, 2010).

The proposed language signals that agreements and non-court dispute resolution processes are not simply add-ons to litigation but are viable, independent options.

It is also proposed that the new statute place a duty on all family justice professionals, including lawyers, family justice counsellors, and mediators to screen for violence and provide people with information about non-court dispute resolution options. Advice about suitable dispute resolution processes cannot be offered without first considering family violence.

The primary reasons for imposing an informational duty on family justice professionals are:

- to ensure that parties are making informed decisions about the range of options available for resolving family law disputes; and
- to maximize opportunities for early, cooperative settlement and, therefore, reduce the emotional and financial costs of separation.

This responds to the 2005 Family Justice Reform Working Group recommendation to get information to separating families at the “front door” of the family justice system.³⁰

Lawyers will be required to file a certificate when initiating court proceedings confirming that the discussion about non-court based processes has occurred. See Chapter 13: Court Jurisdiction and Procedural Matters for further details. Imposing an obligation on lawyers to provide such information already exists under the *Divorce Act*,³¹ and is also done in Alberta,³² Saskatchewan,³³ and Australia.³⁴

Feedback from the consultation was that everyone in the system is responsible to support a shift toward greater use of collaborative processes. Following the approach that has been taken in Australia,³⁵ a duty to inform clients about non-court dispute resolution options will apply to all family justice professionals, not just lawyers.

The proposed legislation includes a general duty to disclose relevant information as well as consequences for failure to disclose. Specifically, in non-court processes, where there has been a material failure to disclose, the court may set aside an agreement if it would be unfair not to do so. This means parents and spouses who are attempting to reach a negotiated agreement will have a statutory obligation to share relevant information. Please see Chapter 11: Case Management and Enforcement Tools for more information.

³⁰ Family Justice Reform Working Group, Above Note 7, Recommendations 1 and 2 at 111.

³¹ CAN *Divorce Act*, Above Note 2, s. 9.

³² *Family Law Act*, S.A. 2003, c. F-4.5, s. 5, online CANLII: <http://www.canlii.org/en/ab/laws/stat/sa-2003-c-f-4.5/latest/sa-2003-c-f-4.5.html> (last accessed: July 7, 2010).

³³ *Children's Law Act*, 1997, S.S. 1997, c. C-8.2, s. 11, online CANLII: <http://www.canlii.org/en/sk/laws/stat/ss-1997-c-c-8.2/latest/ss-1997-c-c-8.2.html> (last accessed: April 30, 2010).

³⁴ AUS *Family Law Act 1975*, Above Note 29, Part IIIA.

³⁵ *Ibid.*, ss.12F and 12G.

The early exchange of information is intended to maximize the effectiveness of all forms of family dispute resolution. Information gaps can fuel and/or prolong conflict and can affect the quality of agreements. Full and accurate disclosure is already an implicit part of negotiations involving lawyers and is often secured by contract in mediation and collaborative family law processes.

Where a party obstructs a family dispute resolution process or knowingly fails to disclose relevant information respecting property or debt such that an agreement is set aside, a judge may award expenses to the party that has been prejudiced. Such orders are intended to encourage the fair and appropriate use of non-court dispute resolution processes.

Recommended Draft Provisions

PART 2 – NON-COURT DISPUTE RESOLUTION AND AGREEMENTS	
Division 1 – Definitions and Purpose	
Definitions	
2	(1) In this Part:
	“ family dispute resolution ” means a process, whether binding or not, whereby parties to a family law dispute attempt to resolve one or more issues in the dispute outside the formal court system, and includes
	(a) assistance from a family justice counsellor,
	(b) mediation, arbitration, collaborative family law and other procedures, and
	(c) the services of a parenting coordinator;
	“ family dispute resolution professional ” means
	(a) a family justice counsellor,
	(b) a parenting coordinator,
	(c) a lawyer advising a party in relation to a family law dispute, and
	(d) a mediator and an arbitrator conducting a mediation or arbitration in relation to a family law dispute;
	“ family justice counsellor ” means a person appointed as a family justice counsellor under section 10 (1) [<i>family justice counsellors</i>];
	“ family law dispute ” means a dispute respecting a matter that may be the subject of a court order under this Act;
	“ parenting coordinator ” means a person who may act as a parenting coordinator under section 6 (1) [<i>parenting coordinators</i>].
	(2) In this Part:
	(a) “ arbitration ” and “ arbitration agreement ” have the same meaning as in the <i>Commercial Arbitration Act</i> ;

- (b) “**arbitration award**” has the same meaning as “award” in the *Commercial Arbitration Act*.

Purposes of Part

3 The purposes of this Part are as follows:

- (a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;
- (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate dispute resolution processes before applying to a court for an order under this Act;
- (c) to encourage parents and guardians to resolve parental conflict other than through court intervention and to create parenting arrangements that are in the best interests of their children.

Duty to advise of family dispute resolution

- 4** (1) A family dispute resolution professional consulted by a party to a family law dispute must
- (a) make inquiries to assess whether family violence may be present, and if so, provide the party with appropriate assistance.
 - (b) discuss with the party the advisability of using various family dispute resolution processes to resolve the matter, and
 - (c) inform the party of the facilities and other resources known to the family dispute resolution professional that may be able to assist in resolving the dispute.
- (2) A family dispute resolution professional consulted by a party to a family law dispute respecting guardianship, the allocation of parental responsibilities, parenting time or contact with a child, must advise the party that
- (a) an agreement that includes provisions respecting such matters must be made in the best interests of the child only, and
 - (b) in a proceeding under Part 4 [*Guardianship and Parental Responsibilities*], except under section 70 [*orders permitting or prohibiting relocation*], a court must consider the best interests of the child only.

Court may order family dispute resolution expenses

- 5** On application by a party, a court may make an order requiring the other party to pay all or part of the expenses reasonably and necessarily incurred by the party making the application if the court is satisfied that the other party
- (a) obstructed the family dispute resolution process in a manner that caused the party making the application to incur unnecessary expenses, or
 - (b) knowingly failed to disclose relevant information respecting property or debt and, as a result of the undisclosed information, an order is made under section 18 [*setting aside or varying agreements generally*] to set aside or vary an agreement arising from the family dispute resolution process.

II. Legislative Supports for Specific Consensual Dispute Resolution Processes

Some family justice dispute resolution processes need specific legislative supports. Processes like mediation and collaborative family law require little formal support to work effectively. However, parenting coordination and arbitration do need more legislative structure because these options involve a form of adjudication.

Consultation Feedback

Stakeholders called for legislative supports to facilitate the use of parenting coordination and family law arbitration.

Parenting Coordination

Recommended Policy

Parenting coordination is being used more and more in North America, in particular, to help manage high-conflict families who have ongoing difficulties implementing parenting arrangements. It offers speedy resolution of day-to-day disputes arising from existing agreements and orders, which conserves court resources and better serves families. Parenting coordination is currently conducted in British Columbia under the *Commercial Arbitration Act*,³⁶ which is not specifically designed to support this form of dispute resolution.

The proposed legislation has a structure for parenting coordination. Parenting coordinators will be given the authority to decide disputes involving the implementation of existing parenting arrangements but not make decisions that will fundamentally change the governing agreement or order. The idea is not to replace judges but to deal with day-to-day disputes not appropriate for the court process.

The parenting coordination agreement or the court order authorizing the process will describe the scope of the parenting coordinator's decision-making authority. A parenting coordination process will be limited to a term of two years with an extension option. Parties may agree to retain a parenting coordinator to solve current or future disputes. As well, the proposed new legislation will give judges the option of requiring parties to attend parenting coordination as a case management tool to deal with those couples who consume a significantly disproportionate share of court time.

³⁶ *Commercial Arbitration Act*, R.S.B.C. 1996, c.55, online BC Laws:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96055_01 (last accessed: July 9, 2010).

Recommended Draft Provisions

PART 2 – NON COURT DISPUTE RESOLUTION AND AGREEMENTS	
Division 2 – Parenting Coordinators	
Parenting coordinators	
6	(1) A person meeting the requirements set out in the regulations may act as a parenting coordinator for the purposes of this Division. (2) On the agreement of the parties or if ordered by the court, a parenting coordinator may do one or both of the following in respect of a dispute over the implementation of an agreement or a court order respecting the allocation of parenting time or parenting responsibilities, or contact with a child: (a) mediate the dispute; (b) make a determination respecting the dispute that is binding on the parties. (3) Without limiting subsection (2), a parenting coordinator may make a determination respecting the following matters: (a) a child’s daily routine and parenting time or contact schedule; (b) the education of a child, including in relation to a child’s special needs; (c) the participation of a child in extracurricular activities and special events; (d) the temporary care of a child by a person other than a parent or a person who has contact under an agreement or a court order; (e) the provision of routine medical, dental or other health care to a child; (f) the discipline of a child; (g) the transportation and exchange of a child between parents; and (h) the sharing of parenting time of a child during vacations and special occasions.
Limits on parenting coordinators	
7	(1) A parenting coordinator must not act in respect of a matter that is not addressed in an agreement or a court order. (2) A parenting coordinator must not make a determination that would result in any of the following: (a) a substantial change to the terms of an agreement or a court order in relation to the allocation of parenting time or parenting responsibilities, or contact with a child; (b) the creation of or a change to child support obligations; (c) a change to the guardianship of a child; (d) the relocation of a child.
End of parenting coordinator’s authority	
8	(1) In this section, “authorizing instrument” means the agreement or court order that authorized the parenting coordinator to act.

	(2) Unless a new authorizing instrument is made, a parenting coordinator's authority to act ends at the earliest of
	(a) the date or the happening of an event described in the authorizing instrument, or
	(b) 2 years following the making of the authorizing instrument.
	(3) Despite any authorizing instrument, a parenting coordinator may at any time discontinue a parenting coordination process on the grounds that the process is inappropriate for any reason.
Outcome of parenting coordination	
9	(1) An agreement between the parties made as a result of a parenting coordination process is effective on the date the agreement is made or a later date specified in the agreement.
	(2) A determination made by a parenting coordinator is effective on the date the determination is made or a later date specified by the parenting coordinator.
	(3) A parenting coordinator may make a verbal determination, but must put the determination into writing and sign it as soon as practicable after the determination is made.
	(4) Subject to section 7 [<i>limits on parenting coordinators</i>], an agreement between the parties made as a result of a parenting coordination process, or a determination made by a parenting coordinator, is deemed to be an agreement made under this Act.

Family Law Arbitration

Recommended Policy

Family law arbitration is not widely employed as a dispute resolution option in British Columbia. Changes are proposed to the *Commercial Arbitration Act* to make arbitration more accessible and more workable for family law disputes.

The changes add safeguards to address some unique aspects of family disputes. Agreements to arbitrate (the contracts that initiate family law arbitrations) may be set aside on the same basis as other agreements, on grounds such as duress, or lack of understanding by a party of the nature and effect of the agreement. Family law arbitration awards may be appealed to the Supreme Court on a question of fact or mixed fact and law as are judicial decisions under the draft legislation. As is currently the case, judges determining an issue on appeal will apply the relevant Canadian or British Columbian family law.

Recommended Draft Provisions

Consequential Amendments - <i>Commercial Arbitration Act</i>	
190	<i>Section 1 is amended by adding the following definitions:</i>
	<i>“dispute” includes a family law dispute;</i>
	<i>“family law dispute” has the same meaning as in the Family Law Act.</i>
<i>The addition of these definitions clarifies that arbitration can be used to resolve family law disputes.</i>	
191	<i>Section 2 is amended</i>

- (a) in subsection (2) by striking out “Family Relations Act” and substituting “Family Law Act,”
 (b) by adding the following subsection:

(2.1) In relation to an arbitration respecting a family law dispute, in the event of a conflict between the *Family Law Act* and this Act, the *Family Law Act* prevails.

The addition of section 2(2.1) ensures that the new family law will prevail in a conflict with the Commercial Arbitration Act. Ontario’s Arbitration Act, 1991 has a similar provision.

192 The following sections are added:

Requirements for arbitration agreement respecting family law dispute

- 2.1** (1) Subject to subsection (2), an arbitration agreement respecting a family law dispute must not be made unless the arbitration agreement is entered into after the dispute to be arbitrated has arisen.
- (2) Subsection (1) does not apply to a provision in an agreement, a court order, or arbitration award respecting a family law dispute that provides for arbitration to decide a matter arising from an agreement, court order or arbitration award.
- (3) If the requirement of subsection (1) is not met, the arbitration agreement and any arbitration award arising from it are not enforceable.

Subsection (1) prevents people from agreeing to use arbitration to resolve a family law dispute years before their separation. The appropriateness of arbitration as a dispute resolution process must be assessed at the time that the process is entered into.

Subsection (2) creates an exception to allow arbitration to be used to assist people in implementing the terms of their settlement or a court order.

193 Section 23 is renumbered as section 23 (1) and the following subsections are added:

- (2) Despite subsection (1) and any agreement of the parties to a family law dispute, an arbitrator making an award respecting the family law dispute is bound, in the same way as a court would be in making an order, by the provisions of the *Family Law Act*.
- (3) A provision of an award that is inconsistent with a provision of the *Family Law Act* referred to above is not enforceable.

This section ensures that arbitration awards are consistent with the provisions of the Family Law Act. For example, a family arbitration award for spousal support must not be inconsistent with the law of spousal support as provided for in the Family Law Act. Also, the best interests of a child provision in the Family Law Act would apply to an arbitrator’s decisions in the same way that it would apply to a judicial decision.

194 The following section is added:

28.1 An arbitration agreement in respect of a family law dispute is deemed to be an agreement under the *Family Law Act*.

This section ensures that an arbitration agreement can be set aside for the same procedural deficiencies as a family law settlement agreement.

195 Section 30 is amended by adding the following subsection:

(4) Nothing in this section restricts or prevents a court from setting aside or varying an award, or part of an award, in respect of a family law dispute for any reason permitted under the *Family Law Act*.

This section is intended to make family arbitrations consistent with the Family Law Act. Section 30 of the Commercial Arbitration Act restricts the ability of a court to set aside or vary an arbitration award except in the case of “arbitral error.” This section will ensure that section 30 is not interpreted as a bar to setting aside or varying an award in circumstances that would otherwise be available under the family law.

196 Section 31 is amended by adding the following subsections:

(3.1) A party may appeal to the court an arbitration award with respect to a family law dispute on a question of fact or on a question of mixed fact and law.

Section 31 of the Commercial Arbitration Act only provides for an appeal if it can be proven that the arbitrator made an error of law. Appeals of family law decisions are often based on allegations of errors of law and errors of fact. Subsection (3.1) ensures that appeals of family law arbitration awards can be made on the same basis as appeals of family law judicial decisions.

197 Section 35 is renumbered as section 35 (1) and amended by adding the following subsection:

(2) An exclusion agreement referred to in subsection (1) is not enforceable with respect to an arbitration of a family law dispute.

Section 35 of the Commercial Arbitration Act allows parties to an arbitration to, by agreement, prevent a party from appealing an arbitrator’s decision to a court, prevent a party from asking an arbitrator for more detailed reasons, and prevent a party from asking a court to determine an issue of law that has arisen during the arbitration process. Subsection (2) does not allow such exclusions if the matter is a family law arbitration. Therefore, parties cannot prevent an arbitration award from being appealed.

Minimum Practice Standards

Recommended Policy

The proposed legislation includes a regulation-making power which will give government the capacity to set practice standards and qualifications (or designate organizations that will set these standards) for all types of family dispute resolution processes. The need for such regulations will depend upon a number of factors, including the need for public protection, the maturity of the practice area and the extent to which a roster process or regulatory body is already operational. Mediation, by way of example, is already well established in British Columbia. An existing

organization, namely Mediate BC Society (formerly, the British Columbia Mediation Roster Society and the Dispute Resolution Innovation Society) has developed qualification and practice standards to address public protection issues. Similarly, the British Columbia Parenting Coordination Roster Society is developing policies on admissions, practice standards and continuing education. The proposal to create a regulatory power is consistent with the observation of the Family Justice Reform Working Group that to the extent that government promotes the use of consensual dispute resolution processes, it is incumbent upon government to ensure that those services are offered by qualified practitioners who meet recognized standards of practice.³⁷

Recommended Draft Provisions

PART 2 - NON-COURT DISPUTE RESOLUTION AND AGREEMENTS	
Division 4 - Agreements	
Regulations for this Part	
25	(1) The Lieutenant Governor in Council may make regulations pertaining to the following: (a) the training, experience and other qualifications a person must have to be qualified as a family dispute resolution professional, including training in assessing family violence; and (b) the organizations of which a family dispute resolution professional must be a member to be qualified to offer services as a family dispute resolution professional.

Family Justice Counsellors

Recommended Policy

The proposed legislation will continue to refer to family justice counsellors who are employed by government. The existing provisions no longer accurately describe their role. The current Act has also caused confusion for both family justice counsellors and for the public with respect to what information may be disclosed and under what circumstances family justice counsellors can be compelled to give evidence. The proposed legislation will provide more information about the role of family justice counsellors, the confidentiality of information in their possession, and the compellability of family justice counsellors.

Recommended Draft Provisions

PART 2 – NON COURT DISPUTE RESOLUTION AND AGREEMENTS	
Division 3 – Family Justice Counsellors	
Family justice counsellors	
10	(1) The Attorney General may by order appoint a person to be a family justice counsellor.
	(2) A family justice counsellor may provide the following assistance to a person:

³⁷ Family Justice Reform Working Group, Above Note 7 at 49.

- (a) information or guidance relevant to a family matter, including a family law dispute;
- (b) family dispute resolution services, including in respect of
 - (i) the allocation of parenting time or other parental responsibilities,
 - (ii) the making of arrangements for contact with a child, or
 - (iii) the making of child and spousal support arrangements;
- (c) referrals to other service providers or agencies.

Confidentiality of information

- 11** (1) A family justice counsellor, and an employee who assists a family justice counsellor, must not disclose information obtained under section 10 (2) [*family justice counsellors*].
- (2) A service provider or agency who receives a referral under section 10 (2) (c) [*family justice counsellors*] must not disclose information obtained from a family justice counsellor under that section.
- (3) With respect to personal information, subsections (1) and (2) apply despite the *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3) of that Act.

Exceptions to confidentiality of information

- 12** (1) Despite section 11 [*confidentiality of information*], the following information may be disclosed:
- (a) a written agreement to mediate resulting from assistance provided under section 10 (2) (b) [*family justice counsellors*];
 - (b) a written agreement resolving one or more issues in a family dispute;
 - (c) information obtained from a child in the course of providing assistance under section 10 (2) [*family justice counsellors*], if disclosure is
 - (i) to the person receiving assistance, and
 - (ii) with the prior consent of the child;
 - (d) personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* that has been in existence for at least 100 years;
 - (e) information not described by paragraph (d) that has been in existence for at least 50 years;
 - (f) information to be used for research purposes that is disclosed in accordance with section 33.2 (k) of the *Freedom of Information and Protection of Privacy Act*.
- (2) Despite section 11 [*confidentiality of information*], information may be disclosed in the following circumstances but only to the extent that disclosure is required or necessary for the purpose referred to:
- (a) as required under the *Child, Family and Community Service Act* or an enactment of Canada;
 - (b) if the person has reason to believe that there is a risk of imminent and serious harm to another person or property, to protect the other person or the property;

	(c) to make a referral to a service provider or agency, if the person being referred has consented to the disclosure; or
	(d) to investigate, prove or disprove a claim of fraud, undue influence, duress or misrepresentation respecting a written agreement resulting from assistance provided under section 10 (2)(b) <i>[family justice counsellors]</i> .
Family justice counsellors not to be compelled	
13	(1) A family justice counsellor must not be compelled to disclose, or testify in any proceeding respecting, information obtained in the course of providing assistance under section 10 <i>[family justice counsellors]</i> , except
	(a) as required under the <i>Child, Family and Community Service Act</i> or an enactment of Canada; or
	(b) to the extent that disclosure is necessary to investigate, prove or disprove a claim of fraud, undue influence, duress or misrepresentation respecting a written agreement resulting from assistance provided under section 10 (2)(b) <i>[family justice counsellors]</i> .
	(2) For greater certainty, subsection (1) applies to all information and documents including the notes and records of a family justice counsellor.
Information obtained while receiving assistance	
14	(1) A party to a family law dispute must not use, in a proceeding before a court under this Act, or for any other purpose, any information obtained from another party during the course of receiving assistance under section 10 (2) <i>[family justice counsellors]</i> .
	(2) Subsection (1) does not apply
	(a) if the other party consents to the use of the information, or
	(b) to information provided by a third party, including in a report, regardless of whether the information
	(i) was obtained at the expense of either or both parties,
	(ii) contains expert advice or opinions, or
	(iii) was provided for the purposes of receiving assistance under section 10 (2) <i>[family justice counsellors]</i> only.

III. Agreements

When family law disputes are resolved without trial, the terms of settlement are very often recorded in a written agreement. Agreements, like court orders, record the terms and conditions that will govern the post-separation relationship between parents or spouses. The enforceability of family law agreements raises some unique issues, such as balancing the desire for finality with the need to modify the agreement to reflect changing circumstances and the evolving interests of children.

Consultation Feedback

The Family Justice Reform Working Group observed that “family disputes are almost always best resolved outside of a courtroom.”³⁸ This view was also reflected in the public consultations, particularly in regard to the use of family law agreements. The consultations made it clear that the current Act causes confusion by referencing four types of agreements: marriage agreements, separation agreements, ante- and post- nuptial settlements, not all of which are defined. There are also two different tests for changing agreements.³⁹ This results in different decisions for couples in similar circumstances and creates uncertainty. For example, a common-law couple and a married couple who have similar agreements using the same formalities would be subject to different tests upon court review, likely resulting in different outcomes.

During the consultations, people also said that a new statute should make it more difficult to set aside property and spousal support agreements. Unlike child-related agreements that must continue to evolve and adapt over time as the child’s circumstances change, certainty and finality are more important objectives on matters such as property, where parties may wish to begin ordering their financial affairs independently.

Consultation also touched on the advisability of “parenting plans.” Some jurisdictions require separating parents to develop parenting plans detailing proposed parenting arrangements and submit them for court approval. Most respondents suggested that while parenting plans could be helpful, they should not be made mandatory under the proposed new Act.

Recommended Policy

Like family legislation in Australia⁴⁰ and New Zealand,⁴¹ the proposed legislation will include a separate division for agreements acknowledging the important role agreements play in resolving family law issues. The law respecting agreements will be simplified in that references to different types of agreements will be eliminated. The proposed statute will set out formalities for agreements, which if used will limit the court’s ability to set aside property and spousal support provisions of agreements.

It is important that the legal framework for agreements be as clear and straightforward as possible in order to encourage the use of written agreements. In furtherance of this objective, the proposed legislation provides further guidance on how agreements may be set aside:

- Child-related provisions in agreements may be set aside if they are not in the best interests of the child.

³⁸ Family Justice Reform Working Group, Above Note 7 at 10.

³⁹ BC *Family Relations Act*, Above Note 1, ss. 61, 65 and 68.

⁴⁰ AUS *Family Law Act 1975*, Above Note 29, Part VII – Children, Division 4 – Parenting plans.

⁴¹ *Care of Children Act 2004*, (N.Z.) 2004/90, Part 2 – Guardianship and care of children; Subpart 2 – Care of children: Making arrangements and resolving disputes, online NZLII: http://www.nzlii.org/nz/legis/consol_act/coca2004128.pdf (last accessed: July 9, 2010).

- Child support provisions in agreements may be set aside if they fail to comply with the *Federal Child Support Guidelines*.⁴²
- All agreements may be set aside on the basis of procedural fairness concerns, such as where there is inadequate disclosure or where one party has taken unfair advantage of the other.
- Property and spousal support provisions in agreements that meet the formalities may only be set aside for non-procedural reasons in the limited circumstances where it would be clearly unfair not to do so. In considering whether to set aside a provision in an agreement a court will consider the length of time that has passed between the making of the agreement and the time at which the application is made, the intention of the parties in making the agreement to achieve certainty, and the objectives of the Act in relation to spousal support.

Providing greater clarity around when a particular provision in an agreement may be set aside increases the certainty of the law and encourages parties to use written agreements to manage their affairs.

Parenting plans will not be made mandatory. While they are useful in many contexts, there are some circumstances, such as where there is an ongoing risk of family violence, where they are not appropriate.

Recommended Draft Provisions

PART 2 – NON COURT DISPUTE RESOLUTION AND AGREEMENTS	
Division 4 – Agreements	
Agreements respecting family law disputes	
15	The parties to a family law dispute or a potential family law dispute may (a) make an agreement to resolve the family law dispute, and (b) include in a single agreement provisions to resolve more than one family law dispute.
Enforceability of agreements	
16	(1) An agreement is enforceable whether or not there is valuable consideration for the agreement. (2) An agreement made before or during cohabitation that is intended to take effect after the date of separation of the parties and that allocates parental responsibilities, establishes parenting time, or contact with a child, or sets the support of a child is not enforceable. (3) If part of an agreement is not enforceable for any reason, that part (a) may be severed from the remainder of the agreement and may not void the entire agreement, and

⁴² *Federal Child Support Guidelines*, S.O.R./97-175, online CANLII: <http://www.canlii.org/en/ca/laws/regu/sor-97-175/70878/sor-97-175.html> (last accessed: July 9, 2010).

- (b) in a proceeding under this Act, may be considered by a court as evidence of
 - (i) a matter at issue in the proceeding, or
 - (ii) the intentions of a party.

Certain agreements enforceable as orders

- 17** (1) This section applies to agreements respecting
- (a) parenting time, contact with a child or the support of a child, or
 - (b) the support of a person by the person's spouse.
- (2) An agreement referred to in subsection (1) may be filed in the court if it is:
- (a) in writing;
 - (b) signed by each party to the agreement; and
 - (c) witnessed by one or more other persons.
- (3) If filed in the court, an agreement referred to in subsection (1) is enforceable as an order of the court.
- (4) An agreement filed on or after March 31, 1979, but before July 1, 1995, must be accompanied by the consent prescribed under the Provincial Court (Family) Rules the Supreme Court Rules, as applicable.
- (5) An agreement referred to in subsection (1) filed in both the Supreme Court and the Provincial Court may, at any time, be varied or terminated
- (a) by a new written agreement filed in the Provincial Court, or
 - (b) by the Provincial Court, on application and subject to section 176 [*court may vary, suspend or terminate orders*], section 129 [*varying, suspending or terminating child support orders*] and section 137 [*varying, suspending or terminating spousal support orders*].
- (6) An agreement respecting the support of a child or of a person by the person's spouse that is enforceable under this Act is also enforceable under the *Family Maintenance Enforcement Act*.

Setting aside agreements generally

- 18** On application by a party to the agreement, the court may make an order to set aside an agreement if satisfied that it would be unfair not to do so because one or more of the following circumstances existed at the time the parties entered into the agreement:
- (a) a party failed to disclose significant property or debts;
 - (b) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;
 - (c) a party did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause a contract to be voidable, in whole or in part.

Setting aside agreements respecting children

- 19** (1) On application by a party to the agreement, the court may make an order to set aside an agreement respecting parenting responsibilities, parenting time or contact with a child if satisfied that the agreement is not in the best interests of the child.
- (2) On application by a party to the agreement, the court may make an order to set aside an agreement respecting the support of a child if satisfied that the agreement fails to comply with section 130 [*determining child support*].

Agreements respecting property or debt or spousal support

- 20** An agreement dealing with property or debt or spousal support must:
- (a) be in writing;
 - (b) be signed by the parties to the agreement; and
 - (c) be witnessed by one or more persons.

Setting aside agreements respecting property, debt or spousal support

- 21** (1) If satisfied that it would be clearly unfair not to do so, a court may on application by a party to the agreement make an order to set aside an agreement that
- (a) divides property or debt and was executed before or during cohabitation or marriage, or
 - (b) establishes spousal support.
- (2) For the purposes of subsection (1), the court must consider
- (a) the length of time that has passed between the making of the agreement and the time at which the application is made,
 - (b) the intention of the parties, in making the agreement, to achieve certainty respecting the matters referred to in subsection (1) (a) or (b), as applicable, and
 - (c) in respect of a spousal support agreement, the degree to which the agreement meets the objectives of the Act in relation to spousal support as set out in section 132 [*objectives of spousal support*].

Agreement does not prevent court order

- 22** (1) A court is not restricted or prevented from making an order for the same relief as is provided for in an agreement that is enforceable under this Act.
- (2) To the extent that a court makes an order for the same relief as is provided for in an agreement, the order replaces the agreement.

General provisions

- 23** (1) A provision of an agreement that provides that a spouse is entitled to support only if the spouse abstains from sexual relations after the date of separation is not enforceable.
- (2) If an agreement provides that specific gifts made to one or both spouses are not disposable by the spouse or spouses without the consent of the donor, the donor is deemed to be a party to the agreement for the purpose of the enforcement or amendment of the provision.

- (3) An agreement may provide that, despite the *Canada Pension Plan Act*, unadjusted pensionable earnings under that Act will not be divided between the spouses.
- (4) A spouse who is a child may enter into and be bound by an agreement, including an agreement in respect of the division of property or debt.

Obligation to disclose

- 24** Each party to a family law dispute has a duty to each other party and to the court to give full and frank disclosure of all information relevant to the family law dispute in a timely manner.

CHAPTER 3: LEGAL PARENTAGE

This chapter describes proposed changes to the area of the law that determines a child's legal parentage. A child's identity - family name, family relationships, nationality and cultural heritage - typically turns on parentage. Legal parentage intertwines with guardianship and, thus, has implications for who has responsibility for the child. It also affects inheritance rights.

Unlike other Canadian provinces, British Columbia does not have comprehensive legislation governing the rules for determining a child's parentage. In British Columbia, the *Law and Equity Act*⁴³ says that, subject to the *Adoption Act*⁴⁴ and the *Family Relations Act*, "a person is the child of his or her natural parents." The *Family Relations Act* deals with determining parentage only when it is disputed in a child support case.⁴⁵ There is no general authority in the *Family Relations Act* for judges to make declarations of legal parentage. Family statutes in most provinces and territories have more comprehensive provisions for determining a child's legal parentage than British Columbia's law does.⁴⁶

Assisted conception, 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. And yet, there is no statute that sets out a way to determine parentage where a child is born as a result of assisted conception. Nor does legislation deal with the legal relationship of donors of genetic material to children born as a result of the donation. This is a problem not only in British Columbia, but to varying degrees across Canada and in other countries.

The proposed changes are intended to provide a scheme for determining legal parentage, including where assisted conception is used, in a way that protects the child's best interests and promotes stable family relationships.

⁴³ *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61(1)(a), online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96253_01 (last accessed: July 9, 2010).

⁴⁴ *Adoption Act*, R.S.B.C. 1996, c. 5, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96005_01 (last accessed: July 9, 2010).

⁴⁵ *BC Family Relations Act*, Above Note 1, ss. 94, 95, 95.1.

⁴⁶ *AB Family Law Act*, Above Note 32, Part 1; *SK Children's Law Act*, 1997, Above Note 33, Part VI; *Family Maintenance Act*, C.C.S.M. c. F20, Part II, online CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-f20/latest/ccsm-c-f20.html> (last accessed: July 9, 2010); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, Parts I and II, online CANLII: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-c12/latest/rso-1990-c-c12.html> (last accessed: July 9, 2010); *Civil Code of Quebec*, L.R.Q., c. C-1991, Art. 522-542, online CANLII: <http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html> (last accessed: July 14, 2010); *Child Status Act*, R.S.P.E.I. 1988, c. C-6, online CANLII: <http://www.canlii.org/en/pe/laws/stat/rspei-1988-c-c-6/latest/rspei-1988-c-c-6.html> (last accessed: July 9, 2010); *Children's Law Act*, R.S.N.L. 1990, c. C-13, Parts I and II, CANLII online: <http://www.canlii.org/en/nl/laws/stat/rsnl-1990-c-c-13/latest/rsnl-1990-c-c-13.html> (last accessed: July 9, 2010); *Children's Act*, R.S.Y. 2002, c. 31, Part 1; *Children's Law Act*, S.N.W.T. 1997, c. 14, Parts I and II, online: <http://www.canlii.org/en/nt/laws/stat/snwt-1997-c-14/latest/snwt-1997-c-14.html> (last accessed: July 14, 2010); and *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, Parts I and II, online: http://action.attavik.ca/home/justice-gn/attach-en_conlaw_postdiv/consSNWT1997c14.pdf (last accessed: July 14, 2010).

Consultation Feedback

The Ministry's discussion paper on parentage asked a series of questions about the legal status of various groups of people, including birth mothers, the birth mother's partner and people who donate eggs or sperm. Most respondents agreed that:

- Birth mothers should be considered legal parents at the birth of the child, whether or not their eggs were used to conceive the child and that they can give up this parental status in two ways: adoption or surrogacy.
- The birth mother's partner, male or female, should be presumed to be the other legal parent, unless it is proven otherwise.
- A person who donates eggs or sperm for another person's use should not become a legal parent, even though there is a genetic link to the child. An exception to that general rule is that a person who donates genetic material can agree in advance of the child's conception to be a legal parent, which means that in certain circumstances, a child can have more than two legal parents. For example, a lesbian couple and a male friend whose sperm is used to conceive a child can agree before the child is conceived that the donor will also be a legal parent. Responses were mixed on whether the pre-conception agreement between a donor and the parents should be sufficient to establish the donor's status as an additional parent or whether a court declaration should be required.

There were some mixed views from respondents about surrogacy. 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 that couple or individual to raise from birth, as parents. The child is conceived using assisted conception, and usually using genetic material provided by one or both of the intended parents, although both egg and sperm or an embryo 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 be the child's birth mother.

All respondents agreed that there should be a process that allows the intended parent(s) (i.e. the couple or individual who asked the birth mother to carry the child and, thus, set the child's conception in motion) to become legal parent(s). A majority also said that the process for the intended parent(s) to become the legal parents should be the same, even where neither of the intended parents provided the genetic material used to conceive the child.

However, opinion was mixed as to how this should happen. Some thought the intended parent(s) should apply to court for a declaration of parentage. Most preferred an out-of-court option, such as a written agreement among the birth mother, intended parent(s) and any donor of genetic material. The majority who commented on the issue said the process of obtaining the birth mother's consent to relinquish her parental status to the intended parent(s) should occur after the child's birth.

There was also mixed opinion about the appropriate balance between the privacy rights of donors and the information rights of children that are born from donated genetic material. Everyone who answered the question in the discussion paper thought the resulting children had a right to some information about their genetic heritage, in particular medical information. However, some also thought the children had a right to know about their genetic ancestry. No one favoured disclosing a donor's identity without that person's prior consent.

Recommended Policy

One important law reform goal is to modernize the law in light of changes in social values and medical technology. Advances in reproductive technology have overtaken the parentage provisions in the *Law and Equity Act* and the *Family Relations Act*.

The proposed statute will contain a comprehensive scheme for determining who a child's legal parents are that takes into account the potential use of assisted conception. This fills gaps in the existing law of parentage and consolidates it into the new family statute. In many respects, the model is consistent with the new *Uniform Child Status Act* which will soon be considered for adoption by members of the Uniform Law Conference of Canada.⁴⁷ Departures from that uniform Act include the way that legal parentage is determined where a child is born using surrogacy and the circumstances that require court declarations of parentage.

The principles guiding the policy development of the proposed scheme are:

- promoting family stability;
- providing certainty of parental status as soon as possible;
- treating children fairly, regardless of the circumstances of their birth;
- protecting vulnerable persons; and
- preferring out-of-court processes where possible.

The existing parentage provision in section 61 of the *Law and Equity Act* will be repealed and the proposed new family statute will include the following scheme:

Birth Mothers

- The birth mother is the child's legal mother at birth. This general rule applies in all cases, including where assisted conception is used, whether or not the child is conceived using the birth mother's egg or a donor's egg. There are two ways in which a birth mother can give up her parental status and another acquire it: adoption or surrogacy.

Partners of Birth Mothers

- In cases where assisted conception is not used, presumptions of paternity similar to those in the *Family Relations Act* will apply to determining who the child's father is, including

⁴⁷ *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 14, 2010).

where the child is born after the father's death. If paternity is contested, DNA testing may be used to determine parentage.

- In cases where assisted conception is used (with the exception of surrogacy), the birth mother's opposite-sex or same-sex spouse, whether or not they are married, is presumed to be the child's other parent. The lack of a genetic link between the presumed parent and the child does not preclude a determination of parentage. If the birth mother's partner disputes parentage, the partner must prove on a balance of probabilities that he or she did not consent, or prior to the assisted conception withdrew consent, to be the child's parent.
- Judges will have statutory authority to make declarations of parentage, where necessary, including where parentage is challenged.

Egg, Sperm or Embryo Donors

- In all cases, third-party donors of eggs, sperm or an embryo are not considered to be parents solely by virtue of the donation. As a general rule, third party donors do not intend to be the child's parents.
- However, where assisted conception is used, a child may have more than two legal parents in certain circumstances:
 - if the child's parents and the donor of eggs, sperm or an embryo all agree and provide their intentions in writing prior to the assisted conception, then the donor may also be a legal parent of the child; or
 - if a woman and intended parents agree that the woman will give birth to a child conceived through assisted conception and the intended parents and the woman will all be the child's parents and provide their intentions in writing prior to the assisted conception, then they will all be legal parents of the child.

Surrogates and Intended Parents

- Surrogacy contracts are unenforceable. A birth mother who agrees to act as a surrogate cannot be required to relinquish her status as the child's parent to the intended parent(s) based only on an agreement made prior to the birth of the child.
- The intended parents will be considered the child's parent(s) from birth if the following requirements are met:
 - Before the assisted conception, the surrogate, her spouse, if any, and the intended parent(s) record their intentions in writing, including the intended role of each in the surrogacy. This would include the surrogate's intention to conceive and carry the child and relinquish the child after birth, and the intended parents' intention to become the child's legal parents.
 - After birth, the surrogate provides the intended parent(s) with her written consent, turning over parentage of the child to the intended parent(s), and the intended parent(s) take the child into their care.

- If these requirements are met, to be registered as parents on the child's birth certificate, the intended parent(s) would file the surrogate's written consent along with any other required documents with the British Columbia Vital Statistics Agency.

Posthumously Conceived Children

If a child is conceived after the death of the person who provided the eggs, sperm or embryo used in the assisted conception and that person consented in writing to be the parent of a posthumously conceived child, the person is presumed to be the child's parent.

This has implications for the related field of wills and estates. The *Wills, Estates and Succession Act*⁴⁸ (not yet in force) will be amended to provide inheritance rights for posthumously conceived children on the same basis as that proposed by the Manitoba Law Reform Commission:

- A posthumously conceived child is an heir of the deceased person's estate if the deceased person is a parent under the parentage provisions.
- Written notice must be given to the deceased person's personal representative who is responsible for administering the will and to people whose interest in the estate may be affected by the use of the deceased's eggs, sperm or embryo (e.g., other children).
- To limit uncertainty in wills and estates law, the child must be born within two years of the person's death, and posthumously conceived children must survive five days from their birth to have inheritance rights.⁴⁹

While posthumously conceived children will presumptively have the same rights of inheritance as any other children of the deceased person, it is only after birth that they will be able to assert these rights against parties other than their deceased parent. For example, assume a person who has consented to posthumous conception dies in a car accident with his parents, and his parents' will divides their estate evenly among their grandchildren. The parents' will can be administered without having to wait to see if their deceased son's sperm is used to conceive a child.

Children's Informational Rights

With respect to the issue of disclosure of information to children born as a result of assisted conception, a final decision in the Supreme Court of Canada is pending in *Procureur général du Canada c. Procureur général de Québec*⁵⁰ heard April 24, 2009. In this appeal, the Attorney General of Quebec argued that the federal government had exceeded its jurisdiction in enacting

⁴⁸ See Bill 4, *Wills, Estates and Succession Act*, 1st Sess., 39th Parl., 2009, online British Columbia Legislative Assembly: http://www.leg.bc.ca/39th1st/3rd_read/gov04-3.htm (last accessed: July 9, 2010).

⁴⁹ See Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants' Relief*, Report No. 118 (November 2008), online: <http://www.gov.mb.ca/justice/mlrc/reports/118.pdf> (last accessed: May 14, 2010). See also J. M. F. Suppon, "Life after Death: The Need to Address the Legal Status of Posthumously Conceived Children," (2010) 48 Fam. Ct. Rev. 228.

⁵⁰ Appeal No. 32750.

the *Assisted Human Reproduction Act*,⁵¹ which limits the information about donors of genetic material that may be disclosed to the children born using donated eggs, sperm or embryos. Once the Court decides which level of government is responsible for laws on this topic, an approach can be developed to deal with the issue in British Columbia.

Other

The proposed statute also provides for recognition of parentage determinations made by judges outside British Columbia in certain circumstances.

Recommended Draft Provisions

PART 3 – LEGAL PARENTAGE	
Division 1 – Determining Parentage	
Definitions	
26	In this Part:
	“ assisted conception ” means the conception of a child through the use of a process other than sexual intercourse and includes the implantation of an embryo;
	“ birth mother ” means a person who gives birth to a child or who is delivered of a child;
	“ donor ” means, in respect of a child conceived through assisted conception, a person who donates the human reproductive material from which the child is conceived or an embryo but does not include a person who provides the human reproductive material or the embryo for their own reproductive use;
	“ embryo ” means a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended;
	“ human reproductive material ” means sperm or ovum;
	“ intended parent or parents ” means a person, or the persons who are married or cohabiting in a marriage-like relationship, who with the intention of being a parent or parents of the resulting child, make arrangements with another person who will give birth to a child conceived through assisted conception for that purpose, whether or not the person or persons provide the human reproductive material or embryo used in the conception of the child.
Application	
27	This Part
	(a) applies to an enactment enacted before, on or after the date this section comes into force and to an instrument made on or after that date, but it does not affect
	(i) an instrument made before that date, or
	(ii) a disposition of property made before that date, and

⁵¹ *Assisted Human Reproduction Act*, S.C. 2004, c. 2, online CANLII: <http://www.canlii.org/en/ca/laws/stat/sc-2004-c-2/latest/sc-2004-c-2.html> (last accessed: July 14, 2010).

(b) is not limited to a proceeding under this Act.

Construction of instruments and enactments

28 In an enactment or instrument to which this Part applies, a reference to a person or a group or class of persons described in terms of relationship to another person by blood or marriage

- (a) includes a person who comes within that description by reason of the parent-child relationship, as determined under this Part, and
- (b) does not include a person who is a donor in respect of a child conceived through assisted conception or a person who comes within that description by reason of his or her relationship to a donor unless the donor has been declared by a court to be a parent of the child or is a parent under section 36 [*parentage in respect of additional parent or parents*].

Void and voidable marriage

29 For the purposes of this Part,

- (a) if
 - (i) two persons go through a form of marriage to each other, with at least one of them doing so in good faith, and they cohabit during the marriage, and
 - (ii) the marriage is void,
 they are deemed to have been married during the period of cohabitation, and the marriage is deemed to have ended when the period of cohabitation ends, and
- (b) if a voidable marriage is declared a nullity, the persons who went through the form of marriage are deemed to be married until the date of the declaratory order of nullity.

Rules of parentage

30 (1) For all purposes of the law of British Columbia, a person is the child of his or her parents.

(2) Subject to subsection (3), the parent or parents of a child are

- (a) his or her birth mother;
- (b) his or her birth mother and
 - (i) the person presumed under section 32 [*presumption of paternity if assisted conception not used*] to be the father,
 - (ii) the person presumed under section 33 [*presumption of parentage if assisted conception used*] to be a parent,
 - (iii) a person declared by a court under section 37 [*declaratory order of parentage*] to be a parent,
 - (iv) a person referred to in subparagraph (ii), or (iii) if the child is born as a result of assisted conception, and a person who is a parent under section 36 [*parentage in respect of an additional parent or parents*], or
 - (v) the person or persons who are the parent or parents under section 35 [*parentage if birth mother and another person or persons agree to be the parents*]; or

	(c) the person or persons who are the parent or parents under section 34 [<i>parentage respecting surrogacy</i>], if the child is born through surrogacy.
	(3) If a child has been adopted, the child's parents are as set out in the <i>Adoption Act</i> .
	(4) Family relationships must be determined according to the relationships described in this section.
	(5) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished.
Donor not a parent	
31	If a child is born as a result of assisted conception, a person who is a donor in the conception of the child
	(a) is not a parent, and
	(b) may not be declared to be a parent in any order of the court
	by reason only of donation.
Presumption of paternity if assisted conception not used	
32	(1) Unless the contrary is proven on the balance of probabilities, a male person is presumed to be the father of a child and is recognized in law to be a parent of a child in any of the following circumstances:
	(a) he was married to the birth mother of the child at the time of the child's birth;
	(b) he was married to the birth mother of the child and the marriage was ended within 300 days before the child's birth by
	(i) his death,
	(ii) a declaratory order of nullity,
	(iii) ceasing to cohabit, in the case of a void marriage, or
	(iv) a judgment of divorce;
	(c) he married the birth mother of the child after the child's birth and acknowledges that he is the father;
	(d) he was cohabiting with the birth mother of the child in a marriage-like relationship at the time of the child's birth;
	(e) he was cohabiting with the birth mother of the child in a marriage-like relationship that ended for any reason within 300 days before the child's birth;
	(e) he and the birth mother have acknowledged he is the father of the child by having signed a statement under section 3 of the <i>Vital Statistics Act</i> ; or
	(f) he has acknowledged paternity of the child by having signed an agreement under section 20 of the <i>Child Paternity and Support Act</i> , R.S.B.C. 1979, c. 49.
	(2) Despite subsection (1), if circumstances give rise to a presumption or presumptions of paternity respecting more than one male person under this section, a presumption must not be made as to paternity.

(3) This section does not apply if the child was born as a result of assisted conception.

Presumption of parentage if assisted conception used

- 33** (1) A person is presumed to be and is recognized in law to be a parent of a child born as a result of assisted conception if the person
- (a) was married to the birth mother of the child, or cohabiting in a marriage-like relationship with the birth mother of the child, at the time of the assisted conception, and
 - (b) consented to be a parent of a child born as a result of assisted conception, and did not withdraw that consent prior to the assisted conception.
- (2) Unless the contrary is proven on the balance of probabilities, a person who was married to a birth mother, or cohabiting in a marriage-like relationship with a birth mother, at the time of the assisted conception is presumed to consent to be a parent of the child conceived.
- (3) Subsections (1) and (2) do not apply in respect of a child born through surrogacy.
- (4) A person who dies before the assisted conception of a child is presumed to be and is recognized in law to be a parent of the child if the person
- (a) before his or her death
 - (i) provided the human reproductive material or embryo used in the child's conception, and
 - (ii) consented in writing to be a parent of a child conceived posthumously; and
 - (b) at the time of his or her death, was married to or cohabiting in a marriage-like relationship with the child's other parent unless it is proven on a balance of probabilities that the person who died withdrew the consent referred to in subparagraph (a)(ii) before his or her death.

Parentage respecting surrogacy

- 34** (1) In this section:
- “**surrogate**” means a person who conceives and gives birth to a child as a result of assisted conception, if at the time of the assisted conception, she intended to relinquish the child to the intended parent or parents.
- (2) This section applies if a child is born as a result of assisted conception and
- (a) before the assisted conception of the child, a surrogate, the surrogate's spouse, if any, and an intended parent or parents record in writing their intentions that
 - (i) the surrogate will give birth to a child conceived through assisted conception,
 - (ii) the surrogate, and the surrogate's spouse, if any, will not be the child's parents,
 - (iii) the surrogate will relinquish parentage of the child to the intended parent or parents, and
 - (iv) the intended parent or parents will be the parent or parents of the child; and
 - (b) after the birth of the child,

	(i) the intended parent or parents take the child into their care, and
	(ii) the surrogate provides the intended parent or parents with written consent relinquishing her parentage of the child to the intended parent or parents, or the court waives the requirement for the consent of the surrogate.
(3)	In the circumstances described in subsection (2),
	(a) the child is the child of the intended parent or parents and the intended parent or parents are the parent or parents of the child from the time of the child's birth,
	(b) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child, and
	(c) the surrogate's spouse, if any, is not a parent of the child.
(4)	Any agreement relating to surrogacy is unenforceable.
(5)	Any agreement or recorded written intentions relating to surrogacy
	(a) may not be used as evidence of consent for the purposes of subsection (2)(b)(ii), and
	(b) may be used as evidence of pre-conception intentions.
(6)	The court may waive the consent required under subsection (2) (b) (ii) in the following circumstances:
	(a) the surrogate is deceased;
	(b) the surrogate is incapable of giving consent;
	(c) the surrogate cannot be located after reasonable efforts have been made to locate her.
(7)	An intended parent who dies before one or both of the requirements in subsection (2) (b) are met, is a parent of the child if the surrogate relinquishes parentage of the child.
Parentage if birth mother and another person or persons agree to be the parents	
35	(1) This section applies if a child is born as a result of assisted conception and
	(a) before the assisted conception of the child, a person, the person's spouse, if any and an intended parent or parents record in writing their intentions that
	(i) the person will give birth to a child conceived through assisted conception,
	(ii) the intended parent or parents will be a parent or parents of the child together with the person who gave birth to the child, and
	(iii) depending on the intentions of the parties, the spouse of the person who gave birth to the child , if any, will or will not be a parent together with the other parties; and
	(b) none of the parties who consent to be parents of the child together withdraw their consent before the assisted conception.
	(2) In the circumstances described in subsection (1), all of the parties who recorded their written intention to be the parents of the child are the parents of the child from the time of the child's birth.

- (3) A person who dies before a child is born and who would be a parent under this section but for their death is a parent of the child.

Parentage in respect of additional parent or parents

36 (1) If

- (a) the parent or parents of a child born as a result of assisted conception entered into a written agreement with the person or persons who provided human reproductive material or an embryo used in the conception of the child under which
 - (i) the parent or parents of the child consented to the person or persons also being a parent or parents of the child, in addition to the parent or parents, and
 - (ii) the person or persons consented to also be a parent or parents of the child, in addition to the parent or parents,
 - (b) the agreement was entered into before the assisted conception of the child,
 - (c) the parent or parents did not withdraw the consent referred to in paragraph (a) (i) before the assisted conception, and
 - (d) the person or persons did not withdraw the consent referred to in paragraph (a) (ii) before the assisted conception,
- the person or persons are also the parent or parents of the child, in addition to the parent or parents, from the time of the child's birth.

- (2) A person who dies before a child is born and who would be a parent under this section but for their death is a parent of the child.

Declaratory order of parentage

- 37** (1) Any person having an interest may apply to court for a declaratory order that a person is or is not a child's parent.
- (2) An application may not be made under this section in respect of a child who has been adopted.
- (3) If the court finds on the balance of probabilities that a person is or is not a parent of a child, the court may make a declaratory order to that effect.
- (4) In making a finding under subsection (3), the court must give effect to any applicable presumption under section 32 [*presumptions of paternity if assisted conception not used*] or section 33 [*presumption of paternity if assisted conception used*].
- (5) If parentage is disputed in circumstances where assisted conception was not used, in making a finding under subsection (3), the court may consider evidence respecting the genetic parentage of a child.
- (6) If parentage is disputed in circumstances where assisted conception was used, in making a finding under subsection (3), the court may consider evidence respecting the consent required under section 33 (1)(b) or (4)(a)(ii) [*presumption of parentage if assisted conception used*] as applicable.
- (7) The court is not prevented from making an order under subsection (3) if either or both of the following are deceased:

- (a) the child who is the subject of an application under subsection (1);
- (b) the person who may or may not be a parent of the child.

Parentage tests

- 38** (1) In this section, “**parentage tests**” include human leukocyte antigen tissue tests and tests of the deoxyribonucleic acid (DNA) in tissue or blood to identify the inheritable characteristics of the tissue or blood.
- (2) On application of a party to a proceeding under this Part, the court may order a person, including a child, to have tissue or blood samples, or both, taken by a medical practitioner or other qualified person so that parentage tests can be done on the samples.
- (3) An order under subsection (2) may include any terms or conditions the court considers appropriate and may require a person to pay all or part of the cost of the parentage tests.
- (4) The results of parentage tests done under subsection (2) may be introduced as evidence in a proceeding for a declaratory order under this Part.
- (5) If a person named in an order under subsection (2) fails to comply with the order, the court may draw any inference from that failure that the court considers appropriate.

Division 2 – Orders Made Outside British Columbia

Definition

- 39** In this Division:
- “**extra-provincial declaratory order**” means an order in the nature of a declaratory order provided for in section 37 [*declaratory order of parentage*] made by a court outside of British Columbia;

Recognition of declaratory orders made outside British Columbia

- 40** (1) An extra-provincial declaratory order that is made in Canada must be recognized and have the same effect as if made in British Columbia.
- (2) An extra-provincial declaratory order that was made outside Canada must be recognized and have the same effect as if made in British Columbia if,
- (a) the court that made the order would have had jurisdiction to do so under the rules that are applicable in British Columbia,
 - (b) the order is not contrary to the public policy of British Columbia, and
 - (c) each party to the order had proper notice or a reasonable opportunity to be heard in the proceeding in which the order was made
- (3) If the court is satisfied that it is in the best interests of a child to recognize an extra-provincial declaratory order that may not otherwise be recognized under subsection (2), the court may recognize the order and the order has the same force and effect as if made in British Columbia.

Declining to recognize declaratory orders made outside British Columbia

- 41** Despite section 40 [*recognition of declaratory orders made outside British Columbia*], a court may decline to recognize an extra-provincial declaratory order and may make a declaratory order under this Part if,
- (a) new evidence becomes available that was not available at the hearing at which the extra-provincial declaratory order was made, or
 - (b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.

Outstanding Policy Issue

The proposed scheme for determining legal parentage provides for two situations in which agreements made before an assisted conception may result in a child having additional legal parent(s):

- if the child's parents and a donor of eggs, sperm or an embryo all agree that the donor will also be a legal parent and provide their intentions in writing prior to the assisted conception; or
- if a woman and intended parent(s) agree that the woman will give birth to a child conceived through assisted conception and the intended parent(s) and the woman will all be the child's parents and provide their intentions in writing prior to the assisted conception.

Question

1. If an assisted conception occurs as set out in such an agreement, what should the effect of the agreement be after the assisted conception in relation to the parties to the agreement? Should the agreement be enforceable or unenforceable? Why or why not?

CHAPTER 4: CHILDREN'S BEST INTERESTS

In British Columbia and the rest of Canada, family laws governing parenting arrangements for children are based on the best interests of the child. Some jurisdictions have detailed lists of factors to be considered in assessing the best interests of the child. The *Divorce Act* has none, but federal Bill C-22 from 2002 would have added a list of 12 factors. That bill died on the order paper.⁵² The factors listed in Alberta's recently modernized *Family Law Act* are similar to the ones proposed in the federal bill.⁵³ British Columbia's *Family Relations Act* also has a list of factors,⁵⁴ but many say these factors need to be updated so the Act reflects current social values and research on issues such as the impact of family violence and the views of children in determining the best interests of the child.

Consultation Feedback

The Ministry's discussion paper on parenting apart asked questions about expanding the factors in the current best interests test. Most agreed the best interests test should be expanded both in terms of including additional factors and broadening the groups of people to whom it applied. A minority, however, thought that expansion of the best interests factors would simply create a longer "shopping list" of topics over which to fight. Some noted that including "cultural factors" in the test would be problematic in an increasingly multi-cultural society. Respondents were virtually unanimous that the best interests analysis should not only apply to parenting decisions made by judges, as is the currently the case, but to parents as well and should be the "only" rather than the "paramount" consideration in decisions about children.

Most stakeholders thought the views of the child factor in the best interests test should be changed to promote greater inclusion of children's views. However, some were concerned about putting children in the middle of a family dispute.

Most thought violence should be an explicit part of the best interests test and should be defined broadly. Those who were not in favour of this approach said this was unnecessary because judges already consider violence when making decisions about arrangements for children. These stakeholders thought the inclusion of family violence as an explicit factor could act as a focal point for conflict and could over-emphasize the past rather than focusing parents on planning towards the future.

⁵² 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. 16.2 (1st reading 10 December 2002), online: Parliament of Canada LEGISinfo: http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=37&Ses=2&Mode=1&Pub=Bill&Doc=C-22_1 (last accessed: July 9, 2010).

⁵³ AB *Family Law Act*, Above Note 32, s. 18.

⁵⁴ BC *Family Relations Act*, Above Note 1, s. 24.

Recommended Policy

It is recommended that the best interests test be modernized. First, it is proposed to make the best interests test the “only” rather than the “paramount” consideration. Other than British Columbia, only Manitoba, Nova Scotia and Yukon use the “paramount” consideration rather than the “only” consideration.⁵⁵ A second overarching change, based on Alberta’s family law,⁵⁶ is to “ensure the greatest possible protection of the child’s physical, psychological and emotional safety.” Third, it is proposed that the best interests factors apply to all decision-makers, not just judges. This means they would apply to the decisions of guardians too and reflects the increasing use of dispute resolution processes that occur out of court. It also ensures that children’s best interests are in the forefront any time parenting issues are discussed.

The following changes are proposed to the specific best interests factors:

Current Factor	Proposed Factor
24 (1) (a) the health and emotional well being of the child including any special needs for care and treatment;	43 (3)(b) (i) the health and emotional well-being of the child;
24 (1)(b) if appropriate, the views of the child;	43 (3) (b) (ii) the views of the child unless it would be inappropriate to consider them;
24 (1)(c) the love, affection and similar ties that exist between the child and other persons;	43 (3) (b) (iii) the nature and strength of the relationship between the child and significant persons in the child’s life;
24 (1) (d) education and training for the child;	Deleted ⁵⁷
24 (1)(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.	43 (3) (b) (iv) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact in respect of the child, to exercise his or her responsibilities adequately;
N/A	43 (3) (b) (v) the history of care of the child;
N/A	43 (3) (b) (vi) the child’s need for stability, taking into consideration the child’s age and stage of development;
N/A	43 (3) (b) (vii) the impact of any family violence (A) directed towards the child or another family member, on the health, emotional well-being and safety and security of the child; (B) on the ability of the person who perpetrated the family violence to care for and meet the needs of the child; (C) on the appropriateness of an arrangement that would

⁵⁵ *Child and Family Services Act*, C.C.S.M. c. C80, s. 2(1), online CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-c80/latest/ccsm-c-c80.html> (last accessed: July 14, 2010); *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 2, online CANLII: <http://www.canlii.org/en/ns/laws/stat/sns-1990-c-5/latest/sns-1990-c-5.html> (last accessed: July 7, 2010); and *YK Children’s Act*, Above Note 46, s.1.

⁵⁶ *AB Family Law Act*, Above Note 32, s. 18(2)(a).

⁵⁷ Since education is a primary factor in a child’s upbringing, it is thought to be covered by both 3(i) and (iv) without the need for a specific reference.

Current Factor	Proposed Factor
	require the guardians of the child to co-operate on issues affecting the child, including consideration of whether requiring the guardians to co-operate would increase the risk to the safety and security of the child, or other family members; and
N/A	43 (3) (b) (viii) any civil or criminal proceedings relevant to the safety or well-being of the child.
24 (2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well being of the child.	See 43 (3) (b) (iv) above.
24 (3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part. 24 (4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).	43 (4) If the conduct of a person does not substantially affect a factor set out in subsection (3), the court must not consider that conduct when making an order under this Part. 43 (5) If under subsection (4) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (3).

The “views of the child” factor has been changed to recognize the importance of children’s views for parenting decisions. While the change is subtle, it is intended to create a shift towards the presumption that decision-makers will seek a child’s views rather than reading this as a more optional factor. New factors, such as the history of care, have been added. Although it was raised as a possibility in the discussion paper on the topic, a child’s culture or heritage has not been included in the revised best interests test. As noted in the consultations, such a factor would be virtually impossible to apply in an increasingly multicultural society such as British Columbia.

By far, the issue that garnered most attention in the consultations was family violence, which is now proposed as an explicit best interests factor. This addresses an important gap in the current law and recognizes that violence – even if directed exclusively at the spouse – can still be harmful to a child.⁵⁸ The proposed new test acknowledges the social problems caused by family violence and sends a clear message that violence is unacceptable.

Moreover, the inclusion of family violence is also consistent with the family laws of other Canadian and international jurisdictions: Alberta,⁵⁹ Ontario⁶⁰ Newfoundland and Labrador,⁶¹ the Northwest Territories,⁶² and Nunavut⁶³ all make family violence an explicit best interests factor.

⁵⁸ See e.g., P. G. Jaffe, C. Crooks and N. Bala, “Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices,” (2005), online: http://hspe.org/policy_forums/pdf/JaffePaper_JusticeReport_Sept05.pdf (last accessed: July 14, 2010). See also M. Shaffer, “The Impact of Wife Abuse on Child Custody and Access Decisions,” (2004) 22 C.F.L.Q. 85.

⁵⁹ AB *Family Law Act*, Above Note 32, s.18(2)(b)(vi).

⁶⁰ ON *Children’s Law Reform Act*, Above Note 46, s. 24(4).

⁶¹ NL *Children’s Law Act*, Above Note 46, s. 31(3).

⁶² NWT *Children’s Law Act*, Above Note 46, s. 17(3).

The amendments proposed to the federal *Divorce Act* in Bill C-22 would have done the same.⁶⁴ Australia's federal family law makes the need to protect the child from the physical or psychological harm caused by being "subjected to or exposed to abuse, neglect or family violence" a primary consideration in its articulation of the best interests test.⁶⁵ "Family violence involving the child or a member of the child's family" and "any family violence order that applies to the child or a member of the child's family" other than an interim or *ex parte* order are additional best interests factors in Australia.⁶⁶ New Zealand's family law also mandates special consideration of violence in the determination of parenting orders where such allegations are raised.⁶⁷ The inclusion of family violence in the best interests test was also recommended by the Family Justice Reform Working Group in their 2005 report on reforming British Columbia's family justice system.⁶⁸

Further legislative guidance will be provided through the inclusion of a broad definition of family violence, which includes:

- physical or sexual abuse, including forced confinement or deprivation of the necessities of life or attempts thereof; and
- psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour, including: intimidation, threats, harassment, intentional damage to property, and financial abuse.

The proposed definition of family violence is intended to give all participants in the family justice system a clear and common understanding of what constitutes family violence. The specific inclusion of elements such as psychological abuse is meant to clarify that violence is more than physical blows. It reflects current social science research that indicates that controlling, coercive patterns of emotional abuse are one of the highest predictors of future risk;⁶⁹ where there is psychological abuse between family members the future risk of physical violence is up to 20 times more likely than where there is not.⁷⁰ France recently enacted legislation prohibiting psychological abuse in an attempt to deal with family violence more effectively.⁷¹

⁶³ NUN *Children's Law Act (Nunavut)*, Above Note 46, s. 17(3).

⁶⁴ CAN Bill C-22, Above Note 52, cl. 16.2(2)(d).

⁶⁵ AUS *Family Law Act 1975*, Above Note 29, s. 60CC(2)(b).

⁶⁶ *Ibid.*, ss. 60CC (3) (j) and (k).

⁶⁷ NZ *Care of Children Act 2004*, Above Note 41, s. 60.

⁶⁸ Family Justice Reform Working Group, Above Note 7, Recommendation 26 at 81.

⁶⁹ J. Kelly and M. Johnson, "Differentiation among Types of Intimate Partner Violence: Research Updates and Implications for Interventions," (2008) 46(3) Fam. Ct. Rev. 479.

⁷⁰ Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006) at 39, online Statistics Canada: <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf> (last accessed: July 9, 2010).

⁷¹ "France outlaws psychological violence in attempt to tackle domestic abuse" *The Guardian* (29 June 2010), online: <http://www.guardian.co.uk/world/2010/jun/29/france-outlaws-psychological-violence> (last accessed: July 8, 2010).

The inclusion of a self-defence exception is meant to protect victims from cross-allegations of family violence. An abuser may accuse the other person of violence if he or she fought back or acted to protect the children. The exception is a part of both Alberta's⁷² and Ontario's⁷³ family laws and was part of the proposed amendments to the federal *Divorce Act*⁷⁴ in 2002.

Also proposed is a list of factors for judges to consider when assessing the impact of family violence, including:

- the nature and seriousness of the violence used;
- how recently the violence occurred;
- the frequency of the violence;
- the physical, psychological and emotional harm caused to the child by the violence;
- any steps the violent person has taken to prevent further violence from occurring; and
- all other matters the court considers relevant.

The proposed list is adapted from New Zealand's family law.⁷⁵ It is designed to produce a more nuanced risk assessment and avoid a one-size-fits-all approach. This approach is seen to be more flexible than legislated presumptions regarding custody or access and takes into account research showing different typologies of violence that carry different levels of future risk.⁷⁶

The factor regarding related civil and criminal proceedings addresses the fact that there may be other civil proceedings or criminal matters that have an impact on the child's safety. If there are related orders from the other parts of the justice system that have an impact on the child's safety or well-being, a judge making a parenting order should be aware of them. Alberta's family statute contains this factor, and Ontario recently created a similar requirement in its legislation.⁷⁷ This provision will promote greater information-sharing within the justice system.

⁷² AB *Family Law Act*, Above Note 32, s. 18(3)(b).

⁷³ ON *Children's Law Reform Act*, Above Note 46, s. 24(5).

⁷⁴ CAN Bill C-22, Above Note 52, cl. 16.2(3).

⁷⁵ NZ *Care of Children Act 2004*, Above Note 41, s. 61.

⁷⁶ See e.g., P. G. Jaffe, C. Crooks and N. Bala, Above Note 58 at 16-20. See also N. Bala, P. Jaffe, and C. Crooks, "Spousal Violence and Child-Related Cases: Challenging Cases Requiring Differentiated Responses," (2007) 27(1) C.F.L.Q. 1 at 17-20.

⁷⁷ AB *Family Law Act*, Above Note 32, s. 18(2)(b)(xi) and ON *Children's Law Reform Act*, Above Note 46, s. 21.

Recommended Draft Provisions

PART 1 – DEFINITIONS AND INTERPRETATION

Definitions

1 In this Act:

“**family violence**” includes the following actions by a person towards a family member,

- (a) causing or attempting to cause, physical or sexual abuse including forced confinement or deprivation of the necessities of life, and
- (b) psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour, which may include, but is not limited to, the following behaviours by the person towards the family member:
 - i) intimidation, harassment or threats, including threats to harm the family member, other persons, pets or property to obtain the compliance of the family member,
 - ii) unreasonable demands to know where or with whom the family member is or restrictions on the family member’s activities or contact with friends or family members,
 - iii) financial abuse, including unreasonable prevention of the family member from access to or knowledge about family income, and
 - iv) stalking or following the family member, or
 - v) intentional damage to property,

but does not include acts of self-protection, or protection of another person, if the force does not exceed what is reasonable in the circumstances.

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS

Division 2 – Best Interests of the Child

Best interests of child

- 43(1)** In making an agreement with respect to any of the following, the parties to the agreement must consider the best interests of the child only:
 - (a) the guardianship of a child;
 - (b) allocation of parental responsibilities;
 - (c) allocation of parenting time; or
 - (d) contact with a child.
- (2) Subject to section 70 [*orders permitting or prohibiting relocation*], in all proceedings under this Part, a court must consider the best interests of the child only.
- (3) In determining what is in the best interests of the child,

	(a) the greatest possible protection of the child's physical, psychological and emotional safety and security must be ensured; and
	(b) all the child's needs and circumstances must be considered, including
	(i) the health and emotional well-being of the child;
	(ii) the views of the child unless it would be inappropriate to consider them;
	(iii) the nature and strength of the relationship between the child and significant persons in the child's life;
	(iv) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact in respect of the child, to exercise his or her responsibilities adequately;
	(v) the history of care of the child;
	(vi) the child's need for stability, taking into consideration the child's age and stage of development;
	(vii) the impact of any family violence;
	(A) directed towards the child or another family member, on the health, emotional well-being and safety and security of the child;
	(B) on the ability of the person who perpetrated the family violence to care for and meet the needs of the child;
	(C) on the appropriateness of an arrangement that would require the guardians of the child to co-operate on issues affecting the child, including consideration of whether requiring the guardians to co-operate would increase the risk to the safety and security of the child, or other family members; and
	(viii) any civil or criminal proceedings relevant to the safety or well-being of the child.
(4)	If the conduct of a person does not substantially affect a factor set out in subsection (3), the court must not consider that conduct when making an order under this Part.
(5)	If under subsection (4), the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (3).
Assessing impact of family violence	
44	In assessing the impact of any family violence in accordance with section 43 (3) (b) (vii) [<i>best interests of the child</i>], a court must have regard to the following matters:
	(a) the nature and seriousness of the family violence;
	(b) how recently the family violence occurred;
	(c) the frequency of the family violence;
	(d) the physical, psychological and emotional harm caused to the child by the family violence;

- (e) any steps the person causing the family violence has taken to prevent further family violence from occurring; and
- (f) all other matters the court considers relevant.

CHAPTER 5: GUARDIANSHIP

I. Guardianship and Parenting Arrangements

The Terminology of Parenting Arrangements

The *Family Relations Act* uses the terms “custody,” “guardianship,” and “access” to describe the responsibilities that parents have to their children but provides little guidance as to what these terms mean. The case law reveals an overlap between “custody” and “guardianship,” which adds further complexity and confusion to the issue. As well, the terms “custody” and “access” in particular tend to encourage the perspective that there are winners and losers when it comes to determining how separated parents continue to be involved in their children’s lives.

Consultation Feedback

In the discussion paper on parenting apart, people were asked what terms should be used in new legislation to describe the responsibilities associated with parenting a child. While there was some concern about the confusion that could result from the use of new terminology and some scepticism about the ability to affect real change in people’s behaviour by changing terminology, most respondents supported doing away with the terms “custody” and “access.” Many family lawyers and other family justice professionals said they already avoid these emotionally laden terms in their interactions with clients.

While not recommending against a change in terminology, many commented that terminology changes will necessitate changes to rules, forms, systems, information and materials. One concern that was identified was whether there would be difficulty in working with different terminology under the new British Columbia legislation and the *Divorce Act*,⁷⁸ where “custody” and “access” are still used.

Recommended Policy

Significant changes are proposed to the terms used to describe those with responsibility for children and to describe time spent with children. The changes generally adopt terminology already used in Alberta’s *Family Law Act*,⁷⁹ and which is similar to changes that were proposed in Bill C-22 to the *Divorce Act*.⁸⁰

The proposed statute will eliminate the terms “custody” and “access,” which some suggest treat children as possessions for which “custody” is obtained or to which “access” is granted. The recommended terms “guardianship” and “parenting time” emphasize a relationship of responsibility towards a child. “Guardianship” will describe responsibility for children, and the

⁷⁸ CAN *Divorce Act*, Above Note 2.

⁷⁹ AB *Family Law Act*, Above Note 32, Part 2.

⁸⁰ CAN Bill C-22, Above Note 52.

current references to “guardianship of the person of the child” and “guardianship of the estate of the child” will be removed.

Other terminology changes are proposed. A guardian will have “parental responsibilities.” The time that a child spends with a guardian will be “parenting time” and a child’s time with a non-guardian will be “contact”. See the discussion under “Parental Responsibilities and Time with a Child” below for further details.

This proposal has the benefit of clarifying and simplifying the terminology. Specifically, replacing “custody” and “guardianship” with the single term “guardianship” will avoid the current confusion in the law that arises from these overlapping and ill-defined terms. Alberta recently released an evaluation report on its *Family Law Act*, which includes feedback results on the changes to terminology. The results of the evaluation indicate differing and sometimes conflicting feedback:

- The majority of respondents (81.1%) agreed that the language of the Alberta Act reflects current thinking about children and families experiencing family breakdown.
- Over three-quarters of respondents (78.6%) thought that the language of the Alberta Act is clear and easy to understand.
- Almost three-quarters (73.7%) of respondents believed that the language of the Alberta Act facilitates collaboration. When asked why, the most common comment was that the language facilitates collaboration somewhat but that ultimately it is the parties who determine whether collaboration will be successful.
- Interestingly, when professionals were asked if they thought that the change in terminology had been effective in reducing the adversarial nature of family law in Alberta, only 43.2% felt that it had. When asked to elaborate the most common comment was that while the new terminology is more focused on developing a cooperative parental relationship, the good intentions of the Alberta Act are frustrated by the reality of the litigation process which has become worse in the last decade.⁸¹

The report does not identify difficulties with the terminology change in general, nor does it indicate significant challenges with having terminology that differs from the *Divorce Act*, although it does acknowledge that people who were familiar with the terms “custody” and “access” had to gain an understanding of a whole new set of terms.

Guardianship and Separated Parents

Sections 27 and 34 of the *Family Relations Act* assign guardianship and custody where there is no court order or agreement (i.e. create statutory defaults). With respect to guardianship, section 27 says that for as long as the child’s parents live together, they share joint guardianship. If they

⁸¹ Canadian Research Institute for the Law and the Family, *An Evaluation of Alberta’s Family Law Act* (Final Report) by L.D. MacRae *et. al.* (May 2009) at 77-80, online University of Calgary: http://people.ucalgary.ca/~crilf/publications/FLA_Final_Report_May_2009.pdf (last accessed: July 7, 2010).

separate, the parent who usually has “care and control” is the sole guardian of the person of the child, while both parents continue to be joint guardians of the estate of the child. If they 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, then the mother is the sole guardian of both of the person and estate of the child. With respect to custody, section 34 says that for as long as a child’s parents live together they share joint custody. If they live apart, then the parent with whom the child usually lives has sole custody.

Consultation Feedback

There were only a few comments on these statutory defaults. Some said the existing default guardianship and custody provisions are confusing, and some stakeholders commented that they appear to favour residential parents. A slight majority of Canadian Bar Association respondents supported some change to the default provisions, particularly to accommodate cases involving reproductive technology. Others, mediators especially, favoured default joint guardianship/custody provisions upon separation.

Recommended Policy

The proposed statute begins with the proposition that the parents of a child are his or her guardians. An exception to this general rule is a parent who has never resided with the child. That person does not automatically become a guardian only because he or she is a parent.

The new guardianship provisions are intended to simplify the law and encourage parents to continue to co-operate in raising their children after separation. They make it clear that parents’ responsibilities for their children do not end when parents separate. The provisions start with the straightforward “default” position that parents who live with their child are guardians automatically and do not lose these responsibilities only because there is a separation. This will ensure that in most cases both parents have guardianship upon the birth of their child. A parent not covered by the default rules may become a guardian by agreement with the child’s other guardian or by court order.

Parental Responsibilities and Time with a Child

The *Family Relations Act* provides very little guidance with regard to what responsibilities guardians have toward their child.

Consultation Feedback

Stakeholder feedback from the consultation period revealed confusion with respect to the overlapping concepts of “custody” and “guardianship.”

Recommended Policy

The proposed Act provides a list of “parental responsibilities” that guardians must exercise in the best interests of their children. This list is modelled largely on section 18(6) of Alberta’s *Family Law Act*.

Upon separation, the starting point is that each guardian may exercise all of the parental responsibilities. Parental responsibilities may be allocated between guardians by agreement or court order, but if there is no allocation, each guardian retains responsibility for all aspects of the care of their children

This approach is intended to encourage greater co-operation by giving guardians a clear idea of what their responsibilities are and allowing parenting arrangements to be tailored to each family's circumstances. However, where co-operation is not possible or appropriate, the option of asking a judge to make an order allocating parental responsibilities in the child's best interests is available. If there is an ongoing risk of family violence, a parent may seek a protection order. See Chapter 4: Children's Best Interests and Chapter 12: Protection Orders for further details.

One of the parental responsibilities that may be allocated is "to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child's daily activities." A guardian's "parenting time" is the time during which he or she exercises this responsibility.

A non-guardian's time with a child ("contact") may be in the form of visits or any other method of communication including oral or written communication. Since only guardians have parental responsibilities, there are no parental responsibilities associated with contact. If a written agreement respecting contact is to be made, all guardians who have the parental responsibility to decide with whom the child is to associate must sign the agreement. Anyone may apply to a court for an order for contact and the court may include any terms in the order that it considers appropriate.

Alberta's evaluation included feedback on the changes to the guardianship provisions in its *Family Law Act*, which are similar to those proposed here. Professionals agreed that the provisions provided for a flexible approach that is easy to understand and apply in practice. Most professionals agreed that this approach reduces financial and emotional costs to families. They also indicated that the guardianship regime assists the court in making parenting orders because it is clear in defining the role a guardian is to take in a child's life.⁸²

Recommended Draft Provisions

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS	
Division 1 – Definitions	
42	In this Part: "parenting time" means the time allocated under an agreement or parenting order during which a guardian of a child has the responsibility to make day-to-day decisions affecting the

⁸² Canadian Research Institute for the Law and the Family, Above Note 81 at 20 and 21.

child, including having the day-to-day care and control of the child and supervising the child's daily activities, whether the child is in the guardian's presence, or out of the guardian's presence, with the guardian's express or implied consent;

Division 3 – Guardianship and Parental Responsibilities

Parents are guardians

- 45** (1) Subject to an agreement or court order respecting guardianship, the parents of a child are the guardians of the child.
- (2) Despite subsection (1), if a parent of a child does not reside with the child after the birth of the child,
- (a) the parent or parents with whom the child resides are the guardians of the child, and
 - (b) the parent or parents with whom the child does not reside are not the guardians of the child.
- (3) Despite subsection (2), the guardian or guardians of the child may enter into an agreement with a parent of the child who, by operation of subsection (2), is not a guardian of the child under which the parties agree that, despite subsection (2), the parent is a guardian of the child.

Parental responsibilities

- 46** (1) Subject to an agreement or court order that allocates parental responsibilities, a guardian may exercise the following parental responsibilities with respect to the child:
- (a) to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child's daily activities;
 - (b) to decide the child's place of residence and to change the child's place of residence;
 - (c) to make decisions about the child's education, including the nature, extent and place of the education and the child's participation in extracurricular school activities;
 - (d) to make decisions regarding the child's cultural, linguistic, religious and spiritual upbringing and heritage;
 - (e) to decide with whom the child is to live and with whom the child is to associate;
 - (f) to decide whether the child should work and, if so, the nature and extent of the work, for whom the work is to be done and other related matters;
 - (g) to consent to medical, dental and other health-related treatment for the child subject to section 17 of the *Infants Act*;
 - (h) to grant or refuse consent if consent of a parent or guardian is required by law;
 - (i) to receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
 - (j) subject to any applicable legislation, to commence, defend, compromise or settle legal proceedings relating to the child and to compromise or settle proceedings taken against the child;

	(k) subject to any applicable provincial legislation, to identify, advance and protect the legal and financial interest of the child not referred to in paragraph (j);
	(l) to authorize a person to exercise, on a temporary basis, the guardian's parental responsibilities, other than those referred to in subsections (b), (d), (j) and (k) on behalf of the guardian if the guardian is temporarily unable to exercise those responsibilities;
	(m) to receive from third parties health, education or other information that may significantly affect the child;
	(n) to exercise any other responsibilities reasonably necessary to nurture the child's physical, psychological and emotional development and to guide the child toward independent adulthood.
	(2) A guardian of a child must exercise his or her parental responsibilities in the best interests of the child.
Agreements that allocate parental responsibilities	
47	(1) Two or more guardians of a child may enter into an agreement respecting:
	(a) the allocation among themselves of the parental responsibilities respecting the child;
	or
	(b) the allocation among themselves of parenting time with the child, which may be by way of a schedule, unless a schedule is unnecessary in the circumstances.
	(2) An agreement under subsection (1) may include a dispute resolution process for any future disputes respecting a matter described in paragraph 1(a) or (b).
Orders that allocate parental responsibilities	
48	(1) If a child has more than one guardian and the guardians are living separate and apart in the case of guardians who are the parents of the child, the court may, on application by one or more guardians, make an order that allocates parental responsibilities among them.
	(2) A order under subsection (1) may contain one or more of the following:
	(a) an allocation among the child's guardians of the parental responsibilities respecting the child;
	(b) an allocation among the child's guardians of parenting time with the child, which may be by way of a schedule, unless a schedule is unnecessary in the circumstances;
	(c) a dispute resolution process for any future disputes respecting a matter described in paragraph (a) or (b);
	(d) any other provisions or terms or conditions that the court considers appropriate.
Varying, suspending or terminating parenting orders	
49	(1) The court may, on application, make an order varying, suspending or terminating an order made under section 48 [<i>orders that allocate parental responsibilities</i>] or any part of that order.

- (2) Before the court makes an order under subsection (1), the court must satisfy itself that a change in the needs or circumstances of the child, including circumstances of another person that affect the child, has occurred since the making of the last order.

Division 4 – Contact Agreements and Orders

Agreement of guardians allowing contact with child

- 61** (1) All the guardians of a child with parental responsibility for deciding with whom the child may associate, as referred to in section 46 (1) (e) [*parental responsibilities*], may enter into a written agreement with a person who is not a guardian of the child to allow that person to have contact with the child.
- (2) The agreement for contact may provide for contact in the form of visits or in the form of oral or written communication or any other method of communication.

Order for contact with child

- 62** (1) A court may, on application, make an order providing for contact between a child and any person other than a guardian of the child and may provide for contact in the form of visits or in the form of oral or written communication or any other method of communication.
- (2) The reference to “person” in subsection (1) includes grandparents, other relatives of the child and persons who are not relatives of the child.
- (3) An order under subsection (1) may include terms and conditions the court considers necessary and reasonable.

Varying, suspending or terminating contact orders

- 63** (1) The court may, on application make an order varying, suspending or terminating a contact order or any part of that order.
- (2) Before the court makes an order under subsection (1), the court must satisfy itself that a change in the needs or circumstances of the child, including circumstances of another person that affect the child, has occurred since the making of the last order.

II. Guardianship Orders and Testamentary and Standby Guardianship

There are other ways that guardianship of a child may be obtained. A judge may make an order appointing a parent or non-parent as a guardian of a child. Guardians may appoint other guardians to ensure the continuity of care for a child in certain circumstances.

Testamentary guardianship allows for the appointment of a guardian in a will. So, for example, a child’s parents might name a child’s aunt and uncle as guardians to take over in the event of the parents’ death. Standby guardianship is guardianship that takes effect upon the happening of a specific event. It can be used to provide a bridging period of guardianship. For example, if a child has only one parent who is terminally ill, that parent may appoint a standby guardian who will become the guardian of the child upon the anticipated incapacity of the parent and who will continue as the guardian of the child after the parent dies.

Neither testamentary nor standby guardianship is provided for in the *Family Relations Act*. There is a testamentary guardianship provision in the *Infants Act*,⁸³ which draws distinctions between parent guardians and non-parent guardians. For example, a parent guardian can appoint a testamentary guardian without a court order, but a non-parent guardian cannot. There is no existing provision to enable standby guardianship.

The British Columbia Law Institute recommended that testamentary guardianship be consolidated into British Columbia's family legislation and that it be expanded to allow non-parent guardians to name other guardians in their will without the need for a court order. The Institute further recommended that standby guardianship be addressed in family legislation.⁸⁴

Consultation Feedback

Respondents supported consolidating guardianship provisions into new family legislation.

On the question of whether parent guardians and non-parent guardians should have the same ability to assign parental responsibilities through wills or standby guardianship agreements, some thought it made sense to eliminate the distinction. Most family lawyers who responded to the question agreed.

An issue was raised regarding the general level of oversight required when parents assign guardianship. The British Columbia Representative for Children and Youth expressed concern and noted at least one case from Ontario where a parent had assigned guardianship to a non-parent relative and the child died. Ontario has since amended its family law to seek greater information about prospective non-parent guardians.⁸⁵ Information from Ontario has indicated this is a very resource intensive process.

Recommended Policy

Testamentary Guardianship

The British Columbia Law Institute in its 2004 *Report on Appointing a Guardian and Standby Guardianship* recommended that section 50 of the *Infants Act* be consolidated into the family statute and that the current distinction between parents and non-parents be eliminated.⁸⁶ The report suggested that there was no reason to assume that a parent guardian was better qualified to appoint a testamentary guardian than a non-parent guardian.⁸⁷

⁸³ *Infants Act*, R.S.B.C. 1996, c. 223, s. 50, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96223_01 (last accessed: July 12, 2010).

⁸⁴ British Columbia Law Institute, *Report on Appointing a Guardian and Standby Guardianship*, Report No. 30 (March 2004) at 1-4 and 8, online British Columbia Law Institute: <http://www.bcli.org/sites/default/files/Appoint-Guardian.pdf> (last accessed: July 7, 2010).

⁸⁵ ON *Children's Law Reform Act*, ss 21.1 and 21.2, Above Note 46.

⁸⁶ British Columbia Law Institute, Above Note 84 at 1-4 and 10.

⁸⁷ *Ibid.* at 4.

It is proposed that section 50 of the *Infants Act* be repealed and that a provision authorizing the appointment of a testamentary guardian be included in the proposed family law. The proposed legislation will allow both parent and non-parent guardians to appoint a testamentary guardian. It will also provide that a testamentary appointment becomes effective when accepted by the person appointed.

Standby Guardianship

The proposed statute will also allow for the appointment of a standby guardian in situations where there is only one guardian. There will be a prescribed form for the appointing document, and guardians will be required to use this form or one substantially similar in order for the appointment to be valid. The British Columbia Law Institute's report supported this change, noting that this type of guardianship developed in many American states as a way to assist single parents with terminal illnesses in providing for an orderly transition of guardianship and to promote certainty and stability in the care of children.⁸⁸

Court Orders

Section 30 of the *Family Relations Act* authorizes the court to appoint a guardian of a child. The proposed statute will carry forward section 30 with minor changes. The consent of a child who is 12 or older to any court appointment of a guardian will be required unless the judge determines that the appointment is needed despite the lack of consent. Section 24 of Alberta's *Family Law Act* requires consent from a child 12 or older, and the age of 12 is used in the *Child, Family and Community Service Act*.⁸⁹

Notice

The new statute will require that all parents and guardians be given notice of an application to appoint a guardian or to remove a guardian. As well, the proposed law will carry forward sections 22.1 and 22.2 of the *Family Relations Act* which address notice and standing where there are proceedings regarding guardianship of a Nisga'a or treaty first nation child. This is meant to ensure that all those who may have an interest in or who have responsibility for a child know about the application. Notice will also be required to be given to the Public Guardian and Trustee and a director under the *Child, Family and Community Service Act* where there is or would be no guardian.

Section 29(3) provides that if a child is without a guardian under the *Family Relations Act*, a director under the *Child, Family and Community Service Act* and the Public Guardian and Trustee are the guardians of the person and estate of the child, respectively. The proposed new statute will not carry forward this provision. The Public Guardian and Trustee and a director will still be able to exercise the same powers with respect to protecting the interests of the child,

⁸⁸ British Columbia Law Institute, Above Note 84 at 4-8.

⁸⁹ See e.g., BC *Child, Family and Community Service Act*, Above Note 3, s. 33.1(2)(a).

where required, but that authority will now be provided in their respective statutes, by making any necessary amendments to those statutes, and not under the family law statute.

Removal of a Guardian

The proposed legislation will allow for the removal of a guardian only by court order. This will provide court oversight so that gaps in guardianship are prevented.

Temporary Guardianship

Including a provision to allow a guardian to appoint a temporary guardian was considered. A temporary guardian is a substitute for the guardian who takes the appointing guardian's place while he or she is temporarily absent or incapacitated. The British Columbia Law Institute's report noted that there are arguments that can be made in favour of allowing temporary guardianship to deal with care of a child during a guardian's temporary incapacity or unavailability, such as where the guardian is doing military service in a foreign country.⁹⁰ However, in view of concerns raised, including about the confusion that could result from potentially overlapping appointments, a provision for the appointment of a temporary guardian is not proposed. Instead, one of the parental responsibilities that a guardian may have is to authorize another person to exercise temporarily some of the guardian's parental responsibilities (see section 46(1)(l)), on the guardian's behalf. This is similar to section 21(6)(k) of Alberta's *Family Law Act*. This ability will not extend to all parental responsibilities listed as some will be specifically exempted, such as settling a lawsuit on the child's behalf.

Recommended Draft Provisions

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS	
Division 3 – Guardianship and Parental Responsibilities	
Guardianship orders	
50	(1) A court may, on application,
	(a) appoint a guardian of a child, or
	(b) terminate the guardianship of a guardian of a child.
	(2) If a child is 12 years of age or older, a court must not make or give effect to an appointment under subsection (1) (a) unless
	(a) the child consents in writing to the appointment, or
	(b) if the child withholds consent or is unable to give consent to the appointment, the court is satisfied that the appointment is necessary.
	(3) An order must not be made under subsection (1) unless all guardians and parents have been given notice of the application.

⁹⁰ British Columbia Law Institute, Above Note 84 at 6 and 7.

- (4) If an application is made to appoint a guardian of a child where there is no present guardian of the child, or an application is made to terminate the guardianship of a guardian where the result will be that there will be no guardian of the child, then a director under the *Child, Family and Community Service Act* and the Public Guardian and Trustee must be given notice of the application.

Guardianship of a Nisga'a child

- 51** (1) If an application is made to a court under this Part in respect of the guardianship of a Nisga'a child
- (a) the Nisga'a Lisims Government must be served with notice of the proceeding, and
 - (b) the Nisga'a Lisims Government has standing in the proceeding as provided in paragraph 94 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
- (2) In a proceeding to which subsection (1) applies, the court must consider, in addition to any other matters it is required by law to consider, any evidence or representations in respect of Nisga'a laws and customs as provided in paragraph 94 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
- (3) As provided in paragraph 95 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the participation of the Nisga'a Lisims Government in a proceeding to which subsection (1) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

Guardianship of treaty first nation child

- 52** (1) If an application is made to a court under this Part in respect of the guardianship of a treaty first nation child and the final agreement of the treaty first nation of which the child is a treaty first nation child so provides, the treaty first nation
- (a) must be served with notice of the proceeding, and
 - (b) has standing in the proceeding.
- (2) Subject to any limitations or conditions set out in the final agreement, in a proceeding to which subsection (1) applies, the court must consider, in addition to any other matters it is required by law to consider, any evidence or representations in respect of the laws and customs of the treaty first nation.

Appointment respecting guardianship on death of guardian

- 53** (1) A guardian of a child may, in a will within the meaning of the *Wills, Estates and Succession Act*, appoint a person who will become a guardian of the child on the appointing guardian's death.
- (2) A person appointed as a guardian under subsection (1) will not have greater parental responsibilities with respect to the child than the appointing guardian.

Appointment of standby guardian

- 54** (1) If there is only one guardian of a child, that guardian may, in an appointing document,

	appoint a person who will become a guardian of the child when the appointing guardian is no longer able to carry out his or her parental responsibilities by reason of mental incapacity or physical debilitation, as specified in the appointing document.
(2)	The appointing document may provide for certification by one or more persons designated in the document that the degree of mental incapacity or physical debilitation referred to in subsection (1) has occurred and, if such a certification is made, it is conclusive.
(3)	A person who becomes a guardian by operation of subsection (1) is required to consult the appointing guardian to the fullest possible extent regarding the care and upbringing of the child.
(4)	A person who becomes a guardian by operation of subsection (1) will continue as the guardian of the child on the death of the appointing guardian if the appointment remains in effect at the time of death.
(5)	The appointing guardian, if mentally competent, may revoke the appointment made under subsection (1) at any time prior to the appointing guardian's death.
(6)	To be valid, the appointment of a guardian under subsection (1) must be in writing in the prescribed form or be substantially similar to the prescribed form and (a) signed by the appointing guardian before a witness who would not become a guardian by operation of the appointment, or (b) if the appointing guardian is unable to sign, attested and signed by two witnesses who would not become guardians by operation of the appointment.
When appointment takes effect	
55	An appointment under section 53 [<i>appointment respecting guardianship on death of guardian</i>] or 54 [<i>appointment of standby guardian</i>] does not take effect unless accepted by the person appointed either expressly or impliedly by the person's conduct.
Note: Consequential amendments will be required to the <i>Public Guardian and Trustee Act</i>.	

III. Other Provisions Related to Guardianship of a Child

There are other issues related to the exercise of guardianship that require legislative comment. The guardianship part of the proposed Act seemed to be the appropriate place to locate a number of these miscellaneous sections.

Recommended Policy

The proposed Act will make clear the legal distinction between a guardian of a child and a trustee of that child's property. A guardian is not automatically also a trustee able to provide a discharge for receipt of property on behalf of the child. This corresponds with new provisions in the proposed Act that provide specific criteria if parents are to administer small amounts of money on behalf of their children or if parents apply for the authority to administer larger amounts. See Chapter 8: Children's Property.

The proposed Act will carry forward the policy in section 29(4) of the *Family Relations Act* that a spouse of a guardian does not, by virtue of the relationship with the guardian, also become a guardian of the child.

It will also allow a guardian to apply to court for directions respecting a question affecting a child so that judges can ensure that decisions made by a guardian are in the best interests of the child. Section 32 of the *Family Relations Act* does this now, and Alberta's *Family Law Act* contains a similar provision.⁹¹ The proposed Act will also have remedies that a judge may use if the judge feels that the provision is being misused, for example, where the judge feels that repeated applications are unwarranted and are being made simply to second guess a guardian's decisions.

The proposed legislation will also contain a provision specifically authorizing a court to make an order either preventing the removal of a child from British Columbia or making any order it deems appropriate to ensure the child will return, such as: surrendering passports or posting security. The provision that specifically authorizes a court to make an order restricting the removal of a child from British Columbia is modelled on section 37 of Ontario's *Children's Law Reform Act*.

Recommended Draft Provisions

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS	
Division 3 – Guardianship and Parental Responsibilities	
Guardian not a trustee	
56	A guardian of a child is not a trustee of the child's property or entitled to provide a valid discharge for receipt of property on behalf of the child by reason only of being a guardian.
Loss of guardian	
57	If a guardian of a child dies, a surviving parent of the child who is not a guardian of the child at the time of the deceased's death does not become a guardian of the child unless the surviving parent has been appointed a guardian of the child under section 53(1) [<i>appointment respecting guardianship on death of guardian</i>] or is, by order, appointed a guardian of the child under section 50 (1) (a) [<i>guardianship orders</i>].
If guardian enters into spousal relationship	
58	If a guardian of a child and a person who is not a guardian of the child enter into a spousal relationship, the spousal relationship in no way
	(a) diminishes the parental responsibilities of the guardian, or
	(b) vests in the other person the parental responsibilities of the guardian.

⁹¹ AB *Family Law Act*, Above Note 32, s. 31.

Referral of questions to court

- 59** A guardian of a child may apply to a court for directions concerning a question affecting the child and the court may make the order in that regard it considers proper.

Order to prevent removal of child

- 60** (1) If a court, on application, is satisfied that a person proposes to remove a child from British Columbia and is not likely to return the child to British Columbia, the court in order to secure the prompt, safe return of the child to British Columbia may make an order under subsection (2).
- (2) In the circumstances described in subsection (1), the court may order the person who proposes to remove the child from British Columbia to do one or more of the following:
- (a) deliver up to the court, or to a person named by the court, any documents;
 - (b) require that, the person who proposes to remove the child from British Columbia provide security in any form that the court directs;
 - (c) transfer specific property to a trustee named by the court to be held subject to the terms and conditions specified in the order;
 - (d) if payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order.

CHAPTER 6: WHEN ORDERS AND AGREEMENTS FOR TIME WITH A CHILD ARE NOT RESPECTED

The *Family Relations Act* does not have specific remedies for disputes over time with a child. The existing remedies are quasi-criminal tools, such as contempt proceedings or applications under section 128(3) of the *Family Relations Act*, which makes interfering with an access order an offence. They are rarely used and have been criticized as being ineffective and ill-suited to this type of parenting dispute: they involve a high burden of proof, are potentially at odds with the child's best interests, are costly and are not equally available in the two courts that hear family law cases (i.e., the Provincial Court and the Supreme Court).

Consultation Feedback

The discussion paper on meeting access responsibilities asked whether the new family law should adopt a special set of remedies to address the consequences of non-compliance with orders or agreements over time with a child. Opinion was mixed. Some said existing tools were inadequate and thought non-compliance with support and access orders should be addressed with equal attention. Others pointed out that support orders and access orders were very different and that the law was poorly placed to force relationships between reluctant family members or address the underlying difficulties, such as addiction problems, personality disorders or even an older child's unwillingness to spend time with a parent. Concerns were also raised about encouraging litigiousness or even litigation harassment of one parent by the other, potentially leading to toxic conflict that could spill over to the child.

There was general agreement, however, that if more remedies were to be included in the new law that they should address both sides of the non-compliance issue; that is, denial and failure to exercise scheduled time with a child. Many also supported the inclusion of a section recognizing that scheduled time with a child might not go ahead in certain circumstances, such as when the child is sick, accompanied by corresponding remedies such as make-up time, to encourage ongoing contact nevertheless.

There was no consensus amongst respondents on the details of such a regime. In particular, some considered punitive remedies such as imprisonment or fines to be inappropriate and worried that these would not be in the child's best interests. The option to enable peace officers to come and get the child and transport him or her to the access parent raised similar concerns. Yet others thought these harsher remedies could be helpful in extreme cases and recommended including them. The remedies that were seen to be most useful included parent education, counselling, mediation and parenting co-ordination.

Recommended Policy

The proposed legislation will provide for a range of tools and remedies to address both denial and failure to exercise time with a child. The remedies will include moderate sanctions or tools (e.g., an order for mediation or counselling), but will also provide for the potential that some situations

will require an escalation in sanctions. Extraordinary remedies, such as imprisonment, would be available only if less drastic remedies would not suffice.

Separate remedies are proposed for access denial and failure to exercise access to recognize the different circumstances in which such problems arise. For example, make-up time or supervised exchanges that promote the child-parent relationship may be an appropriate remedy where there is access denial; however, these same remedies may be inappropriate for failure to exercise access as it may not be in a child's best interests to force contact with a reluctant parent.

Including more options to address non-compliance is intended to clarify the law and fill legislative gaps (i.e., the lack of effective remedial tools, differing tools in the two levels of court) while at the same time maintaining sufficient flexibility to address the unique facts of each case. Options which fall on the preventative side of the continuum such as counselling could reduce the costs of separation by helping to resolve underlying issues and avoid future difficulties.

Further flexibility is built into the new law through the inclusion of exceptions (i.e., when scheduled parenting time did not go ahead because a doctor's note indicated the child was too ill) and certain limited remedies for those exceptional circumstances, such as make-up time.

The recommended approach draws on the approach taken in other jurisdictions, both inside and outside of Canada. These include: Alberta,⁹² Saskatchewan,⁹³ Manitoba,⁹⁴ Newfoundland and Labrador,⁹⁵ the Northwest Territories⁹⁶ and Nunavut,⁹⁷ as well as Australia,⁹⁸ New Zealand,⁹⁹ and several American states.¹⁰⁰ England is also contemplating the adoption of specific remedies.¹⁰¹

⁹² AB *Family Law Act*, Above Note 32, ss. 40 and 41.

⁹³ SK *Children's Law Act*, 1997, Above Note 33, ss. 24 and 26-29.

⁹⁴ *Child Custody Enforcement Act*, C.C.S.M. c. C360, ss. 9, 14 and 14.1, online CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-c360/latest/ccsm-c-c360.html> (last accessed: July 7, 2010).

⁹⁵ NL *Children's Law Act*, Above Note 46, ss. 41 and 43.

⁹⁶ NWT *Children's Law Act*, Above Note 46, ss. 30 and 31.

⁹⁷ NUN *Children's Law Act (Nunavut)*, Above Note 46, ss. 30 and 31.

⁹⁸ AUS *Family Law Act 1975*, Above Note 29, Part VII (Children), Division 13A.

⁹⁹ NZ *Care of Children Act 2004*, Above Note 41, ss. 68-71, 73, 78-79 and 142.

¹⁰⁰ See e.g., Arizona's *Marital and Domestic Relations*, A.R.S., 25-414; California's *Code of Civil Procedure*, s.1218; Colorado's *Uniform Dissolution of Marriage Act*, C.S., 14-10-129.5; Michigan's *Support and Parenting Time Enforcement Act*, Act No. 295 of 1982, 552.644; 1998 Oregon's *Marital Dissolution, Annulment and Separation; Mediation and Conciliation Services; Family Abuse Prevention*, O.R.S., 11-107.434; and Utah's *Utah Code*, 78-32-12.1.

¹⁰¹ *Children and Adoption Act 2006 (UK)*, 2006, c. 20, online BAILII: http://www.bailii.org/uk/legis/num_act/2006/ukpga_20060020_en_1.html (last accessed: July 13, 2010).

Recommended Draft Provisions

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS	
Division 5 – Consequences of Failure to Comply with Agreements or Orders for Parenting Time or Contact	
Denial of parenting time or contact with child	
64	(1) The court, on application by a person entitled to parenting time or contact with a child under an agreement or court order may, if satisfied that the person has been wrongfully denied parenting time or contact with the child within 12 months of the application being brought, may make one or more of the following orders: (a) an order requiring the parties to participate in mediation or other dispute resolution process; (b) an order requiring a party or a child to attend counselling or to attend a program or service, including, in the case of a child, without the consent of the child’s guardian; (c) an order specifying a period of time in which the person may exercise compensatory parenting time or contact with the child; (d) an order requiring the guardian who denied the parenting time or contact with the child to pay the person for all or part of the expenses reasonably and necessarily incurred by the person as a result of the denial of parenting time or contact, including travel expenses, lost wages and child care expenses; (e) an order requiring the parties to transfer the child under the supervision of another person named in the order if, before the order is made, the person agrees to supervise the transfer; (f) if the court considers that a guardian may not comply with an order under this subsection, order that guardian to (i) provide security in any form that the court directs, (ii) report to court or to a person named by the court, at the time and in the manner specified by the court, or (iii) produce to the court, or to a person named by the court, any documents. (2) In making an order under subsection (1), the court may attach any terms and conditions the court considers appropriate. (3) If the court makes an order under subsection (1), the court may, as appropriate in the circumstances, (a) allocate all or part of the expenses incurred relating to the counselling, program or service among the parties or (b) require one of the parties to pay all or part of the expenses incurred relating to the counselling, program or service. (4) A denial of parenting time or contact with a child is not wrongful if one or more of the following circumstances apply:

- (a) the guardian reasonably believed that the child might suffer family violence if the parenting time or contact was exercised;
 - (b) the guardian reasonably believed that the person was impaired by drugs or alcohol at the time the parenting time or contact was to be exercised;
 - (c) the child was suffering from an illness at the time the parenting time or contact was to be exercised and a doctor's note indicated that it was not appropriate that the parenting time or contact be exercised;
 - (d) in the preceding 12 month period, the person failed repeatedly to exercise parenting time or contact without reasonable notice;
 - (e) the guardian was informed by the person in advance of the parenting time or contact that the person was not going to exercise it and, subsequently, reasonable notice was not given to the guardian that the person intended to exercise the parenting time or contact after all;
 - (f) other circumstances determined by a court to provide sufficient justification for the denial of the parenting time or contact.
- (5) If a court is satisfied that a person was denied parenting time or contact with a child, and one or more circumstances apply under subsection (4), the court may make an order specifying a period of time in which the person may exercise compensatory parenting time or contact with the child.

Extraordinary remedy for denial of parenting time or contact with child

- 65** (1) If a court is satisfied that there has been a wrongful denial of parenting time or contact with a child and determines that one or more orders under section 64(1) [*denial of parenting time or contact with child*] would not provide a remedy adequate in the circumstances, the court may make one or both of the following orders:
- (a) an order requiring that the guardian who denied the parenting time or contact be imprisoned for up to 30 days;
 - (b) an order that the child be apprehended by a peace officer and taken to the person denied the parenting time or contact.
- (2) In making an order under subsection (1), the court may attach any terms and conditions the court considers appropriate.
- (3) For the purpose of locating and apprehending a child in accordance with subsection (1) (b), a peace officer may enter and search any place where he or she has reasonable and probable grounds for believing the child may be.

Failure to exercise parenting time or contact with child

- 66** (1) If a person entitled to parenting time or contact with a child under an agreement or court order fails to exercise the parenting time or contact without reasonable notice to the applicable guardian, the court may, on application, make one or more of the following orders:

(a)	an order requiring the parties to participate in mediation or other dispute resolution process;
(b)	an order requiring a party or a child to attend counselling or to attend a program or service, including, in the case of a child, without the consent of the child's guardian;
(c)	an order requiring the person to pay the person for all or part of the expenses reasonably and necessarily incurred by the guardian as a result of the person's failure to exercise the parenting time or contact, including travel expenses, lost wages and child care expenses;
(d)	an order requiring the parties to transfer the child under the supervision of another person named in the order if, before the order is made, the person agrees to supervise the transfer;
(e)	if the court determines that the person who failed to exercise the parenting time or contact may not comply with an order under this subsection, order that person to
	(i) provide security as the court considers appropriate, or
	(ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court.
(2)	In making an order under subsection (1), the court may attach any terms and conditions the court considers appropriate.
(3)	If the court makes an order under subsection (1), the court may, as appropriate in the circumstances,
(a)	allocate all or part of the expenses incurred relating to the counselling, program or service among the parties or
(b)	require one of the parties to pay all or part of the expenses incurred relating to the counselling, program or service.

CHAPTER 7: RELOCATION

Relocation is an increasingly common event in children's lives after their parents separate or divorce, and disputes over relocation tend to result in litigation.

The *Family Relations Act* says nothing specific about relocation, and, while case law has developed, it is still regarded as an area where the considerations for decision-making are open-ended. Critics have called relocation law "rock, paper, scissors territory" and say that its uncertainty and unpredictability fuel litigation, prolong disputes and interfere with parents' ability to plan.

Canadian law professor Rollie Thompson argues that the governing relocation test from *Gordon v. Goertz*¹⁰² and subsequent cases is so open-ended and flexible that there is little certainty in relocation law. He points to the comments of American academics, Professors Bruch and Bowermaster as summarizing the problem:

*The experience of other jurisdictions...suggests that asking the trial court in its discretion to weigh all appropriate factors fails to provide a workable long-term solution...most jurisdictions [in the United States] that have considered relocation issues have ultimately delineated guidelines, presumptions or rules to assist in their analysis.*¹⁰³

Consultation Feedback

The discussion paper on relocation focused on ways to increase the certainty and predictability of the law in this contentious area. It asked whether it would be helpful to include a definition of relocation, as well as a notice-to-move provision in the new family statute. Other questions included whether the legislation could be made more certain through, for example, assigning one parent or the other the burden of proof, by including rebuttable presumptions or by legislating factors that judges are or are not to consider. The final discussion topic was about sharing costs after relocation had occurred.

Respondents liked the idea of a definition of relocation and thought that it should be child-centred. Thus, a proposed move would be considered "relocation" if it would make it significantly more difficult for the child to have a meaningful relationship with the non-moving parent.

There was less support for inclusion of a notice-of-move provision. Half of the respondents thought it would not be useful. Some of them thought it could be harmful to parents and children in relationships where family violence was an issue. Others said it was unnecessary because notice of a proposed move was a term that could already be included in orders or agreements. Half supported the idea but did not explain why.

¹⁰² *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

¹⁰³ D.A. Rollie Thompson, "Movin' On: Parental Relocation in Canada," (2005) 43(3) Fam. Ct. Rev. 398.

One area of consensus in the notice-of-move debate was that if such a provision were included in the new legislation, it should apply equally to both custodial and access parents.

Respondents also agreed that making relocation law more certain was a valuable goal. The majority approved of the idea of using the burden of proof to do this, but opinion was split as to which presumption to use. The three examples of burden of proof clauses raised in the discussion paper were:

1. The relocating person has the burden of proof to show that the proposed relocation is made in good faith and in the best interests of the child.
2. The non-relocating person has the burden of proof to show that the objection to the proposed relocation is made in good faith and that relocation is not in the best interests of the child.
3. The relocating person has the burden of proof to show 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 interests of the child.¹⁰⁴

Respondents also approved of legislating a list of factors for judges to consider (e.g., existing arrangement, the reasons for moving, etc.), and all thought it was proper to disallow judges from asking whether the parent proposing the move would do so without the child. Some recommended disallowing other considerations such as misconduct if this was not relevant to the parent's caretaking ability and the relative cost of living in the two locations.

Opinion was divided on the desirability of including a provision that allowed judges to divide the costs of maintaining the non-moving parent's contact with the child. Those against the idea said that a dollar for dollar reduction in child support, for example, would run contrary to established case law on the topic. Those in favour said it would be helpful to give judges the express authority to deal with post-move costs.

Recommended Policy

Significant reforms are proposed in order to introduce certainty into what has been criticized as an extremely uncertain area of the law. The goal is to reduce the need for litigation and, thus, reduce the costs associated with disputes over relocation. The *Proposed Model Relocation Act*¹⁰⁵ developed by the American Association of Matrimonial Lawyers and other American family laws was considered in developing the recommended policy.

¹⁰⁴ British Columbia Ministry of Attorney General, *Family Relations Act Review Discussion Paper – Chapter 14: Relocating Children* (August 2007) at 6, online British Columbia Ministry of Attorney General: <http://www.ag.gov.bc.ca/legislation/pdf/Chapter14-RelocatingChildren.pdf> (last accessed: June 2, 2010).

¹⁰⁵ *Proposed Model Relocation Act* (As Adopted by the Board of Governors of the AAML, Cancun, Mexico, March 9, 1997), online: http://www.aaml.org/tasks/sites/default/assets/File/docs/publications/Model_Relocation_Act.htm (last accessed: June 9, 2010).

The proposed approach is three-fold. First, introduce a mandatory 60-day notice-of-move provision except where there is an ongoing risk of violence or where the child and the non-moving guardian do not have a relationship, to be used to work co-operatively to resolve relocation issues. The obligation would attach to any guardian proposing a move (i.e., with or without the child). Failure to provide the notice may be considered as a factor in a judge's decision to permit or refuse a relocation order.

The introduction of notice-of-move provisions is designed to create opportunities for parents to take a co-operative approach to the resolution of relocation issues in the best interests of their children. It is also meant to recognize the value of family autonomy in that the notice-of-move provision contemplates that many families will be able to resolve disputes that arise on their own. However, the proposed exemptions to the notice requirement recognize that a co-operative approach is not appropriate for all separating families.

The *Divorce Act* and legislation in Alberta and Saskatchewan allow for orders that establish parenting arrangements to also include provisions requiring notice of a proposed move of a child. Saskatchewan's *Children's Law Act, 1997*,¹⁰⁶ and the *Divorce Act*¹⁰⁷ require 30 days notice while Alberta's *Family Law Act*¹⁰⁸ requires 60 days notice. A notice period of less than 60 days was considered an insufficient period of time for cooperative discussions to take place and 60 days was seen as sufficient time to prepare for a hearing if settlement was not possible.

The second prong of the proposed policy is to include a child-centred definition of relocation that takes into account the specific circumstances of individual families. A child-centred definition of relocation that focuses on the impact of the proposed move on the child's primary relationships avoids the potential arbitrariness of distinctions drawn on threshold distances, travel times or borders.

The third prong is to legislate specific factors that a judge must and must not consider and introduce the following presumptions:

- Where the day-to-day care of the child is not equal or substantially equal, the initial burden is on the guardian who wants to move with the child to show that the proposed move is in good faith and that reasonable efforts have been made to find ways to preserve the relationship with the other guardian(s) and with others who are significant to the child. If this initial burden is met, then the onus shifts to the other guardian to prove that the proposed move is not in the child's best interests.
- Where the day-to-day care of the child is equal or substantially equal, the burden is on the guardian who wants to move with the child to show that the proposed move is in good faith and is in the child's best interests.

¹⁰⁶ SK *Children's Law Act, 1997*, Above Note 33, s. 6(6).

¹⁰⁷ CAN *Divorce Act*, Above Note 2, s. 16(7).

¹⁰⁸ AB *Family Law Act*, Above Note 32, s. 33(2).

When assessing good faith, it is proposed that judges be directed to consider: the reasons for the move; the likelihood it would enhance the general quality of life of the child and the guardian proposing the move, including improved financial, emotional or educational opportunities; and any existing restrictions on relocation in an order or agreement. However, judges would be prohibited from considering whether a guardian proposing a move with a child would relocate without the child in any event.

If a judge grants an order in favour of relocation, he or she may also order reasonable security (e.g., posting of a bond) to ensure the relocating guardian complies with orders designed to preserve the relationship between the child and the other guardian(s) or people significant to the child.

The granting of a relocation application will likely necessitate a change in the parenting arrangements for a child, like parenting time schedules. The proposed new Act allows a judge to make those changes needed to facilitate the new reality without the need to establish a change in circumstance. However, the judge will be limited to making changes only insofar as needed to accommodate the move and is directed to preserve the existing parenting arrangements to the greatest extent possible. This responds to the criticism that relocation applications may evolve into an unintended re-examination of the entire parenting arrangement. The concern is that previous agreements or court orders regarding which guardian is best to exercise particular responsibilities should not be re-examined simply because the residence of one of the adults and the child is to be different.

On the flip side, if the judge does not grant the request for a relocation order, the proposed move is not to be considered a material change of circumstance that would alone justify a change to existing parenting arrangements.

Recommended Draft Provisions

PART 4 – GUARDIANSHIP AND PARENTING ARRANGEMENTS	
Division 6 - Relocation	
Definition and application	
67	(1) In this Division, “ relocation ” means a move that can reasonably be expected to have a significant impact on the child’s relationship with (a) a guardian of the child, or (b) one or more other persons who have a significant role in the child’s life.
	(2) This Division applies if (a) a guardian of a child plans a relocation (i) of himself or herself, with or without the child, or (ii) of the child, without him or her, and (b) two or more guardians of the child are parties to a written agreement or court order that allocates parental responsibilities for the child.

Notice of relocation

- 68** (1) Subject to subsection (2), the guardian planning a relocation must provide to all other guardians of the child, at least 60 days written notice of
- (a) the date of the relocation, and
 - (b) the name of the municipality or unincorporated area of the new location.
- (2) The guardian planning the relocation is not required to provide written notice under subsection (1) to another guardian if
- (a) there is an ongoing risk of family violence by the other guardian, or
 - (b) there is no ongoing relationship between the child and the other guardian.
- (3) If written notice is required under subsection (1), after the notice is provided and before the date of the relocation,
- (a) the guardians of the child must use their best efforts to cooperate with one another and try to resolve any issues relating to the proposed relocation, and
 - (b) despite paragraph (a), a guardian of the child is not precluded from making an application under section 70 (1) *[orders permitting or prohibiting relocation]*.

Relocation may take place unless guardian objects

- 69** If a guardian of a child planning the relocation of the child, with or without the guardian, provides written notice under section 68 (1) *[notice of relocation]*, the relocation of the child may take place on the date set out in the notice unless another guardian of the child, within 30 days after receipt of the notice, objects to the relocation by filing an application for an order to prohibit the relocation.

Orders permitting or prohibiting relocation

- 70** (1) Subject to this section, if a guardian of a child is planning a relocation of the child, the court may, on application by that guardian or another guardian of the child, make an order permitting or prohibiting the relocation.
- (2) Subject to subsection (3), the court may make an order permitting the relocation of the child under subsection (1) if the guardian planning the relocation satisfies the court that
- (a) the proposed relocation is made in good faith, and
 - (b) he or she has made reasonable efforts to find ways to preserve the relationship between the child and the guardians of the child and the other persons who have a significant role in the child's life,
- unless a guardian who objects to the relocation of the child, satisfies the court that the proposed relocation is not in the best interests of the child.

- (3) If the guardian planning the relocation of the child and another objecting guardian of the child have equal or substantially equal parenting time with the child, the court may make an order permitting the relocation of the child under subsection (1) if the guardian planning the relocation satisfies the court that
 - (a) the proposed relocation is made in good faith, and
 - (b) the relocation is in the best interests of the child.
- (4) In determining if good faith is established under subsection (2) (a) or (3) (a), the court must consider all relevant factors including the following:
 - (a) the reasons for the proposed relocation;
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and the guardian planning the relocation, if that guardian is planning to relocate with the child, including, but not limited to, increasing financial, emotional or educational opportunities;
 - (c) the existence of any restrictions on relocation contained in an agreement or court order; and
 - (d) whether notice was given under this Division if required.
- (5) In determining whether to make an order under subsection (1), the court must not consider whether the guardian planning to relocate with the child would relocate without the child.
- (6) If the court makes an order under subsection (1) permitting the relocation of the child, the court may
 - (a) subject to subsection (7),
 - (i) in the case of an agreement between the guardian planning the relocation and another guardian of the child, make an order under section 48 (2) [*orders that allocate parental responsibilities*], or
 - (ii) in the case of a parenting order respecting the child, make an order under section 49 (1) [*varying, suspending or terminating parenting orders*] and, for the purposes of section 49 (2), the relocation is a sufficient change in circumstances, or
 - (b) order that, as security for arrears and subsequent payments, the guardian planning the relocation provide security in any form that the court directs.
- (7) In making an order described in subsection (6) (a) (i) or (ii), the court must seek to preserve the parenting arrangements under the existing agreement or court order, as applicable, to the greatest extent possible.

Proposed relocation and parenting orders

- 71** If the court makes an order prohibiting the relocation of a child under section 70 [*orders permitting or prohibiting relocation*] a proposed relocation of the child alone does not constitute a change in the needs or circumstances of the child for the purposes of section 49 [*varying, suspending or terminating parenting orders*].

CHAPTER 8: CHILDREN'S PROPERTY

Other Canadian provinces give parents the authority to administer small trusts for their children.¹⁰⁹ In British Columbia the Public Guardian and Trustee administers children's trusts, regardless of their size.¹¹⁰ Parents can go to court to get an order to make them responsible for a child's trust, but the time and expense may outweigh the amount at issue. Families also complain that the fees associated with this service are relatively high for small trusts, and some say this approach undermines families' autonomy.

As well, unlike other provinces including Alberta and Ontario, the existing legislation does not have any criteria to govern the appointment of trustees where the trust is larger.¹¹¹

Consultation Feedback

People were asked whether parents should be able to manage children's trusts under a certain value without the need for a court order appointing them as trustees. There seemed to be some support for the idea, with most respondents choosing \$10,000 as the appropriate maximum value of the trust. Most also agreed that parents or others managing small trusts for children should be required to provide the child with an accounting when the child turns 19.

Recommended Policy

The proposed legislation will allow small trusts to be managed by a child's guardian without the need for a court order. The monetary limit for a small trust will be established by regulation. It is proposed that to qualify as a small trust, the value of the property must not be more than \$10,000. A person owing certain types of property to a child may discharge their obligation to the child by delivering the property to and receiving an acknowledgement from a child's guardian who has responsibility for making day-to-day decisions with respect to the child. The obligation can also be discharged if the property is delivered to and accepted by the Public Guardian and Trustee or to the child if the child has an obligation to support someone else. The form of the acknowledgment, which will be set out in the regulations, will be modelled on the form used in Alberta under the *Minors' Property Regulation*.¹¹²

For larger trusts, the draft legislation proposes a trust-specific best interests test to govern the court appointment of a trustee. The proposed best interests criteria include the:

- apparent ability of the proposed trustee to administer the property;

¹⁰⁹ See e.g., *Minors' Property Act*, S.A. 2004, c. M-18.1, online CANLII: <http://www.canlii.org/en/ab/laws/stat/sa-2004-c-m-18.1/latest/sa-2004-c-m-18.1.html> (last accessed: July 7, 2010), and *ON Children's Law Reform Act*, Above Note 46.

¹¹⁰ Public Guardian and Trustee of British Columbia, "Guardianship and Trust Management Services for Children and Youth," online: http://www.trustee.bc.ca/services/youth/trust_mgmt.html (last accessed: May 21, 2010).

¹¹¹ *AB Minors' Property Act*, Above Note 109, s. 10(2) and *Guardianship Act*, S.N.S. 2002, c. 8, s. 4, online CANLII: <http://www.canlii.org/en/ns/laws/stat/sns-2002-c-8/latest/sns-2002-c-8.html> (last accessed: July 15, 2010).

¹¹² *Minors' Property Regulation*, Alta. Reg. 240/2004, online CANLII: <http://www.canlii.org/en/ab/laws/regu/alta-reg-240-2004/latest/alta-reg-240-2004.html> (last accessed: July 7, 2010).

- merits of the proposed trustee's plan for administering the property;
- views of the child unless it would be inappropriate;
- personal relationship between the proposed trustee of the child and the child;
- wishes of the guardians of the child;
- view, if any, of the Public Guardian and Trustee;
- potential benefits and risks of appointing the proposed trustee to administer the property compared to other available options for administering the property.

Moreover, a judge appointing a trustee may impose the following terms and conditions to protect the child's interests:

- require the trustee to submit the trustee's accounts at specified intervals for the examination and approval of the court;
- limit the duration of the trusteeship;
- specify or limit the types of investment in which the trustee may invest the trust property,
- provide for compensation of the trustee; or
- require the trustee to post a bond or other security.

Court appointed trustees are governed by the *Trustee Act*.¹¹³

The small trusts proposal will promote the value of family autonomy referenced in the Family Justice Reform Working Group's 2005 report¹¹⁴ by allowing a guardian (usually a parent) to manage small trusts for his or her child. In this way, families can avoid the fees associated with professional trustees. However, at the same time, the proposal builds in safeguards, including limits on the value and type of property that the guardian may manage without court appointment as well as the use of written acknowledgements of receipt of property, to reduce the risk of mismanagement of the child's property.

The proposal to include factors for the court to consider in deciding whether to appoint a trustee for larger trusts will add greater clarity to the statute by establishing consistent standards for judges to use.

Recommended Draft Provisions

PART 5 – CHILDREN'S PROPERTY	
Definitions	
72	In this Part:
	"deliver property" includes pay money;

¹¹³ *Trustee Act*, R.S.B.C. 1996, c. 464, online BC Laws:

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96464_01 (last accessed: May 7, 2010).

¹¹⁴ Family Justice Reform Working Group, Above Note 7, at 6.

“person obligated to a child” means a person, including the Crown, who is under a legal or equitable obligation to deliver property to a child or who would be under a legal or equitable obligation to deliver property to a child if the child were an adult;

“Public Guardian and Trustee” means the Public Guardian and Trustee appointed under section 2 (2) of the *Public Guardian and Trustee Act*;

“trust instrument” means a will, deed, declaration or other instrument in writing by which a person creates a trust.

Application to appoint trustee of child’s property

- 73** (1) The court may, on application, appoint one or more persons as trustee of
- (a) particular property to which a child is entitled or is likely to become entitled and for which no trustee has been appointed by a trust instrument, or
 - (b) a child’s property generally.
- (2) The court may appoint a trustee under subsection (1) (a) only if in the court’s opinion it is in the child’s best interests to do so, having regard to the following factors:
- (a) the apparent ability of the proposed trustee to administer the property;
 - (b) the merits of the proposed trustee’s plan for administering the property;
 - (c) the views of the child unless it would be inappropriate to consider them;
 - (d) the personal relationship between the proposed trustee of the child and the child;
 - (e) the wishes of the guardians of the child;
 - (f) the view, if any, of the Public Guardian and Trustee;
 - (g) the potential benefits and risks of appointing the proposed trustee to administer the property compared to other available options for administering the property.
- (3) The court may appoint a trustee under subsection (1) (b) only if the court is of the opinion that it would be in the child’s best interests to do so, having regard to
- (a) the factors referred to in subsection (2), and
 - (b) whether the interests of the child are likely to be better served by an order under subsection (1)(b) than by an order under subsection (1) (a).
- (4) An order under subsection (1) (a) applies to the particular property identified in the order and to any property derived from the investment or disposition of that property.
- (5) Subject to any limitation in the order, an order under subsection (1)(b) applies to all property
- (a) to which a child is entitled at the time the order is made, and
 - (b) to which the child becomes entitled while the order is in effect,
- excluding property for which a trustee has been appointed by a trust instrument or another order.
- (6) An order appointing a trustee under subsection (1) may include any terms or conditions that the court considers to be in the child’s best interests, and without limitation, may

- (a) require the trustee to submit the trustee's accounts at specified intervals for the examination and approval of the court,
 - (b) limit the duration of the trusteeship,
 - (c) specify or limit the types of investment in which the trustee may invest the trust property,
 - (d) provide for compensation of the trustee, or
 - (e) require the trustee to provide security as the court considers appropriate.
- (7) Except as otherwise provided by an order appointing a trustee under subsection (1), the *Trustee Act* applies to the trustee of the trust.

Discharge of certain obligations to child

- 74** (1) This section does not apply to any obligation that
- (a) exceeds a prescribed amount,
 - (b) arises out of a contract with a child,
 - (c) may be discharged by delivering the property to a trustee who is authorized by a trust instrument or court order to receive the property, or
 - (d) is of a class of property prescribed by regulation.
- (2) A person obligated to a child may discharge the obligation
- (a) by
 - (i) delivering the relevant property to
 - (A) the child, if the child has a legal duty to support another person, or
 - (B) a guardian who has the responsibility to make day-to-day decisions affecting the child, and
 - (ii) obtaining an acknowledgement in the form prescribed in the regulation from the person to whom the property is delivered, or
 - (b) by delivering the relevant property to the Public Guardian and Trustee if the Public Guardian and Trustee is willing to accept the property.
- (3) A person obligated to a child is entitled to rely on a representation in the acknowledgement.
- (4) A guardian who receives property under subsection (2) (a) (i) (B) holds the property in trust for the child.
- (5) Nothing in this section affects the duty of a trustee to deal with trust property in accordance with the terms of the trust.

CHAPTER 9: FAMILY PROPERTY

I. Division of Family Property

The *Family Relations Act*'s division of property regime has been criticized for being so flexible that outcomes are difficult to predict. Over two decades ago, the British Columbia Law Reform Commission proposed making fundamental changes to the way family property is divided,¹¹⁵ but there was little support at that time from lawyers.¹¹⁶ Some lawyers prefer the flexibility of the existing model, even if it is less certain, because it allows for consideration of each couple's individual circumstances in deciding what is fair.

Identification and Distribution of Family Property and Family Debts

There are two main aspects to the law of property division: identifying family property and distributing it.

Only the laws of British Columbia and the Yukon identify divisible property based on whether the property was "ordinarily used for a family purpose."¹¹⁷ In contrast, all other places in Canada have classes of property that are excluded from the pool of assets subject to distribution. Excluded property typically includes pre-relationship property, personal injury awards, and inheritances.¹¹⁸ This approach provides greater certainty in identifying property subject to division.

British Columbia's current law relies heavily on judicial discretion to sort out property division disputes. The existing statute provides a general framework for dividing property but relatively few detailed rules. As well, in British Columbia, judges have significant discretion with regard to

¹¹⁵ British Columbia Law Reform Commission, *Property Rights on Marriage Breakdown*, Working Paper No. 63 (1989), online: <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/42100/wp63.htm> (last accessed: July 15, 2010).

¹¹⁶ *Ibid.* at Appendix C.

¹¹⁷ BC *Family Relations Act*, Above Note 1, ss. 58 and 59; *Family Property and Support Act*, R.S.Y. 2002, c.83, ss.4-6, online Yukon Government: <http://www.gov.yk.ca/legislation/acts/faprsu.pdf> (last accessed: July 9, 2010).

¹¹⁸ See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 s. 7, online CANLII: <http://www.canlii.org/en/ab/laws/stat/rso-2000-c-m-8/latest/rso-2000-c-m-8.html> (last accessed: July 9, 2010); *Family Property Act*, S.S. 1997, c. F-6.3, s. 23, online CANLII: <http://www.canlii.org/en/sk/laws/stat/ss-1997-c-f-6.3/latest/ss-1997-c-f-6.3.html> (last accessed: July 14, 2010); *Family Property Act*, C.C.S.M. c. F25, ss. 7 and 8, online CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-f25/latest/ccsm-c-f25.html> (last accessed: July 14, 2010); *Family Law Act*, R.S.O. 1990, c.F-3, s. 4(2) online CANLII: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-f3/latest/rso-1990-c-f3.html> (last accessed: July 14, 2010); *Marital Property Act*, R.S.N.B. 1980, c.M-1.1, s. 6, online CANLII: <http://www.canlii.org/en/nb/laws/stat/snb-1980-c-m-1.1/latest/snb-1980-c-m-1.1.html> (last accessed: July 14, 2010); *Matrimonial Property Act*, R.S.N.S. 1989, c.275, s. 4(1), online CANLII: <http://www.canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html> (last accessed: July 14, 2010); *Family Law Act*, R.S.N.L. 1990 c. F-2, s. 18(1)(c), online CANLII: <http://www.canlii.org/en/nl/laws/stat/rsnl-1990-c-f-2/latest/rsnl-1990-c-f-2.html> (last accessed: July 14, 2010); *Family Law Act*, R.S.P.E.I. 1998, c.F-2.1, s. 4(b), online CANLII: <http://www.canlii.org/en/pe/laws/stat/rspei-1988-c-f-2.1/latest/rspei-1988-c-f-2.1.html> (last accessed: July 14, 2010); *Family Law Act*, S.N.W.T. 1997, c.18, s. 35 online CANLII: <http://www.canlii.org/en/nt/laws/stat/snwt-1997-c-18/latest/snwt-1997-c-18.html> (last accessed: July 14, 2010); and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18, s. 35, online CANLII: <http://www.canlii.org/en/nu/laws/stat/snwt-nu-1997-c-18/latest/snwt-nu-1997-c-18.html> (last accessed: July 14, 2010).

dividing property unequally at the distribution stage. While experienced family lawyers are familiar with the developments from the case law, the governing law is relatively inaccessible to spouses without lawyers. The broad discretion in the existing Act makes it harder to predict outcomes. This uncertainty, in turn, can fuel and prolong disputes.

Other criticisms of the existing property division model are that:

- It can be time-consuming and expensive: it is not always easy to determine whether an asset has been used for a family purpose.
- It treats similar kinds of property differently. For example, RRSPs, including the amount accumulated before marriage, are subject to division while the general rule for pensions is that the pre-marriage portion is not divided.
- It does not provide sufficient clarity about what to do with certain kinds of property, such as gifts, inheritances, ventures, court awards and income tax refunds.
- It does not specifically address division of debts.

Consultation Feedback

Although stakeholders resoundingly agreed on the need for reform to increase the certainty of the law, opinion was divided on whether to change the property division model used in British Columbia from a family purpose model to an excluded property model. Stakeholders also agreed that the broad judicial discretion characterizing the current model reduces predictability, prolonging the time and cost associated with resolving property division disputes.

Those who disagreed with the move to an excluded property model argued that such a change would unsettle the existing body of law that has developed around the current model. Some thought the judicial discretion in the existing model afforded the law valuable flexibility. Some also suggested that a new model might result in women leaving marriages with fewer assets than they do now. Others disagreed.

Those who agreed with moving to an excluded property model said this would make the law simpler, clearer and easier for the average person to understand. As a result, fewer people would need to go to court to settle their property disputes. It would have the benefit of aligning British Columbia better with most other provinces in this increasingly mobile age. It was also suggested that an excluded property regime accords better with most people's intuitive sense of fairness.

Stakeholders also agreed that debts should be dealt with expressly in the new statute.

Recommended Policy

It is proposed that the new family legislation move to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division.

Family property will include all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the

value of the asset during the relationship is divisible. Whether an asset was ordinarily used for a family purpose will not be relevant in deciding if it is family property.

Proposed exclusions include:

- gifts and inheritances to one spouse;
- settlements or damage awards from tort claims, except that part meant to compensate both spouses or to replace wages;
- non-property related insurance proceeds, except that part meant to compensate both spouses or to replace wages;
- pre-and post- relationship property; and
- trust property, unless the beneficiary spouse has an immediate and absolute interest in the trust property or has the power to terminate the trust.

This resembles the approach taken under the Alberta *Matrimonial Property Act*.¹¹⁹

Where there is a dispute about whether an asset is excluded property, the person claiming the exclusion will bear the burden of proof. While spouses will share in the increased equity in an excluded asset, there remains an outstanding policy issue of what to do with decreased equity in an excluded asset. Please refer to the final section of this part entitled “Outstanding Policy Issues.”

The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people’s expectations about what is fair. They “keep what is theirs,” (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. Where one spouse enters the relationship with more assets than the other, providing that spouses share the increase in the value of the excluded property promotes a fair outcome. For example, assume one spouse enters the relationship with a house and a mortgage. During the relationship, the spouses pay down the mortgage and invest in renovations to the house. Upon separation, the spouse who brought the house into the relationship retains the value the house had at the beginning of the relationship, and the associated mortgage. The spouses share in the increased equity flowing from renovations and mortgage payments over the duration of the relationship.

Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement.

As with the current law, the new property division scheme will presume a 50-50 division of all family property. The new law will also presume family debts are to be equally divided.

¹¹⁹ AB *Matrimonial Property Act*, Above Note 118, s. 7(2).

If an equal division of family property and debts causes unfairness, judges will have discretion to address this, although in a more limited manner than under the existing law. That is, a judge may order an unequal division if it would be clearly unfair not to do so having regard to specified criteria. The proposal to change the standard for judicial reapportionment of family property from “unfair” to “clearly unfair” is meant to create a higher threshold and make the test for reapportionment stricter.

In limited circumstances, judges will also be able to divide or transfer excluded property. For example, where family property is inaccessible because it is located in another country, a judge may instead divide excluded property in British Columbia to achieve a fair division.

The ability to reapportion family property or divide or transfer excluded property ensures that judges still have some flexibility to take into account a spouse’s unique circumstances, but may only do so based on a limited set of factors.

Common-Law Spouses

Generally, the *Family Relations Act*’s property division scheme does not apply to unmarried spouses. Where a common-law spouse seeks a share in the other’s property, he or she must bring a constructive trust claim. These are complex, expensive and often unsuccessful.

The one exception is when unmarried couples make an agreement under section 120.1 of the *Family Relations Act*. This section was intended to allow common-law spouses to opt into the Act’s property division scheme by making an agreement with respect to their property. However, the way that the section has been interpreted has resulted in the Act’s property division rules applying even when common-law spouses specifically agree in their property agreement not to be bound by the Act.¹²⁰ Section 120.1 has been roundly criticized in the Family Justice Reform Working Group’s report¹²¹ and by family lawyers generally because it discourages common-law couples from making agreements to deal with their property or to resolve or avoid a property dispute.

Consultation Feedback

The question of whether statutory property division rules should apply to common-law spouses, as well as married spouses, attracted the most attention in the consultations on property. There were strong views on both sides of the debate.

Those who opposed the idea noted that not everyone forms relationships with the expectation of financial inter-dependence. In fact, some couples may choose not to marry specifically to avoid equal property division. This group said that including couples who have lived together for only two years would expand the reach of property division rules too far and would capture too many

¹²⁰ See e.g., BC *Family Relations Act*, Above Note 1, s. 120.1 and *Family Law Sourcebook for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.5.

¹²¹ Family Justice Reform Working Group, Above Note 7 at 80.

casual relationships. Lawyers on this side of the debate also noted that a challenge to strike down the different treatment of married and common-law spouses regarding property division in Nova Scotia's law had failed before the Supreme Court of Canada in 2002.¹²²

Supporters of expanding the property division regime to include common-law couples noted that various other areas of law, including wills and estates and income tax, already recognize common-law relationships and extend the same rights and responsibilities to these couples as to married couples. Indeed, support obligations under the *Family Relations Act* apply to common-law couples after two years of cohabitation.¹²³ The difficulty and expense common-law spouses currently face in making a constructive trust claim was also raised often. In response to the argument that family law should not undermine a legitimate form of private ordering (i.e., the choice to marry or not and the legal consequences flowing from that choice), several respondents in the consultation asserted that many people do not know what the legal consequences of marriage are. That is, those who are choosing common-law relationships over marriage may not be doing so with any awareness or understanding of the law of property division. It was argued that, in fact, many British Columbians wrongly assume that the *Family Relations Act*'s presumption of equal property division already applies to common-law couples after two years of living together.

One point of agreement was the need to repeal section 120.1. As one stakeholder noted, the vast majority of common-law couples who want cohabitation agreements want them for the precise purpose of protecting their assets from subsequent claims by their partners, which is exactly what section 120.1 does not allow them to do.

Recommended Policy

It is proposed that property division scheme in the new statute apply to all married spouses as well as to unmarried spouses who have cohabited in a marriage-like relationship for at least two years, or less if they have a child together. It is also proposed that section 120.1 of the *Family Relations Act* not be carried forward.

The recommended policy recognizes that the number of common-law relationships is on the rise and that the vehicle of constructive trust claims inadequately protects the interests of this growing number of unmarried spouses. It also makes for greater consistency in the treatment of unmarried spouses in family law generally and across related laws.

As well, many of the concerns raised in the consultation period about expanding the division of property to include common-law spouses are answered by the changes to the proposed property model. For example, concerns about applying the property division rules to short term relationships are answered by the two year cohabitation requirement and by the fact that under the new model, the value of pre-relationship property is excluded from division.

¹²² See *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83.

¹²³ BC *Family Relations Act*, Above Note 1, s.1, definition of "spouse".

The proposed reforms also facilitate property agreements. If married or common-law spouses do not wish the statutory property division rules to apply to them, they can make different arrangements in a written agreement. For information about the approach of the new law to agreements in general, please see Chapter 2: Non-Court Dispute Resolution and Agreements.

Other Property-Related Issues

Other criticisms of the existing law were raised in relation to triggering events, valuation dates, time limits, conflict of laws, and orders for interim distribution of property. Each of these issues is discussed in turn.

Currently, unless spouses are able to make a separation agreement, the only way to trigger entitlement to family assets is to go to court, most commonly for a declaration that there is no reasonable prospect of reconciliation. The Family Justice Reform Working Group recommended there be a non-court based way for spouses to trigger entitlement.¹²⁴

The *Family Relations Act* does not provide any guidance on setting a date for valuing family property. Critics say that judicial discretion in determining valuation dates is too broad and results in too much uncertainty which, in turn, makes negotiating settlements more difficult.

The time limits under which a spouse or common-law spouse may make an application for property division or spousal support are embedded in the definition of spouse. (Common-law spouses may only make a property application under the *Family Relations Act* if they have made an agreement that falls under s. 120.1.) This means the limitation periods for these applications are not evident on the face of the legislation. As well, the time limits are different: married spouses generally have two years after divorce to make an application while common-law spouses have only one year after separation.

The current Act is also silent on how conflict of laws problems relating to family property should be resolved. This is increasingly a problem as families become more mobile. In conflicts cases involving family property, judges first have to satisfy themselves that they have jurisdiction to hear the case. If they do, they then must determine which jurisdiction's law governs. The *Court Jurisdiction and Proceedings Transfer Act*,¹²⁵ which came into effect in 2006 and sets out the circumstances in which a British Columbia court has jurisdiction to hear a case, is inconsistent with family law principles and does not include most of the circumstances relevant to determining a "real and substantial connection" for establishing jurisdiction in family property cases. As well, choice of law in family property cases continues to be governed by the common law. This fosters complex, technical, time-consuming and expensive litigation.

Lastly, the *Family Relations Act* does not explicitly authorize orders respecting the interim distribution of family property, although case law provides some authority to order interim

¹²⁴ Family Justice Reform Working Group, Above Note 7 at 79 and 80.

¹²⁵ *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03028_01 (last accessed: June 8, 2010).

distributions but in very limited circumstances.¹²⁶ Other provinces (including Manitoba, Saskatchewan, Nova Scotia and Ontario) provide a more liberal approach than British Columbia, both in legislation and case law. Although only Manitoba has legislation explicitly providing for orders for interim distribution, including payment or transfer of property,¹²⁷ case law in other provinces has created tests for interim distribution of property.¹²⁸ This can be a particularly important matter for an economically weaker spouse. If litigation is required to resolve a property division dispute and resources are required to realize entitlement, interim access to resources may help to ensure fair outcomes and better access to resolution.

Consultation Feedback

While there was general agreement that the current triggering events need to change, opinion was mixed on whether or not to make the date of separation the only triggering event for property division. The call for change reflects the fact that it can take a long time to conclude a separation agreement, and, in the meantime, a spouse has no way to protect his or her rights to family property without going to court. However, some respondents expressed concern about using the date of separation as the only triggering event insofar as it is not always clear when separation has occurred and because retaining some flexibility regarding the triggering date could help to ensure the best economic outcome for separating spouses.

There was not much feedback during the consultations on the issue of time limits. The majority said that married and common-law couples should be subject to the same limitation period for bringing a claim.

On the conflict of laws question, the Ministry asked for feedback on adopting the *Uniform Jurisdiction and Choice of Laws Rules in Domestic Property Proceedings Act* developed by the Uniform Law Conference of Canada.¹²⁹ Views were mixed. Some respondents supported adopting this uniform law and others felt conflict of laws was not a priority issue and could be adequately dealt with using existing case law and conflict of law principles.

During the consultations a number of family lawyers raised the need for a provision that would allow the court to make an interim property distribution order in circumstances where a spouse needs resources to adequately participate in efforts to resolve the dispute. These lawyers specifically noted the unfairness that can result where one spouse has no access to financial resources to pursue a claim.

¹²⁶ See e.g., *Ansari v. Ansari*, 2000 BCSC 634.

¹²⁷ MB *Family Property Act*, Above Note 118, s.18.1(1).

¹²⁸ See e.g., *Edwards v. Edwards*, [2003] S.J. No. 257 (Q.B.) (Q.L.); *Luke v. Luke*, [2003] N.S.J. No. 143 (S.C.) (Q.L.); and *Zadianski v. Zadianski*, [2001] O.J. No. 2886 (Sup. Ct. Jus.) (Q.L.).

¹²⁹ Uniform Law Conference of Canada, *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*, online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1j1> (last accessed: July 14, 2010).

Recommended Policy

The following is proposed for the new legislation:

Triggering Events

The proposed Act will replace the existing triggering events with one triggering event – the date of separation. Spouses would not be required to go to court to trigger entitlement to an interest in family property. Using the date of separation accords with most people's expectations; that is, it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives. The recommended approach should also eliminate problems that can arise in the existing model if, for example a spouse dies or declares bankruptcy between the date of separation and the occurrence of the triggering event.

Valuation Date

It is proposed that the new law provide for a valuation date that, absent a contrary arrangement is either the date of an agreement or the date of a court order dividing the property. Making the valuation date clear in the statute should make the rules easier to understand and to apply. Flexibility is ensured by allowing spouses to set a different valuation date by agreement.

Time Limits

The proposed statute will increase the time limit for common-law spouses to start a claim for property division or spousal support from one year to two years after separation. For married spouses the time limit will remain at two years after a divorce order or a declaration of nullity. These time limits will no longer be part of the definition of "spouse". While this will make the law clearer on its face and will promote greater consistency between married and common-law spouses, time limits will not be identical for married and common-law spouses. The date of separation which starts the time limit running for common-law spouses is earlier than the date of divorce which starts time running for married spouses.

Conflict of Laws

The proposed Act will include the provisions from the Uniform Law Conference of Canada's *Uniform Jurisdiction and Choice of Laws Rules in Domestic Property Proceedings Act* that address both jurisdiction to hear the case and choice of law. This is intended to eliminate many of the technicalities and inconsistencies found in the case law on conflict of laws. It simplifies the choice of law rules and includes jurisdiction rules tailored to family property cases. It provides a more solid statutory basis for making orders to achieve a fair division of property when property is located outside the province. The model provision should reduce the time and expense required to resolve conflict of law issues in property disputes. Although no other provinces or territories have adopted the uniform act fully, most have clearer provisions

regarding jurisdiction and conflict of laws than British Columbia. In a 1998 report, the British Columbia Law Institute recommended the adoption of the *Uniform Act*.¹³⁰

Interim Orders

The proposed legislation will enable judges to make orders for interim distribution of property prior to final resolution of the issues. Distribution will be based on a list of factors, including whether the interim distribution is necessary and whether it would prejudice either spouse. Interim distribution orders can play a role in protecting vulnerable spouses and making assets available to economically disadvantaged spouses who need them to achieve a fair division of family property.

Recommended Draft Provisions

PART 1 – DEFINITIONS AND INTERPRETATION

Definitions

1 In this Act:

“spouse” means a person who

(a) is married to another person,

(b) lived with another person:

(i) in a marriage-like relationship for a continuous period of at least 2 years, or

(ii) in a marriage-like relationship of some permanence if the persons are together the parents of a child

and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender, or

(c) is a former spouse for the purposes of applying for an order under this Act.

PART 10 – COURT PROCESSES

Time limit for specific applications

161 (1) Subject to subsection (3), a person who is or was married to another person must make an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 within 2 years of

(a) the date a judgment granting a divorce of the spouses is made, or

(b) the date an order is made declaring the marriage of the spouses to be null and void.

¹³⁰ British Columbia Law Institute, *The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings*, Report No.1 (April 1998) at 12, online: <http://www.bcli.org/sites/default/files/uclrdpp.pdf> (last accessed: July 14, 2010).

- (2) Subject to subsection (3), a person who is or was living with another person in a marriage-like relationship as defined in section 1 (b) [*definitions: spouse*] must make an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 within 2 years of the date of separation of the spouses.
- (3) The time limit set out in subsection (1) and (2) does not apply if an order is made under section 18 [*setting aside agreements generally*] or section 21 [*setting aside agreements respecting property, debt or spousal support*] and a party to the agreement makes an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6.

PART 6 – PROPERTY DIVISION

Division 1 - Determination of Family Property and Family Debt

Definitions and interpretation

75 In this Part:

“**excluded property**” means property as described under section 77 (1) [*excluded property*];

“**family debt**” means family debt as described under section 78 [*family debt*];

“**family property**” means family property as described under section 76 [*family property*];

“**property**” includes all of the following:

- (a) family property; and
- (b) excluded property.

Family property

76 (1) Subject to section 77 [*excluded property*], family property means

- (a) all real property and personal property in which, on the date the spouses separate, at least one spouse has an interest; and
 - (b) all real property and personal property in which at least one spouse acquires an interest after the spouses separate through income received from or in place of property referred to in subsection (a).
- (2) Without limiting subsection (1), family property includes the following:
- (a) a share or interest in a corporation;
 - (b) an interest in a partnership, association, organization, business or venture;
 - (c) property owing to a spouse including
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
 - (d) property over which a spouse has, alone or with another person, a power of appointment that may be exercised in favour of the spouse;

- (e) property that a spouse has disposed of but for which the spouse may, alone or with another person, exercise a power to revoke the disposition or to do anything with the property;
- (f) an investment, security or money in an account with a financial institution; and
- (g) a pension of a spouse.

Excluded property

- 77** (1) Except for the amount by which the value of a spouse's interest in property increases during the spousal relationship, the interest of a spouse in the following property is not family property:
- (a) property acquired by a spouse before the spousal relationship started;
 - (b) gifts or inheritances to a spouse;
 - (c) an award or settlement for damages in tort in favour of the spouse, except that part of the award or settlement that is compensation for loss to both spouses or lost wages of the spouse;
 - (d) money paid or payable under an insurance policy that is not paid or payable with respect to property, except that part of the proceeds that is compensation for a loss to both spouses or lost wages of the spouse; and
 - (e) property held in trust for the benefit of a spouse, unless the spouse has an immediate and absolute interest in the trust property or has the power to terminate the trust.
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is
- (i) property referred to in subsection (1), or
 - (ii) acquired from property referred to in subsection (1).

Family debt

- 78** (1) Family debt means all financial obligations incurred by at least one spouse during the spousal relationship.
- (2) For greater certainty, family debt does not include financial obligations incurred after the date of separation.
- (3) Nothing in this Part affects the rights and remedies of third party creditors, guarantors or assignees in relation to family debt.

Division 2 – Dividing Family Property and Family Debt

Valuation of family property and family debt

- 79** (1) Except in relation to a benefit under a pension plan, the division of family property and family debt must be based on the value of the property and debt as of the date an agreement or court order dividing the property is made, unless the agreement or court order provides otherwise.
- (2) The fair market value is the value of an item of family property unless another value is agreed to or ordered.

Equal division of family property and family debt

- 80** (1) Each spouse is entitled to an undivided half interest in family property and is equally responsible for family debt except
- (a) as otherwise provided in an agreement or court order, or
 - (b) in relation to a benefit under a pension plan, with respect to which, each spouse is entitled to a share of benefits as determined under Part 7 [*Pension Division*].
- (2) The Supreme Court may on application order that family property or family debt be:
- (i) divided into shares fixed by the court, or
 - (ii) transferred to the spouse.

Unequal division of family property and family debt

- 81** (1) This section applies if, having regard to the factors listed in subsection (2), it would be clearly unfair to
- (a) equally divide family property or family debt, or
 - (b) divide benefits as required under Part 7 [*Pension Division*].
- (2) For the purposes of subsection (1), the following factors must be considered:
- (a) the duration of the spousal relationship;
 - (b) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the spousal relationship;
 - (c) a spouse's direct or indirect contribution, financially or otherwise, to the acquisition, conservation, improvement, operation or management of a business owned or operated by at least one of the spouses;
 - (d) whether actions or omissions of a spouse during the relationship or after the date of separation caused a significant change in the value of an item of family property beyond market trends;
 - (e) the terms of any oral or written agreement between the spouses;
 - (f) whether a spouse has made, without the other spouse's consent,
 - (i) a substantial gift of property to a third party, or
 - (ii) a transfer of property to a third party other than a purchaser in good faith for value;
 - (g) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or any order of the court;
 - (h) whether a spouse has dissipated property, or otherwise substantially reduced the value of property;
 - (i) a spouse's direct or indirect contribution to the career or career potential of the other spouse;

	(j) whether an item of family debt was incurred without the knowledge or consent of the other spouse;
	(k) the extent to which each spouse directly or indirectly benefitted from family debt incurred;
	(l) the ability of each spouse to pay where the amount of family debt exceeds the value of family property; and
	(m) any other relevant fact or circumstance.
	(3) In the circumstances set out in subsection (1), the Supreme Court may on application order that family property or family debt be
	(i) divided into shares fixed by the court, or
	(ii) transferred to the spouse.
	Division or transfer of excluded property
82	(1) Excluded property may only be divided if
	(a) one of more items of family property are not available to effect the division of family property under section 80 [<i>equal division of family property and family debt</i>] or section 81 [<i>unequal division of family property and family debt</i>]; or
	(b) it would be clearly unfair not to do so having regard to
	(i) the duration of the spousal relationship, or
	(ii) a spouse's direct or indirect contribution to the preservation, maintenance, improvement, operation, or management of excluded property.
	(2) In the circumstances set out in subsection (1), the Supreme Court may on application order that one or more items of excluded property be
	(i) divided into shares fixed by the court, or
	(ii) transferred to the spouse.
	Determination of ownership, possession or division
83	(1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property or division of debt under this Part and may make orders that are necessary, reasonable or ancillary to give effect to the determination.
	(2) Without limiting subsection (1), the Supreme Court may do one or more of the following in an order under this section:
	(a) declare the ownership of or right of possession to property;
	(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
	(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of dividing the property or debt under this Division;

	(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts; (e) order that property forming all or a part of the share of either or both spouses be transferred to, or held in trust for, or vested in a child; (f) order that one spouse is responsible for payment of an item of debt and must indemnify the other spouse for that item of debt; (g) order a sale of a property for payment of an item or items of debt; (h) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property, and order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the <i>Chattel Mortgage Act</i>, R.S.B.C. 1979, c. 48, section 19 of the <i>Sale of Goods on Condition Act</i>, R.S.B.C. 1979, c. 373, or section 58 and section 67 of the <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359.
	(3) If the Supreme Court is satisfied that a spouse has, for the purpose of defeating a spouse's claim to an interest in property, transferred or intends to transfer the property to a third person who is not a purchaser in good faith for value, the Supreme Court may, on application, make an order (a) to restrain the transfer, or (b) to vest all or a portion of the property in, or in trust for, the other spouse.
	Proceedings involving treaty lands
84	(1) If the final agreement of a treaty first nation so provides, in proceedings under this Part in which: (a) a parcel of the treaty lands of a treaty first nation that is entitled under its final agreement to make laws restricting alienation of its treaty lands is at issue, and (b) at least one spouse is a treaty first nation member of the treaty first nation, that treaty first nation has standing in the proceeding. (2) In a proceeding to which subsection (1) applies, the court must consider, among other matters, any evidence or representations in respect of the applicable treaty first nation's laws restricting alienation of its treaty lands. (3) The participation of a treaty first nation in a proceeding to which subsection (1) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.
	Interim orders respecting property
85	(1) The Supreme Court must on application make an order restraining a spouse from disposing of any property at issue under this Part or Part 7 [<i>Pension Division</i>] until or unless the other spouse establishes that a claim made under this Part or Part 7 [<i>Pension Division</i>] will not be defeated or substantially impaired by the disposal of the property.

- (2) The Supreme Court may on application make an order for the possession, delivery, safekeeping and preservation of property at issue under this Part or Part 7 [*Pension Division*].
- (3) The Supreme Court may make an order under subsection (1) or (2) before notice of the application is served on the other spouse or may order that notice of the application be served on the other spouse.
- (4) The Supreme Court may on application make an order for the interim distribution, of property at issue under this Part if satisfied the distribution is needed prior to the final determination of the matter for the purpose of providing money to fund
 - (a) anything that may assist the parties in resolving a family law dispute, or
 - (b) an application under this Act.
- (5) In determining whether to make an order under subsection (4) the Supreme Court must consider whether the interim distribution of property may prejudice one or both spouses.
- (6) Despite section 176 (2) [*court may vary, suspend or terminate orders*], the Supreme Court may on application vary or terminate an order made under this section.

Conflict of Laws

To view the proposed jurisdiction and conflict of laws provision, please see the *Uniform Jurisdiction and Choice of Laws Rules in Domestic Property Proceedings Act* developed by the Uniform Law Conference of Canada. Online: <http://www.ulcc.ca/en/us/>

Outstanding Policy Issues

Question:

1. Should both the increased and decreased equity of excluded assets be subject to division under the proposed property division rules? Why or why not?

II. Division of Pensions

The financial well-being of many former spouses turns on the workability of the pension division provisions in family law. Because pension plans are complex, the legal rules dealing with the division of benefits must be set out with precision. The British Columbia Law Institute, in its May 2006 Report entitled: *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*,¹³¹ concluded that the current pension division legislation is working well, but there are some important areas where refinements and additional guidance is required. In some cases the complexity of pension plans means that the current legislation does not cover every eventuality, causing losses to former spouses and the risk of professional negligence claims against lawyers. Similarly, any uncertainty in the law makes pension administration more difficult and costly.

¹³¹ British Columbia Law Institute, *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*, Report No. 44 (May 2006), online: http://www.bcli.org/sites/default/files/Pension_Division_Review_FRA_Part_6.pdf (last accessed: May 19, 2010).

Increasing the certainty and predictability of the pension division provisions will benefit a broad range of people: former spouses, the lawyers who advise them as well as the pension plan administrators who implement the division of pension benefits on a daily basis.

Consultation Feedback

The proposals in the pension division discussion paper largely reflected the recommendations of the British Columbia Law Institute report. Respondents agreed that it would be helpful to clarify and simplify the pension division provisions in the new family law.

Recommended Policy

The proposals address a number of ambiguities in the existing law, including:

- the division of pre-retirement survivor benefits, which is important because the current law has generated unfair results for former spouses;
- the ability to designate a new beneficiary, such as a child, for the portion of a member's death benefit that exceeds the former spouse's share;
- the election options available to members and limited members (i.e., former spouses) in defined benefit pension plans;
- the privacy rights of members and former spouses;
- entitlement in situations where there are overlapping, inconsistent rights, such as where a person has an entitlement to both spousal support and a share of a pension or entitlement to a share of pension benefits as a limited member and additional rights as a spouse. Another example is where rights are affected by a change of status, which can occur on the retirement of the plan member or a loss of spousal status; and
- the division of supplementary pensions and disability benefits.

With respect to pension plan administrators, the recommended legislation:

- outlines the steps pension plan administrators are to take when they know or suspect a former spouse has an interest in a pension, but they have not yet received a formal notice; and
- provides more guidance in relation to disclosure of information to a former spouse.

The pension division provisions in Part 7 of the proposed Act incorporate a number of major and minor reforms, largely as proposed by the British Columbia Law Institute.¹³² A description of the major reforms follows. (Note that changes to the pension division regulations will also be needed. They will not be discussed here, but will be largely based on the proposals for changes to the regulations included in the British Columbia Law Institute's report).

The Property Division and Pension Division Parts of the proposed statute will apply to married spouses and to common-law spouses under the definition of "spouse," which is being expanded

¹³² British Columbia Law Institute, Above Note 131.

to include people in a marriage-like relationship of at least two years, or less if they have a child together. The general rule is that pensions that accumulate during such relationships are family property to be divided when the relationship ends. This flows from the interplay of the sections covering what is “family property” and what is “excluded property” in Part 6: Property Division.

The proposal that addresses the fair division of pre-retirement survivor benefits is set out in Part 7: Pension Division in section 99 [*death of member or limited member*]. It provides that if a plan member dies before retirement and before the pension is divided, the former spouse receives survivor benefits equal to the former spouse’s share of the pension had it been divided during the member’s lifetime. This is done using the commuted value of the former spouse’s share as calculated as of the day before the death of the member.

Under the current law, there are circumstances where, if the member dies before the pension is divided, the former spouse can end up with nothing, or with twice as much as would have been received if the pension had been divided during the member’s lifetime, depending on how the plan calculates preretirement survivor benefits. The recommended change will rectify this uncertainty and promote greater fairness.

The related proposal that allows a pension plan member to designate a new beneficiary in relation to that part of the survivor benefits that exceed the former spouse’s proportionate share is set out under section 100 [*entitlement to preretirement survivor benefits*]. This provision prevents the former spouse from receiving a windfall. The excess will go to another beneficiary named by the member (e.g., a child) or to the member’s estate.

Under the current rules, if the former spouse does not agree to the change of beneficiary designation, the only recourse to the member is to apply for a court order.

The proposal giving former spouses the same options for taking benefits as plan members in relation to the former spouse’s share of a defined benefit pension is set out in section 90 [*rules respecting local defined benefit plans*]. The idea is to give the plan member and the former spouse the same planning tools. The general rule is that if the member has not yet taken the pension but is eligible to do so, the former spouse has the right to receive his or her share “by any method the member could receive benefits”.

Privacy rights are dealt with in Division 7: Administrative Matters in section 110 [*information from plan*]. As is currently the case under the *Family Relations Act*, pension plan administrators are to provide certain prescribed information, about the pension plan to the former spouse although the points in time at which the information must be provided have changed somewhat. The section now also sets out that pension plan administrators are not to provide personal information about the plan member without the plan member’s written consent. As with all legislation, an express requirement to disclose overrides provincial privacy laws, raising the need to carefully define the balance between one person’s entitlement to information and another’s entitlement to protect the confidentiality of personal information.

Another major goal is to remedy overlapping or inconsistent entitlements. One example is to provide guidance on reviewing a support obligation when one of the spouses begins receiving a share of a divided pension, or becomes eligible to do so. This is addressed in Part 8: Child and Spousal Support, in section 138 [*review of spousal support*]. Another example in Part 7 is section 121 [*no further entitlement after division of benefits*] which sets out the rules that determine when, after property is divided between former spouses, entitlement to preretirement survivor benefits or postretirement survivor benefits should cease.

Further guidance on technical issues related to supplemental pension plans and disability benefits is also proposed. Each of these is discussed in turn.

Supplemental plans pay benefits to high income earners that exceed the amounts the *Income Tax Act*¹³³ permits to be paid under a registered plan. In many cases, supplemental benefits can exceed the value of a registered pension several times over. The *Family Relations Act* has only a rudimentary rule dealing with them that fails to provide a former spouse with any security for lifetime payments because typically payments end when the member dies.¹³⁴ The proposed Act rectifies this gap by including more detailed provisions regarding their division. See Division 4: Division of Other Benefits, section 95[*rules respecting supplemental pension plans*]. These specify, for example, that if the Supplemental Pension Plan is structured as a defined benefit plan, the former spouse can elect to take a separate pension to run for the duration of the former spouse's lifetime (i.e., not that of the plan member). In other words, whatever options are available to the plan member under the Supplemental Pension Plan, these, too, are available to the limited member or former spouse.

The proposed Act also provides more detailed rules that are tailored to the special features of disability benefits. For example, in contrast to the existing law, which provides a rule for dividing disability benefits after the member reaches age 60 on the basis that, at that date, the benefits are equivalent to pension entitlement, the proposed Act recognizes that there will be circumstances where these are quite properly divided at any time. See Division 4: Division of Other Benefits, section 97 [*rules respecting disability benefits*].

There are also two proposals relating to pension plan administrators. The first addresses the liability of pension plan administrators. As described in the section 119 [*administrator not liable*], an administrator can avoid potential liability, in situations where the administrator has not yet received formal notice of a former spouse's interest (e.g., in an order, agreement or notice) but suspects or knows of an interest, by doing one of three things:

- requiring the plan member to register the former spouse as a limited member;

¹³³ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

¹³⁴ BC *Family Relations Act*, Above Note 1, s.70(1), definition of "extraprovincial plan". As an extraprovincial plan is defined to include a supplemental pension plan, the rule that applies to extraprovincial plans in section 77 also governs supplemental pension plans.

- requiring the plan member to prove that the former spouse does not have an interest in the pension; or
- giving the former spouse advance notice before taking any action.

Second, as in the *Family Relations Act*, there is authority to set administrative fees in the new Act. This is found in section 117 [*administrative costs*]. (The amount of the fees will be set out in the regulations.) A new provision will allow pension plan administrators to deduct the fee from the payment of benefits.

The main purpose of the proposed changes is to make the law more certain and understandable by addressing gaps or ambiguities that have been identified. The changes are also designed to modernize the law of pension division and to protect the economic well-being of both married and common-law spouses.

In combination, the changes will simplify separating the economic lives of former spouses, while promoting the financial security of both.

Recommended Draft Provisions

PART 1 – DEFINITIONS AND INTERPRETATION	
Definitions	
1	In this Act: “spouse” means a person who (a) is married to another person, (b) lived with another person: (i) in a marriage-like relationship for a continuous period of at least 2 years, or (ii) in a marriage-like relationship of some permanence if the persons are together the parents of a child and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender, or (c) is a former spouse for the purposes of applying for an order under this Act.

PART 10 – COURT PROCESSES	
Time limit for specific applications	
161	(1) Subject to subsection (3), a person who is or was married to another person must make an application for an order under section 135 [<i>spousal support orders</i>] or Division 2 [<i>Dividing family property and family debt</i>] of Part 6 within 2 years of (a) the date a judgment granting a divorce of the spouses is made, or (b) the date an order is made declaring the marriage of the spouses to be null and void.

- (2) Subject to subsection (3), a person who is or was living with another person in a marriage-like relationship as defined in section 1 (b) [*definitions: spouse*] must make an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 within 2 years of the date of separation of the spouses.
- (3) The time limit set out in subsection (1) and (2) does not apply if an order is made under section 18 [*setting aside agreements generally*] or 21 [*setting aside agreements respecting property, debt or spousal support*] and a party to the agreement makes an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6.

PART 8 – CHILD AND SPOUSAL SUPPORT

Division 3 – Spousal Support

Review of spousal support

- 138**
- (1) An agreement or court order may include a provision for a review of the amount or duration of spousal support provided for within the agreement or court order, on or after a fixed date, after a fixed period of time, or after the happening of a specific event.
 - (2) The agreement or court order may include a dispute resolution process with respect to conducting the review.
 - (3) If, upon the completion of a spousal support review, the parties are unable to agree on the amount or duration of spousal support then the court on application may:
 - (a) with respect to an agreement, set aside the provision of the agreement relating to spousal support and make a spousal support order under section X (1) [*spousal support orders*], or
 - (b) in the case of a court order, make an order confirming, varying, suspending or terminating the spousal support order.
 - (4) If
 - (a) a term or condition referred to in subsection (1) is not included in a spousal support order, and
 - (b) a spouse
 - (i) with the obligation to pay spousal support under the order starts receiving benefits under a pension, or
 - (ii) entitled to receive spousal support under the order becomes eligible to receive benefits under a pension,
 the court may, on application, make an order confirming, varying, suspending or terminating the order, or any part of the order after taking into consideration section X [*obligation to support spouse*].

- (5) For greater certainty, section X [*setting aside or varying agreements respecting property, debt or spousal support*] and section X (2) [*varying, suspending and terminating spousal support orders*] do not apply with respect to subsection (3) or (4) of this section.

PART 6- PROPERTY DIVISION

Division 1 – Determination of Family Property and Family Debt

Family property

- 76** (1) Subject to section 77 [*excluded property*], family property means
- (a) all real property and personal property in which, on the date the spouses separate, at least one spouse has an interest; and
 - (b) all real property and personal property in which at least one spouse acquires an interest after the spouses separate through income received from or in place of property referred to in subsection (a).
- (2) Without limiting subsection (1), family property includes the following:...
- (g) a pension of a spouse.

Excluded property

- 77** (1) Except for the amount by which the value of a spouse's interest in property increases during the spousal relationship, the interest of a spouse in the following property is not family property:
- (a) property acquired by a spouse before the spousal relationship started;....

PART 7 – PENSION DIVISION

Division 1 - Definitions, Benefits Determination and Limited Members

Definitions

- 86** (1) In this Part:
- “**beneficiary**” means a person entitled under the terms of a plan to receive preretirement survivor benefits or postretirement survivor benefits on the death of a member;
 - “**commuted value**” means the value of a benefit, determined in accordance with the *Pension Benefits Standards Act*;
 - “**defined benefit plan**” means a plan that is not a defined contribution plan or a hybrid plan;
 - “**extraprovincial plan**” means a plan that is not a local plan and includes a supplemental pension plan to an extraprovincial plan;

“former Act” means the *Family Relations Act*, R.S.B.C. 1996, c. 128, and a reference to a provision under the former Act is a reference to that provision as it read immediately before its repeal by this Act.

“hybrid plan” means any of the following:

- (a) a plan under which some benefits are determined as if the plan were a defined contribution plan and other benefits are determined by a defined benefit formula;
- (b) a plan under which the member, when the pension commences, may choose whether benefits are determined as if the plan were a defined contribution plan or by a defined benefit formula;
- (c) a plan specified in the regulations;

“joint pension” means a pension payable during the joint lives of the member and another person and which, after the death of either, continues to be payable to the survivor for life;

“limited member” means a person designated under section 88 [*designation of limited members*] as a limited member of a local plan;

“local plan” means any of the following:

- (a) a plan that is established by the government;
- (b) a plan that has members that accrue pension entitlement from employment in British Columbia;
- (c) a plan that is subject to this Part
 - (i) by the terms of the plan,
 - (ii) by the operation of an enactment that regulates the plan, or
 - (iii) by reason of a reciprocal agreement between pension regulators, and the requirements of the *Pension Benefits Standards Act*,

but does not include a plan for specified individuals;

“member” means, in relation to a plan, a person

- (a) who has made contributions to the plan or on whose behalf an employer was required by the plan to make contributions, and who has not terminated membership or begun receiving a pension,
- (b) who retains a present or future entitlement to receive a benefit under the plan, or
- (c) who has begun receiving a pension,

but does not include a limited member;

“pension” means a series of payments that continue for the life of a member, whether or not it is afterward continued to any other person;

“plan” means a plan, scheme or arrangement organized and administered to provide pensions for members;

“postretirement survivor benefit” means lump sum or periodic benefits paid under a plan to a beneficiary when a member dies after the pension commences;

“preretirement survivor benefit” means lump sum or periodic benefits paid under a plan to a beneficiary when a member dies before the pension commences;

“proportionate share” means a fraction calculated in accordance with the regulations, unless an agreement or a court order provides for the fraction to be calculated differently;

“separate pension” means the share of a member’s benefits that is

- (a) payable to the limited member
 - (i) on pension commencement, and
 - (ii) until the earlier of the death of the limited member and the termination of benefits under the plan, and
- (b) separate from the benefits payable to the member;

“spouse” includes a former spouse of a member;

“transfer” means, if referring to the transfer of benefits from a plan to the credit of a spouse, a transfer made in accordance with the regulations.

- (2) In this Part, **“administrator,” “benefit,” “defined contribution plan,” “phased retirement benefit,” “phased retirement period”** and **“supplemental pension plan”** have the same meaning as in the *Pension Benefits Standards Act*, except that **“administrator”** includes the issuer of an annuity.

Benefits to be determined in accordance with this Part

- 87** If a spouse is entitled under Part 6 [*Property Division*] to an interest in benefits, the following must be determined in accordance with this Part, unless an agreement or a court order excludes the application of this Part:

- (a) the spouse’s share of the benefits;
- (b) the manner in which the spouse’s entitlement to benefits is to be satisfied.

Designation of limited members

- 88** (1) This section applies if benefits to be divided are in a local plan and
- (a) the pension has commenced, or
 - (b) the pension has not commenced but is in a defined benefit plan, the defined benefit portion of a hybrid plan, or in a defined contribution plan to which section 89 (2)(b) [*rules respecting local defined contribution plans*] applies.
- (2) In the circumstances described in subsection (1), a spouse may be designated a limited member of the local plan by either the spouse or the member giving notice in accordance with section 113 [*notice or waiver*].
- (3) A limited member has the following rights:
- (a) to receive from the administrator payment of a separate pension or a proportionate share of benefits paid under the plan, as applicable, as determined under this Part;
 - (b) to enforce rights under the plan and recover damages for losses suffered as a result of a breach of a duty owed by the administrator to the limited member;

(c) except as modified by this Part and the regulations made under it, all of the rights of a member under the *Pension Benefits Standards Act*;

(d) the additional rights that are set out in this Part.

(4) A spouse ceases to be a limited member if the commuted value of the spouse's proportionate share of benefits is transferred under this Part to the credit of the spouse.

Division 2 - Division of Benefits in Local Plan Before Pension Commencement

Rules respecting local defined contribution plans

89 (1) This section applies if

- (a) the benefits to be divided are in a local plan that is a defined contribution plan, and
- (b) the pension has not commenced, regardless of whether the member is receiving benefits by withdrawals.

(2) In the circumstances described in subsection (1), a spouse is entitled, by giving notice in accordance with section 113 [*notice or waiver*],

- (a) to have a prescribed portion of the member's account balance transferred from the plan to the credit of the spouse, or
- (b) if the administrator consents, to have the spouse's proportionate share administered in the plan subject to the same terms and conditions that apply to members.

Rules respecting local defined benefit plans

90 (1) This section applies if

- (a) the benefits to be divided are in a local plan that is a defined benefit plan, and
- (b) the pension has not commenced.

(2) In the circumstances described in subsection (1), a limited member is entitled to receive, on giving notice in accordance with section 113 [*notice or waiver*],

- (a) the limited member's share of the benefits by a separate pension that may commence no earlier than the earliest date the member could elect to have the pension commence, and
- (b) during any applicable phased retirement period, a proportionate share of the phased retirement benefit paid to the member under and in accordance with section 38.1 of the *Pension Benefits Standards Act*.

(3) The separate pension of a limited member commences on the date the member's pension commences, unless the limited member gives notice in accordance with section 113 [*notice or waiver*] that the separate pension is to commence on an earlier date.

(4) A limited member who receives a separate pension earlier than the date the member's pension commences may choose, in the notice referred to in subsection (3), to receive benefits by any method the member could receive benefits.

(5) Subject to subsection (6), if a member

- (a) terminates membership in the plan, and

(b) chooses to have the member's share of the benefits transferred from the plan, the limited member's proportionate share must be transferred from the plan to the credit of the limited member.

(6) Subsection (5) does not apply if

(a) the administrator consents to continue administering the limited member's proportionate share in the plan, or

(b) the limited member has commenced receiving a separate pension before the member terminates membership in the plan.

Rules respecting local hybrid plans

91 (1) This section applies if

(a) the benefits to be divided are in a local plan that is a hybrid plan, and

(b) the pension has not commenced.

(2) In the circumstances described in subsection (1), a spouse is entitled, by giving notice in accordance with section 113 [*notice or waiver*], to a division of benefits as follows:

(a) if the member may choose to receive benefits as if the benefits were in either a defined contribution plan or a defined benefit plan, that choice is also available to the spouse;

(b) in any other case,

(i) to the extent that the pension is based on principles applicable to a defined contribution plan, as if the benefits were in a defined contribution plan, and

(ii) the remainder divided as if the benefits were in a defined benefit plan.

Division 3 - Division of Benefits in Local Plan After Pension Commencement

Rules respecting local plans

92 (1) This section applies if

(a) the benefits to be divided are in a local plan, and

(b) the pension has commenced.

(2) In the circumstances described in subsection (1), a spouse is entitled, by giving notice in accordance with section 113 [*notice or waiver*], to receive a proportionate share of benefits paid under the plan until the earlier of

(a) the death of the spouse, and

(b) the termination of benefits under the plan.

(3) The reference in subsection (2) to "benefits" does not include a member's phased retirement benefit if the condition in section 38.1 (4) (e) (i) of the *Pension Benefits Standards Act* has been met.

(4) If a spouse is entitled to receive payment from a member of a proportionate share of benefits after pension commencement under an agreement or court order made before July

1, 1995, a spouse may require the administrator, by giving notice in accordance with section 113 *[notice or waiver]*, to administer the division of benefits in accordance with subsections (2) and (3).

- (5) If a spouse is entitled to receive payment from a member of a proportionate share of benefits after pension commencement under an agreement or court order made under the former Act and the agreement or court order does not prohibit the application of the former Act, a spouse may choose to have this Part apply by giving notice in accordance with the section that would apply had the agreement or court order been made after this Part comes into force.

Retroactive division of benefits

- 93** (1) In this section, “**pension commencement date**” means the date chosen by a member, in accordance with the requirements of the plan, to have the member’s pension commence.
- (2) If commencement of a member’s pension is delayed past the pension commencement date because the member and the member’s spouse, or either of them, are seeking agreement or a court order respecting division of benefits, both the member and the spouse are entitled to receive their respective shares of benefits retroactively to the pension commencement date if all of the following conditions are met:
- (a) the pension commencement date has been chosen;
 - (b) before the pension commencement date, the member or spouse gave to the administrator a copy of an agreement or a court order that prohibits the member from dealing with the pension or with family property generally;
 - (c) on or before December 1 of the year following the year in which the pension commencement date falls, the member or spouse gives to the administrator a copy of an agreement or a court order
 - (i) setting out the final terms of the division of benefits, and
 - (ii) lifting the prohibition referred to in paragraph (b);
 - (d) if approval from the Canada Revenue Agency is required to divide the benefits as of the pension commencement date, the administrator, before dividing the benefits, obtains that approval.
- (3) For the purposes of subsection (2), the rules respecting division of benefits as set out in Division 2 *[Division of Benefits in Local Plan Before Pension Commencement]* apply.
- (4) Nothing in this section limits the discretion of an administrator to consent to, or the jurisdiction of a court to order, the retroactive division of benefits in circumstances other than those set out under subsection (2).

Division 4 - Division of Other Benefits

Rules respecting annuities

- 94** Unless an agreement or a court order provides otherwise, if a member receives benefits under an annuity that is not provided under a local plan, the provisions under this Part that apply to the division of benefits after pension commencement apply to the division of the annuity.

Rules respecting supplemental pension plans

- 95** (1) This section applies if a member has or may acquire benefits under a supplemental pension plan that is integrated with benefits in a local plan.
- (2) In the circumstances described in subsection (1), a spouse who is entitled to a proportionate share of a member's benefits in a local plan is entitled, by giving notice in accordance with section 113 [*notice or waiver*], to a proportionate share of benefits under the supplemental pension plan.
- (3) Division of benefits under a supplemental pension plan is as follows:
- (a) if the supplemental pension plan is structured as a defined contribution plan and the pension has not commenced, the rules respecting that type of plan apply;
 - (b) if the supplemental pension plan is structured as a defined benefit plan and the pension has not commenced, the rules respecting that type of plan apply except that, unless the administrator otherwise consents, the limited member is not entitled to receive a separate pension until the member's pension commences.
- (4) A spouse is entitled to the same proportionate share of benefits under a supplemental pension plan as the spouse's proportionate share of benefits under the local plan unless
- (a) an agreement or a court order provides that the spouse is not entitled to a share of benefits under a supplemental pension plan, or
 - (b) benefits under the pension plan and the supplemental pension plan are calculated differently, in which case, an agreement or a court order may provide that the spouse is entitled to a different proportionate share.
- (5) Despite any other provision, payment of a spouse's proportionate share of benefits under a supplemental pension plan
- (a) is subject to the same terms and conditions that apply to the payment of benefits to the member, and
 - (b) is adjusted, suspended or ends if, for any reason, payment of benefits to the member is adjusted, suspended or ends.

Rules respecting benefits for specified individuals

- 96** (1) This section applies if a member has benefits under a plan, the only members of which are "specified individuals" within the meaning of the *Income Tax Act* (Canada).
- (2) In the circumstances described in subsection (1), a spouse is entitled, by giving notice in accordance with section 113 [*notice or waiver*], to a proportionate share of benefits under the plan.
- (3) Division of benefits under a plan for specified individuals is as follows:
- (a) the provisions under section 95 (3) [*rules respecting supplemental pension plans*] that apply to the division of benefits under a supplemental pension plan that is integrated with benefits in a local plan apply to the division of the benefits;
 - (b) if the administrator consents, the spouse may choose to have a proportionate share of the member's account balance transferred from the plan to the credit of the spouse.

Rules respecting disability benefits

- 97** (1) This section applies if benefits are paid to a member under a plan as a consequence of the member's disability.
- (2) In the circumstances described in subsection (1), if a spouse is entitled under an agreement or a court order to receive from the administrator a proportionate share of disability benefits paid under the plan,
- (a) the disability benefits are to be divided on giving notice in accordance with section 113 [*notice or waiver*],
 - (b) the provisions under this Part that apply to the division of benefits after pension commencement apply to the division of the disability benefits, and
 - (c) division of the disability benefits continues until the earlier of
 - (i) the death of the spouse, and
 - (ii) the termination of disability benefits under the plan.
- (3) If an agreement or a court order dividing benefits is silent on entitlement to disability benefits, all of a member's disability benefits are deemed to be allocated to the member.
- (4) A member's entitlement to disability benefits does not affect how other benefits under a plan are divided between the member and the member's spouse.

Rules respecting extraprovincial plans

- 98** (1) This section applies if the benefits to be divided are in an extraprovincial plan.
- (2) A spouse is entitled to division of benefits in an extraprovincial plan as follows:
- (a) subject to subsection (4), if the plan, or an enactment of any jurisdiction establishing or regulating the plan, provides a method of satisfying the interest of the spouse in the benefits, by that method;
 - (b) in any other case, to receive from the administrator a proportionate share of benefits paid under the plan until the earlier of
 - (i) the death of the spouse, and
 - (ii) the termination of benefits under the plan.
- (3) For the purposes of subsection (2), the member holds the spouse's proportionate share of benefits in trust for the spouse.
- (4) If, having regard to the principles that apply to the division of benefits under this Part, the method under subsection (2) (a) would operate unfairly, the court may order that the spouse's share in the benefits be satisfied in accordance with subsection (2) (b) instead.

Division 5 - Death of Member or Limited Member

Death of member or limited member

- 99** (1) This section applies if a limited member is entitled to a proportionate share of benefits under
- (a) a defined benefit plan, or

	(b) a supplemental pension plan
	(i) that is integrated with benefits in a local plan, and
	(ii) under which preretirement survivor benefits are payable.
	(2) In the circumstances described in subsection (1), if a member dies before
	(a) the member's pension commences, and
	(b) the limited member receives the limited member's proportionate share of the
	benefits,
	the limited member is entitled to receive that proportionate share as if the member had not
	died, in an amount equal to the commuted value of the limited member's proportionate
	share as calculated on the day before the death of the member.
	(3) If a member dies after the limited member receives all of the limited member's share of
	benefits under sections 90 <i>[rules respecting local defined benefit plans]</i> and 95 <i>[rules</i>
	<i>respecting supplemental pension plans]</i> , the limited member is entitled to no further share
	of the member's benefits except to the extent that the member has designated the limited
	member to be a beneficiary of the benefits.
	(4) If a limited member dies before the member and before receiving all of the limited
	member's share of benefits under sections 90 <i>[rules respecting local defined benefit plans]</i>
	and 95 <i>[rules respecting supplemental pension plans]</i> , the administrator must transfer to
	the credit of the limited member's estate the proportionate share of the commuted value of
	the benefits.
	(5) Despite the division of benefits under this Part,
	(a) if a member elected a joint pension with a spouse, the spouse is the owner of the
	postretirement survivor benefits, and
	(b) a limited member who is a beneficiary of a postretirement survivor benefit is entitled
	to all of the postretirement survivor benefit, subject to the entitlement, if any, of
	another limited member.
	Entitlement to preretirement survivor benefits
	100 Entitlement to any portion of preretirement survivor benefits under a plan that exceed a limited
	member's proportionate share is to be determined in accordance with the law that applies as if
	benefits had not been divided.
	Waiving pension or postretirement survivor benefits
	101 (1) Before an administrator implements the division of benefits under a plan, a limited
	member or the personal representative of his or her estate may waive the division of
	benefits by giving notice in accordance with section 113 <i>[notice or waiver]</i> .
	(2) No waiver or court order is effective to deprive a spouse who is otherwise entitled to
	receive, or is receiving, postretirement survivor benefits of those benefits unless
	(a) the spouse gives notice in accordance with section 113 <i>[notice or waiver]</i> , or
	(b) a court order allocating all or part of the postretirement survivor benefits to a third
	party refers expressly to this section.

(3) A waiver or order that complies with the requirements of subsection (2) does not place any obligation on an administrator to pay the benefits to a third party.

(4) If a person becomes entitled to benefits as a result of a waiver or court order that complies with the requirements of subsection (2), that person and the spouse who is otherwise entitled to the benefits are jointly and severally liable to the administrator to repay any overpayment of the postretirement survivor benefits.

Division 6 - Division by Agreement or Court Order

Member to have half of benefits

102 Subject to section 105 [*court may give more than half*], if a spouse and a member enter into an agreement respecting the manner of determining the spouse's proportionate share of benefits or a court makes an order respecting the division of benefits, the agreement or court order must leave the member with at least half of

- (a) the value the benefits would have had if they had not been divided, or
- (b) the periodic benefits that would have been paid under the plan when the pension commences if the benefits had not been divided.

Agreements generally

103 (1) A spouse may enter into a written agreement with a member respecting one or more of the following:

- (a) subject to section 102 [*member to have half of benefits*], the determination of the spouse's proportionate share of benefits in a manner other than as required under this Act;
- (b) a waiver by the spouse under section 23 (3) [*general provisions*] of any right to or interest in a division of unadjusted pensionable earnings under the *Canada Pension Plan*;
- (c) the satisfaction, by the member providing compensation to the spouse, of all or part of the spouse's interest in the benefits.

(2) If by agreement or court order a member must provide compensation to a spouse in satisfaction of all or part of the spouse's interest in benefits under a plan, the compensation must be determined in accordance with the regulations unless the spouse and member otherwise agree or the court otherwise orders.

(3) If an administrator and a spouse enter into an agreement under which the spouse accepts from the administrator, in satisfaction of the spouse's interest in any circumstance not specifically dealt with under this Part, compensation or a transfer of a share of benefits, the compensation or transfer must be calculated in accordance with the regulations unless the court otherwise orders.

Spouse and member may agree Part applies

104 (1) In this section, "**original agreement or court order**" means an agreement or a court order, made at any time, that does not prohibit the application of the Act or the former Act.

- (2) A spouse and member may agree to divide benefits in accordance with this Part if
 - (a) an original agreement or a court order was made,
 - (b) under the original agreement or court order, the member is required to pay the spouse a proportionate share of benefits under a plan, and
 - (c) the member's pension has not yet commenced or the spouse is not yet receiving benefits.
- (3) Subject to subsection (4), if the spouse and member agree under this section to divide benefits in accordance with this Part,
 - (a) the original agreement or court order applies as if it were made as of the date of the agreement under subsection (2),
 - (b) subject to subsection (5), the spouse's proportionate share of benefits is determined by the share or formula set out in the original agreement or court order,
 - (c) provisions of the original agreement or court order that clarify, supplement or are collateral to a division of benefits under this Part continue in effect, and
 - (d) provisions of the original agreement or court order that are inconsistent with this Part because they provide for a different method of dividing benefits or are inapplicable because of changed circumstances no longer have effect.
- (4) A spouse and member may agree that one or more provisions of subsection (3) do not apply for the purposes of an agreement under subsection (2).
- (5) If an original agreement or a court order does not provide for division of benefits before a member dies or terminates membership in the plan, or the pension commences, the administrator may, despite the original agreement or court order, divide benefits in the manner set out in the regulations.
- (6) Unless the parties otherwise agree or the court otherwise orders, a term in an agreement or a court order, whenever made, that requires a member to sever or to assist a spouse in severing the spouse's share from the member's pension as soon as it becomes possible to do so is conclusively deemed to be an agreement referred to in subsection (2) of this section, made as of the date the administrator receives notice in accordance with section 113 *[notice or waiver]*.

Court may give spouse more than half

- 105** A court may reapportion to a spouse entitlement to all or part of a member's benefits under a plan for the purpose of providing the spouse with an independent source of income if
- (a) it is necessary, appropriate or convenient in the circumstances, and
 - (b) the financial and property arrangements between the member and spouse to address the spouse's need to become or remain economically independent and self-sufficient would otherwise require
 - (i) a support order, or

- (ii) an order requiring the member, after pension commencement, to pay the spouse a share of the benefits under the plan, or another plan, as they are received.

Court may clarify division of benefits

- 106** On application by a member or spouse, the court may at any time give directions or make orders to facilitate or enforce the division of benefits in accordance with an agreement under section 103 [*agreements generally*] or 104 [*spouse and member may agree Part applies*] or a court order.

Court may vary division of benefits in unusual circumstances

- 107** (1) This section applies if the method of dividing benefits under this Part will operate in a manner that is inappropriate given
- (a) the terms of the plan, or
 - (b) any change to the terms of the plan after the date an agreement or a court order is made to divide the benefits.
- (2) In the circumstances described in subsection (1),
- (a) the court may direct, on application by a member or a spouse, an appropriate method of dividing benefits, and
 - (b) the order of the court is binding on the administrator.
- (3) An application under this section
- (a) may be made at any time before benefits are divided, and
 - (b) must be served, at least 30 days before the date set for the hearing, on the administrator.
- (4) The administrator may attend the hearing and make representations respecting the effect on the plan of any proposed division of benefits under this section.

Court may order compensation for lost supplemental benefits

- 108** (1) If an act or omission by a member of a supplemental pension plan causes a loss to a spouse respecting the spouse's proportionate share of benefits under the supplemental pension plan, the court may on application by the spouse order the member to pay compensation to the spouse.
- (2) In determining whether to make an order under subsection (1) and, if an order is made, the amount of compensation to award, the court must consider
- (a) whether the member acted unreasonably or in bad faith,
 - (b) whether the member obtained an unfair advantage as a result of the act or omission, and
 - (c) the financial arrangements and division of property respecting the member and the spouse when their spousal relationship ended.

If agreement or court order is silent on entitlement to benefits

- 109** (1) For the purposes of this Part, all of a member's benefits are deemed to be allocated to the member if an agreement between that member and the member's spouse, or a court order,
- (a) is silent on entitlement to benefits, and
 - (b) represents a final settlement and separation of the financial affairs of the spouse and the member in recognition of the end of their spousal relationship.
- (2) Nothing in subsection (1) affects a court's jurisdiction under Part 6 [*Property Division*] to review an agreement or a court order.

Division 7 - Administrative Matters

Information from plan

- 110** (1) A spouse claiming to be entitled to benefits has a right to receive from the administrator prescribed information in respect of the plan
- (a) at the time notice of the spouse's entitlement is given in accordance with section 113 [*notice or waiver*], and
 - (b) annually, on request of the spouse.
- (2) Despite subsection (1), the court may order that an administrator provide some or all of the information required under subsection (1) at any time.
- (3) An administrator must not disclose prescribed information in respect of a member without the member's written consent.
- (4) If there is a conflict between this section and a provision of the *Freedom of Information and Protection of Privacy Act* or the *Personal Information Protection Act*, this section prevails.

Agreement or court order required for division of benefits

- 111** An administrator may administer the division of a member's benefits under this Part only if the administrator has first received a copy of an agreement or a court order respecting division of benefits between the member and the member's spouse.

Identification of plan

- 112** (1) An administrator is not required to take any action under this Part until the administrator has sufficient information to identify the plan and, for this purpose, the administrator may request a member or spouse to provide relevant information.
- (2) If the plan is not identified by name in an agreement or a court order, information respecting the employment under which a member accrued the benefits is sufficient information to identify the plan.

Notice or waiver

- 113** If a person is required to give notice or a waiver under this Part, the notice or waiver must be given to the administrator, in the prescribed form and in the prescribed manner, if any.

Implementing division of benefits

- 114** (1) This section applies if an administrator must divide benefits in a local plan and

	(a) the pension has commenced, or
	(b) the pension has not commenced but is in a defined contribution plan.
(2)	Subject to section 93 [<i>retroactive division of benefits</i>] and subsection (3), an administrator is required to divide only those benefits that become payable within the prescribed period after the administrator receives
	(a) the documents required under section 111 [<i>agreement or court order required for division of benefits</i>],
	(b) in accordance with section 113 [<i>notice or waiver</i>], the notice required under this Part,
	(c) the information required, if any, under section 112 [<i>identification of plan</i>], and
	(d) any documents required under any other enactment, or reasonably required by the administrator, to implement the division.
(3)	An administrator may delay division of benefits in a defined contribution plan
	(a) if delay is necessary until net investment returns affecting the spouse's share are allocated,
	(b) if delay may avoid or reduce transaction costs associated with dividing benefits, or
	(c) for any other reason that is reasonably likely to be advantageous to the spouse.
(4)	Nothing in this section relieves the administrator from an obligation to pay any benefits, or compensation for benefits, that were not paid through the fault of the administrator.
(5)	Nothing in this section limits a member's duty to compensate a spouse under Part 6 [<i>Property Division</i>] for the spouse's share of benefits paid to the member before the date the administrator implements the division of benefits.
Adjustment of member's pension	
115	If under this Act a spouse or the spouse's estate receives a share of a member's benefits directly from the administrator, the administrator must adjust in accordance with the regulations the member's interest in the benefits or the interest of any person claiming an interest through the member.
Transfer of commuted value of separate pension or share	
116	If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the plan,
	(a) the limited member may apply for a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that a member may do so under the <i>Pension Benefits Standards Act</i> , and
	(b) an administrator may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that an administrator can require a member to do so under the <i>Pension Benefits Standards Act</i> .

Administrative costs

- 117** (1) If the administrator requires a fee to be paid to offset administrative costs incurred in dividing benefits under this Part,
- (a) the fee may be no more than the prescribed amount, and
 - (b) a spouse and member are each responsible for paying the fee.
- (2) A spouse or member who pays more than a half share of the fee under subsection (1) may recover from the other the additional amount paid.
- (3) An administrator may deduct a fee under subsection (1) from the payment of benefits.

Income tax

- 118** (1) A spouse and a member are each responsible for paying income tax on his or her own share of divided benefits.
- (2) If, under the *Income Tax Act (Canada)*, a spouse or a member is required to pay income tax on the other's share of divided benefits, the person who is required to pay the income tax on the other person's share must be reimbursed by the other person for the amount paid.
- (3) An administrator who pays benefits to a spouse under this Part must, with respect to deduction required under the *Income Tax Act (Canada)*, make separate source deductions for each of the spouse's and member's share of the benefits.

Administrator not liable

- 119** (1) An administrator is not liable for loss or damage suffered by any person because of anything done or omitted to be done by the administrator relying and acting in good faith on
- (a) a notice or waiver given under this Part, or
 - (b) an agreement or a court order under this Act.
- (2) An administrator is not liable for any prejudice to a spouse's interest in benefits because of anything done or omitted to be done by the administrator, acting in good faith, with respect to the benefits
- (a) before
 - (i) the administrator receives an agreement or a court order under which the spouse acquires an interest in the benefits, or
 - (ii) the spouse gives the administrator, in accordance with section 113 [notice or waiver], a notice required under this Part, or
 - (b) if the administrator
 - (i) has been given notice, in accordance with section 113 [notice or waiver], respecting a spouse's claim to an interest in benefits or an application to become a limited member or to divide benefits, but the notice is incomplete or otherwise insufficient, and

	(ii) gives to the spouse advance notice, in accordance with the regulations, before the administrator takes any action in relation to the pension.
	(3) In any circumstances other than one described in subsection (2) (a) or (b) (i), an administrator who has notice that a spouse has or may have acquired an interest in a member's benefits is not liable for any prejudice to a spouse's interest in benefits because of anything done or omitted to be done by the administrator, acting in good faith, with respect to the benefits if the administrator does any of the following:
	(a) requires the member to give the notice referred to in section 88 (1) [<i>designation of limited members</i>] to the administrator;
	(b) requires the member to provide evidence, sufficient to the administrator and including by affidavit, declaration or certificate, that the spouse has no interest under this Act in the member's benefits;
	(c) if the administrator reasonably believes the information will be brought to the attention of the spouse, gives to the spouse advance notice, in accordance with the regulations, before the administrator takes any action in relation to the pension.
	(4) An administrator who does not take one or more actions described in subsection (3) is not liable for any loss or damage to a person in any circumstance in which the administrator would not otherwise be liable to that person for loss or damage.
	(5) An administrator is not liable for loss or damage suffered by any person if the administrator, acting in good faith, inadvertently discloses information specified under section 110 (3) [<i>information from plan</i>].
Trust of survivor and pension benefits	
120	(1) If a spouse is entitled to a proportionate share of preretirement survivor benefits or postretirement survivor benefits paid to another person, the recipient holds them in trust for the spouse.
	(2) If a spouse is entitled to a proportionate share of a member's benefits and the spouse's proportionate share is paid to the member or another person, the recipient holds the spouse's proportionate share in trust for the spouse.
	(3) A person holding benefits in trust under subsection (1) or (2) who has information respecting the spouse's interest in the benefits must immediately pay the benefits to the spouse.
	(4) If a spouse receives benefits in an amount that exceeds the spouse's entitlement, the spouse holds the excess amount in trust for, and must immediately pay the excess amount to, the member or the person who is otherwise entitled to the amount.
No further entitlement after division of benefits	
121	(1) This section applies
	(a) to benefits regulated under the <i>Pension Benefits Standards Act</i> , and
	(b) despite any provision to the contrary in the <i>Pension Benefits Standards Act</i> or any other Act.

- (2) If benefits described in subsection (1) (a) have been divided with a spouse under this Part, the spouse has no further rights, arising solely from that spouse's status as a spouse, to a share of the benefits.
- (3) If a spouse qualifies as a spouse under the *Pension Benefits Standards Act*, a member is not required to choose a postretirement survivor benefit with the spouse or have the spouse waive the benefit if
 - (a) an agreement or a court order provides that division of benefits with the spouse is to be in accordance with this Part, or
 - (b) the spouse is a limited member, regardless of whether benefits have been divided.
- (4) For the purposes of this section, unless the agreement or court order provides otherwise, an agreement or court order is to be treated as if it divides benefits under this Part if it provides that
 - (a) a spouse has no share of a pension, or
 - (b) a spouse's share is satisfied by a means other than by dividing benefits under this Part.

Power to make regulations

- 122** The Lieutenant Governor in Council may make regulations for the following purposes and respecting the following matters:
- (a) the specifying of plans that qualify as hybrid plans;
 - (b) the methods and assumptions to be followed for the valuation, division of benefits and transfer of benefits at the end of a spousal relationship, including
 - (i) the method of calculating the proportionate share of benefits under a plan,
 - (ii) determining the duration of a spousal relationship for the purpose of determining a spouse's proportionate share, and
 - (iii) respecting the division of benefits for the purposes of section 104 (5) [*spouse and member may agree Part applies*];
 - (c) the methods and assumptions to be followed for the calculation of any compensation payment or commuted value at the end of a spousal relationship;
 - (d) the rights of a limited members, including providing that a limited member does not have a right of a member or modifying the rights of a limited member;
 - (e) the procedures to be followed by a spouse, member and administrator when dividing benefits, satisfying a spouse's entitlement to benefits, or choosing a date to receive benefits under a plan;
 - (f) the information an administrator must make available to a spouse or limited member about a plan or benefit entitlement and when the information must be provided, including
 - (i) requiring that different information be provided at different times, and
 - (ii) in relation to providing advance notice to a spouse before an administrator takes any action with respect to a pension;

- (g) the information an administrator must not disclose in respect of a member without the member's written consent;
- (h) the form, content and manner of giving or withdrawing any notice or waiver under this Part;
- (i) the consequences and procedures to be followed for failing to give or failing to comply with a notice under this Part;
- (j) the method of calculating a compensation payment or a transfer of a share of benefits for the purposes of section 103 (2) [*agreements generally*];
- (k) the period for the purposes of section 114 (2) [*implementing division of benefits*];
- (l) the methods and assumptions to be followed for the adjustment of a member's benefits;
- (m) the prescribing of the amount of any administrative fee.

Transition – division of benefits in defined benefit plan before pension commencement

- 123** (1) This Part applies if a spouse was entitled under Part 5 of the former Act to an interest in a member's benefits but, as of the date that Part was repealed, the benefits had not been divided.
- (2) Despite the repeal of sections 72 (1) and 74 of the former Act and the enactment of section 90 [*rules respecting local defined benefit plans*] of this Act, a spouse who has been designated as a limited member under section 72 (1) of the former Act may exercise any right the spouse may have had under section 74 of the former Act as if that section had not been repealed.

Transition - general

- 124** (1) Subject to subsection (2), this Part applies in respect of a person who became a limited member under the former Act, and the benefits have not been divided on or after the date this Part comes into force.
- (2) The former Act applies with respect to any issues upon which, after the application was made for a spouse to become a limited member, the administrator consulted with the member and the limited member concerning the application of the former Act to the agreement or court order dividing the benefits between the spouses.

CHAPTER 10: SUPPORT

I. Child Support

There was no discussion paper on child support as part of the *Family Relations Act* review. This is because in 2002, the federal government completed a comprehensive review of the *Federal Child Support Guidelines*,¹³⁵ which are used in British Columbia to calculate child support. Under the draft legislation minor changes to the child support provisions are proposed in order to modernize the language, to match the structure of the support division with the rest of the draft statute, and to codify case law where it would be useful.

Recommended Policy

The proposed statute contains a terminology change with regard to payments for children and spouses. It eliminates the use of “maintenance” and replaces it with “support” which is used in the *Divorce Act*.

The draft legislation retains the obligation to support a child as found in the *Family Relations Act* but clarifies that the obligation does not continue if a person under 19:

- becomes a spouse; or
- voluntarily withdraws from his or her parents’ or guardians’ care.

The support obligation is revived if the child returns to live with his or her guardian or parent. This reflects current case law¹³⁶ and Alberta’s *Family Law Act*¹³⁷ also contains similar provisions.

The draft legislation also expands on the circumstances under which a court may vary a child support order. An order may be varied if there has been change in circumstance since the making of the previous order, if a court is satisfied that there is evidence of a substantial nature that was not available previously or if there is evidence of a lack of financial disclosure.

Recommended Draft Provisions

PART 8 – CHILD AND SPOUSAL SUPPORT	
Division 1 – Definitions	
Definitions for Part	
125	In this Part: “ child ” includes a person who is at least 19 years of age and is unable, because of illness, disability or other cause, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians;

¹³⁵ *Federal Child Support Guidelines*, Above Note 42.

¹³⁶ See e.g., *T.L.M. v. M.J.M.* 2007 BCSC 772.

¹³⁷ *AB Family Law Act*, Above Note 32, s. 49.

“child support guidelines” means the child support guidelines established by regulation under section [power to make regulations] for the calculation of awards of child support;

“child support order” means an order made under section 128 (1) [child support orders] and includes any variation to that order;

“guardian” does not include a person who is not a parent and whose only parental responsibility is in respect of the child’s legal and financial interests;

“parent” includes a stepparent of a child if

- (a) the stepparent contributed to the support of the child for at least one year, and
- (b) 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 of the child;

Division 2 – Child Support

Obligation to support child

- 126** (1) Every parent and every guardian of a child has an obligation to provide support for the child.
- (2) The obligation under subsection (1) does not extend to a child who
- (a) is a spouse, or
 - (b) is under 19 years of age and has voluntarily withdrawn from his or her parents’ or guardians’ charge and is living an independent lifestyle.
- (3) The obligation under subsection (1) is revived if a child referred to in subsection (2) (b) abandons his or her independent lifestyle and returns to his or her parents’ or guardians’ charge.

Child support agreements

- 127** (1) A parent or guardian of a child may enter into an agreement with another parent or guardian of the child to pay support for the child.
- (2) An agreement referred to in subsection (1) does not preclude a person from applying for a child support order.

Child support orders

- 128** (1) The court may, on application by a person referred to in subsection (2), make an order requiring a parent or guardian of a child to provide support for the child by paying to the person designated in the order the amount ascertained by the court in accordance with section 130 [determining child support].
- (2) An application under subsection (1) may be made by
- (a) a parent or guardian of the child,
 - (b) any other person on behalf of the child,
 - (c) the child, or

	(d) if the right to apply for an order under this section is assigned to a minister under the <i>Employment and Assistance Act</i> or the <i>Employment and Assistance for Persons with Disabilities Act</i> , the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.
	(3) The court may make a child support order against more than one parent or guardian of the child.
	(4) If parentage of a child is at issue in a proceeding for a child support order, the court may, with or without an application being made under Part 3 [<i>Legal Parentage</i>],
	(a) make a declaratory order of parentage under section 37 [<i>declaratory order of parentage</i>] in accordance with that section, or
	(b) make an order under section 38 [<i>parentage tests</i>] in accordance with that section.
Varying, suspending or terminating child support orders	
129	(1) The court may, on application, make an order varying, suspending or terminating a child support order or any part of that order, prospectively or retroactively.
	(2) Before the court makes an order under subsection (1), the court must satisfy itself that
	(a) a change in circumstances, as provided for in the child support guidelines, has occurred since the child support order was made or last varied,
	(b) evidence of a substantial nature that was not available at the previous hearing has become available, or
	(c) evidence of a lack of financial disclosure by a party to the proceeding was discovered after the child support order was made or last varied and in making the order under subsection (1), the court must consider that change of circumstances or evidence.
Determining child support	
130	(1) If the court makes a child support order, the order must be made in accordance with the child support guidelines.
	(2) Despite subsection (1), a court may make a child support order in an amount that is different from the amount calculated under the child support guidelines if the court is satisfied
	(a) that
	(i) provisions in a written agreement, or an order, respecting the financial obligations of the parents, or the division or transfer of their property, directly or indirectly benefit a child or
	(ii) special provisions have otherwise been made for the benefit of a child, and
	(b) the application of the child support guidelines would be inequitable in the circumstances to which paragraph (a) refers.
	(3) If the court makes an order under subsection (2), it must record its reasons for having done so.

- | |
|--|
| (4) Despite subsection (1), on the consent of the parties to a proceeding a court may award an amount that is different from the amount calculated under the child support guidelines if the court is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates. |
| (5) For the purposes of subsection (4), the court must consider the child support guidelines in determining whether reasonable arrangements have been made for the support of the children to whom the order relates but must not consider the arrangements to be unreasonable solely because the amount calculated under the child support guidelines differs from the amount to which the parties consent. |

II. Spousal Support

In reviewing the spousal support provisions of the *Family Relations Act*, the Ministry looked at a number of issues, including the:

- criteria and tools used to determine entitlement, duration and amount of spousal support,
- inter-relationship between spousal support and property division,
- ways in which spousal support orders or agreements may be changed,
- appropriate treatment of spousal conduct in decisions to change a spousal support order or agreement, and
- effect of the paying spouse's death on support obligations.

On the first point, the *Family Relations Act* and the *Divorce Act* both list criteria to determine entitlement to spousal support as well as its amount and duration. While the wording of the spousal support provisions in the two Acts is different, judges have interpreted them in a similar way. There are *Spousal Support Advisory Guidelines*¹³⁸ that have been strongly endorsed by the British Columbia Court of Appeal;¹³⁹ however, they are not mandatory.

On the second point, the current Act is silent on how property division should interact with spousal support. While property division and spousal support are separate issues in law, in practice, they overlap. For example, neither the existing Act nor the case law provides a clear rationale or set of principles on how reapportionment of family property based on economic need relates to spousal support.

The third point covers three sub-topics: the test to be applied in applications to vary, the role of reviews, and the test to be applied in applications to cancel or reduce unpaid amounts of spousal support (arrears).

¹³⁸ *Spousal Support Advisory Guidelines*, online: <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html> (last accessed: May 21, 2010).

¹³⁹ See e.g., *Redpath v. Redpath*, [2006] BCJ No. 1550 (C.A.) (Q.L.); *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748 (C.A.) (Q.L.); *Tedham v. Tedham*, [2005] B.C.J. No. 2186 (C.A.) (Q.L.); and *Toth v. Kun*, [2006] B.C.J. No. 739 (C.A.) (Q.L.).

- i) Regarding the test to be applied in variation applications, the existing *Family Relations Act* relies heavily on judicial discretion, which makes it difficult to predict outcomes and makes the law uncertain. The current Act allows a judge to vary a spousal support order if there have been “changes in the needs, means, capacities and economic circumstances of each person affected by the order” since the order was made or last varied.¹⁴⁰
- ii) Reviews allow spouses or a judge to re-examine the terms of spousal support at a certain time or upon the happening of a certain event without needing first to find a change in circumstances as is required for variation applications. Although the existing Act does not provide for reviews, they are often used.
- iii) The policy question in relation to the cancellation or reduction of arrears of spousal support is whether these are to be characterized as a retroactive variation and analyzed in a similar way to other variation applications or whether they should continue to be subject to a tougher standard: the current Act says that arrears may be cancelled or reduced only if it would be “grossly unfair” not to do so.¹⁴¹

With regard to spousal conduct, the existing Act addresses the issue only in part by specifying that a judge can reduce the amount of spousal support on the basis that the recipient spouse is not making “reasonable efforts” to become self-sufficient.¹⁴² It does not appear to address the conduct of the paying spouse.

Finally, the *Family Relations Act* is silent, and case law is not clear about whether spousal support orders may extend past the death of the paying spouse. This can complicate the administration of the paying spouse’s estate. This problem is compounded by the fact that the paying spouse’s personal representative has no authority to apply to court to vary a spousal support order that has survived that spouse’s death.

Consultation Feedback

There was relatively little feedback on reforms to spousal support, and much of it was mixed. The one point of general agreement was that the *Spousal Support Advisory Guidelines* should remain advisory.

On the question of whether to make British Columbia’s statute more consistent with the federal *Divorce Act*, some thought this was a good idea while others thought the existing legislation worked well enough.

Some thought the new statute should codify the case law that provides that property division is to occur before consideration of spousal support. Others disagreed, saying this would not resolve

¹⁴⁰ BC *Family Relations Act*, Above Note 1, s. 96(1).

¹⁴¹ *Ibid.*, s. 96(2).

¹⁴² *Ibid.*, s. 96(5).

the complex relationship between spousal support, the notion of “economic need” and the division of family property. Yet others said judges should have the flexibility to deal with property division and spousal support together, or in whatever order makes the most sense in a particular case.

Regarding changes to spousal support orders, some thought the law governing applications to vary existing spousal support orders could be clearer. For example, some thought greater consideration should be given to legislating an obligation on each spouse to be self-supporting. However, the corresponding concern was that including consideration of a spouse’s conduct in the analysis could result in a high degree of surveillance of that person – an undesirable outcome.

Many indicated that in practice spousal support reviews are routinely used in British Columbia and should be explicitly included in the new family statute. Some said that review orders did not promote resolution but simply delayed a decision.

There was no consensus on whether the “grossly unfair” test should continue to apply to applications to cancel spousal support arrears.

The most controversial issue in the spousal support consultations was whether judges should have the ability to continue spousal support payments after the death of the paying spouse (i.e., to have spousal support binding on the estate of the deceased paying spouse). Some supported the idea, noting it would clarify the law and also noting treatment of this issue under the family statutes of other provinces.¹⁴³ Others, however, were strongly opposed and thought it would generate “litigation galore” between the surviving former spouse and the children.

Recommended Policy

The definition of “spouse” will include all married spouses and common-law spouses who have lived in a marriage-like relationship for at least two years or less if they have a child together. An application for spousal support must be brought within two years of the date the marriage ended or the date of separation for common-law spouses.

It is proposed that the new family statute will continue to impose an obligation on spouses to support one another but will include both spousal support objectives and factors to guide entitlement to support that are more closely aligned with the *Divorce Act*.¹⁴⁴ This approach is also consistent with other family statutes in Canada, including Alberta’s *Family Law Act*.¹⁴⁵

The *Spousal Support Advisory Guidelines* are used extensively by lawyers in British Columbia. However, a consistent theme during consultations was to leave them as advisory, and, as a result, they will not be referred to in the proposed statute.

¹⁴³ AB *Family Law Act*, Above Note 32, s. 80; ON *Family Law Act*, Above Note 118, s. 34(4), and PEI *Family Law Act*, Above Note 118, s. 34(3).

¹⁴⁴ CAN *Divorce Act*, Above Note 2, ss. 15.1(4) and (6).

¹⁴⁵ AB *Family Law Act*, Above Note 32, ss. 58 and 60.

It is further proposed that the new legislation recognize the inter-relationship between property division and spousal support. In determining whether spousal support is appropriate a court will be directed to consider whether a prior unequal division of property has obviated the need for a spousal support order. Spousal support will be ordered only to the extent the spousal support objectives have not already been met through an unequal property division.

A spousal support order can be changed under the draft legislation where a change in circumstance has occurred. It also can be changed if there was evidence of a substantial nature that was not available previously or there is evidence of a lack of financial disclosure. If a variation is justified, then the spousal support determination begins afresh in relation to the listed objectives and factors. This is more consistent with family legislation elsewhere in Canada.¹⁴⁶

The proposed legislation will also explicitly provide for reviews of spousal support, codifying an already existing practice in British Columbia. Although there was some debate on the issue, it is expected that reviews will facilitate settlement - it may be easier for spouses to agree if they know their agreement is not for all time. Reviews may also increase the likelihood of agreement in situations where there is a lot of uncertainty (e.g., it may not be clear how long it will take for a spouse to get accepted into and to complete training). In essence, reviews allow former spouses to try out an arrangement to see if it is appropriate and/or to anticipate changes to the need for support as their lives evolve.

Consideration of a spouse's alleged misconduct will be limited to that which "arbitrarily or unreasonably" affects the need for support or the ability of a spouse to provide support. This is consistent with the *Divorce Act*.¹⁴⁷ By way of example, a recipient spouse's conduct could be considered where the spouse unreasonably limits his or her ability to become self-sufficient, such as refusing to take employment when offered. On the flipside, where a paying spouse unreasonably moves from full-time to part-time employment, this conduct could be taken into account.

The proposed legislation carries forward the ability to apply to reduce or cancel spousal support arrears if it would be "grossly unfair" not to do so. The retention of a more stringent standard for cancelling or reducing arrears reflects the fact that these liabilities result from a party's non-compliance with an order.

¹⁴⁶ The proposed variation test draws on: the CAN *Divorce Act*, Above Note 2, s. 17(4.1); AB *Family Law Act*, Above Note 32, ss. 77(5)(a) and (b); ON *Family Law Act*, Above Note 118, ss. 37(2) and 56(4); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 118(1), online CANLII: <http://www.canlii.org/en/nb/laws/stat/snb-1980-c-f-2.2/latest/snb-1980-c-f-2.2.html> (last accessed: July 14, 2010); NL *Family Law Act*, Above Note 118, s. 47; PEI *Family Law Act*, Above Note 118, s.37(2); YK *Family Property and Support Act*, Above Note 117, s. 44(2); NWT *Family Law Act*, Above Note 118, s.23(2); and NUN *Family Law Act (Nunavut)*, Above Note 118, s.23(2).

¹⁴⁷ CAN *Divorce Act*, Above Note 2, s. 15.2(5). Please note: the proposed spousal misconduct provision draws on AB *Family Law Act*, Above Note 32, s. 59 and *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 6(1), online CANLII: <http://www.canlii.org/en/ns/laws/stat/rsns-1989-c-160/latest/rsns-1989-c-160.html> (last accessed: July 8, 2010).

The proposed statute will provide that spousal support obligations in agreements or court orders survive the death of the paying spouse unless the agreement or court order provides otherwise. Criticisms of the idea of making spousal support payable after death were carefully considered. An important reason for including a provision making support binding on the estate of the paying spouse is to protect economically vulnerable spouses. It is also something which other Canadian family statutes permit, including those in Alberta, Ontario and Prince Edward Island.¹⁴⁸ The proposed legislation will allow variation applications by the deceased spouse's representative and parties can agree or seek an order to not have support bind the estate. The proposed statute will also provide courts with the authority to order a person to obtain life insurance or provide security over property in order to ensure the payment of support if the paying spouse dies, as an alternative to binding the estate.

Recommended Draft Provisions

PART 1 – DEFINITIONS AND INTERPRETATION

Definitions

1 In this Act:

“spouse” means a person who

- (a) is married to another person,
- (b) lived with another person:
 - (i) in a marriage-like relationship for a continuous period of at least 2 years, or
 - (ii) in a marriage-like relationship of some permanence if the persons are together the parents of a child
 and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender, or
- (c) is a former spouse for the purposes of applying for an order under this Act.

PART 10 – COURT PROCESSES

Time limit for specific applications

- 161** (1) Subject to subsection (3), a person who is or was married to another person must make an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 [*Property Division*] within 2 years of
- (a) the date a judgment granting a divorce of the spouses is made, or
 - (b) the date an order is made declaring the marriage of the spouses to be null and void.

¹⁴⁸ AB *Family Law Act*, Above Note 32, s.80; ON *Family Law Act*, Above Note 118, s. 34(4), and PEI *Family Law Act*, Above Note 118, s. 34(3).

- (2) Subject to subsection (3), a person who is or was living with another person in a marriage-like relationship as defined in section 1 (b) [*definitions: spouse*] must make an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 [*Property Division*] within 2 years of the date of separation of the spouses.
- (3) The time limit set out in subsection (1) and (2) does not apply if an order is made under section 18 [*setting aside agreements generally*] or 21 [*setting aside agreements respecting property, debt or spousal support*] and a party to the agreement makes an application for an order under section 135 [*spousal support orders*] or Division 2 [*Dividing family property and family debt*] of Part 6 [*Property Division*].

PART 8 – CHILD AND SPOUSAL SUPPORT

Division 1 – Definitions

Definitions

125 In this Part...

“**spousal support order**” means an order made under section 135 (1) [*spousal support orders*] and includes any change to that order;

“**support order**” means a child support order or a spousal support order.

Division 3 – Spousal Support

Obligation to support spouse

131 A spouse has an obligation to provide support for the other spouse in accordance with sections 132 [*objectives of spousal support*] and 133 [*determining spousal support*].

Objectives of spousal support

132 Spousal support should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the spousal relationship or its breakdown,
- (b) apportion between the spouses any financial consequences arising from the care of any child of the spousal relationship over and above the obligation apportioned between the spouses under an agreement or order,
- (c) relieve any economic hardship of the spouses arising from the breakdown of the spousal relationship, and
- (d) as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time

only to the extent that the objectives listed in paragraphs (a) to (d) have not already been met through an unequal division of property under Part 6 [*Property Division*].

Determining spousal support

- 133** The amount and duration of spousal support, if any, is to be determined having regard to the conditions, means, needs and other circumstances of each spouse including the following:
- (a) the length of time the spouses lived together;
 - (b) the functions performed by each spouse during the period they lived together;
 - (c) any order relating to the support of either spouse;
 - (d) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
 - (e) any legal obligation of a spouse to provide support for any other person;
 - (f) the extent to which any other person who is living with a spouse contributes towards household expenses and thereby increases the ability of that spouse to provide support or reduces the financial needs of that spouse.

Spousal support agreements

- 134** (1) Spouses may enter into an agreement in which
- (a) one spouse agrees to pay support for the other spouse, or
 - (b) one spouse agrees to release the other spouse from liability for support.
- (2) An agreement referred to in subsection (1) does not preclude a person from applying for a spousal support order.

Spousal support orders

- 135** (1) The court may, on application by a person referred to in subsection (2), make an order requiring a spouse to pay to the person designated in the order the amount the court considers appropriate after taking into consideration section 131 [*obligation to support spouse*].
- (2) An application under subsection (1) may be made by
- (a) either or both spouses,
 - (b) on behalf of a spouse, a designated agency, as defined in the *Adult Guardianship Act*, after an investigation is conducted under Part 3 of that Act, or
 - (c) if the right to apply for an order under this section is assigned to a minister under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act*, the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.

Misconduct of spouse

- 136** In making a spousal support order, the court must not take into consideration any misconduct of a spouse except conduct that
- (a) arbitrarily or unreasonably precipitates, prolongs or aggravates the need for support, or
 - (b) arbitrarily or unreasonably affects the ability of the spouse having the support obligation under the order to provide support.

Varying, suspending and terminating spousal support orders

- 137** (1) The court may, on application, make an order varying, suspending or terminating a spousal support order or any part of that order, prospectively or retroactively, after taking into consideration section 131 [*obligation to support spouse*].
- (2) Before the court makes an order under subsection (1), the court must satisfy itself that
- (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the spousal support order was made or last varied,
 - (b) evidence of a substantial nature that was not available at the previous hearing has become available, or
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the spousal support order was made or last varied
- and in making the order under subsection (1), the court must consider the change of circumstances or evidence.
- (3) Despite subsection (2), if a spousal support order provides for support for a definite period or until a specified event occurs, the court may not, on an application commenced after the expiration of that period or the occurrence of that event, make an order under subsection (1) for the purpose of resuming that support unless the court is satisfied that
- (a) an order under subsection (1) is necessary to relieve the economic hardship arising from a change described in subsection (2) (a) that is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the spousal support order was made or last varied, would likely have resulted in a different order.

Review of spousal support

- 138** (1) An agreement or court order may include a provision for a review of the amount or duration of spousal support provided for within the agreement or court order, on or after a fixed date, after a fixed period of time, or after the happening of a specific event.
- (2) The agreement or court order may include a dispute resolution process with respect to conducting the review.
- (3) If, upon the completion of a spousal support review, the parties are unable to agree on the amount or duration of spousal support then the court on application may:
- (a) with respect to an agreement, set aside the provision of the agreement relating to spousal support and make a spousal support order under section 135 (1) [*spousal support orders*], or
 - (b) in the case of a court order, make an order confirming, varying, suspending or terminating the spousal support order.
- (4) If
- (a) a term or condition referred to in subsection (1) is not included in a spousal support order, and
 - (b) a spouse

- (i) with the obligation to pay spousal support under the order starts receiving benefits under a pension, or
- (ii) entitled to receive spousal support under the order becomes eligible to receive benefits under a pension,

the court may, on application, make an order confirming, varying, suspending or terminating the order, or any part of the order after taking into consideration section 131 [*obligation to support spouse*].

- (5) For greater certainty, section 21 [*setting aside agreements respecting property, debt or spousal support*] and section 137 (2) [*varying, suspending and terminating spousal support orders*] do not apply with respect to subsection (3) or (4) of this section.

Priority of child support

- 139** (1) If a court is considering an application for a spousal support order and an application for a child support order, the court must give priority to child support in determining the applications.
- (2) If, as a result of giving priority to child support, the court is not able to make a spousal support order, or the court makes a spousal support order in an amount that is less than it otherwise would have been,
- (a) the court must record its reasons for doing so, and
 - (b) any subsequent reduction or termination of child support constitutes a change described in section 137 (2) (a) [*varying, suspending or terminating spousal support orders*] for the purposes of applying for
 - (i) an order for spousal support under section 135 (1) [*spousal support orders*], if one was not made previously, or
 - (ii) an order under section 137 (1) [*varying, suspending or terminating spousal support orders*], if a spousal support order was made in an amount that is less than it would have been otherwise.

Division 4 – General

Terms and conditions of support orders

- 140** In a support order, the court may impose terms and conditions as the court considers appropriate including, without limitation the following:
- (a) payment periodically, annually or otherwise, and either for an indefinite or limited period or until the happening of a specified event;
 - (b) payment of support in respect of any period of time before the date of the application for the order;
 - (c) payment of a lump sum directly or in trust on any conditions the court considers appropriate;
 - (d) registration of a charge against specific property to secure payment;
 - (e) that a person must obtain, or that a person who has a policy of life insurance, within the meaning of the *Insurance Act*,

	(i) designate his or her spouse or a child as a beneficiary irrevocably or for the period designated by the court, and (ii) pay all premiums on the policy, or authorize that his or her spouse pay all premiums on the policy, for the purpose of ensuring the payment of support if the person dies;
	(f) payment for expenses arising from and incidental to (i) the prenatal care of the mother or child, or (ii) the birth of a child.
	Reducing or cancelling arrears
141	(1) The court may, on application reduce or cancel arrears under a support order if satisfied that it would be grossly unfair not to do so. (2) For the purposes of this section, the court may take into consideration (a) the efforts the person having the support obligation has made to comply with the support order, (b) the explanation of the person having the support obligation for any delay in applying for an order to vary, suspend or terminate the support order, and (c) any special circumstances that the court considers relevant. (3) If the court reduces arrears under a support order, the court may order that interest does not accrue on the reduced amount of arrears if the court is satisfied it would be grossly unfair not to make that order. (4) If the court cancels arrears under a support order, the court may cancel interest that has accrued on the arrears under section 11.1 of the <i>Family Maintenance Enforcement Act</i> if the court is satisfied it would be grossly unfair not to make that order.
	If person with support obligation dies
142	(1) An agreement for child or spousal support binds the estate of the person having the support obligation unless the agreement provides otherwise. (2) A support order binds the estate of the person having the support obligation unless the support order provides otherwise. (3) Subsections (1) and (2) apply to an agreement entered into or an order made, as the case may be, after this section comes into force. (4) If a person with a support obligation under a child support order dies, the personal representative of that person may, despite any other provision of this Part, make an application under (a) section 129 [varying, suspending or terminating child support orders], or (b) section 141 [reducing or cancelling arrears]. (5) If a person with a support obligation under a spousal support order dies, the personal representative of that person may, despite any other provision of this Part, make an application under

- (a) section 137 [varying, suspending or terminating spousal support orders],
- (b) section 138 [review of spousal support], or
- (c) section 141 [reducing or cancelling arrears].

III. Parental Support

Section 90 of the *Family Relations Act* sets out the obligation of adult children to support dependent parents in certain circumstances. The main criticism of this provision is that the financial needs of the elderly are more appropriately addressed through measures other than a legislated duty of support in a family statute.

Consultation Feedback

While this policy issue did not generate a lot of feedback, the vast majority of respondents thought that section 90 should not be carried forward into the proposed new Act. This is consistent with the recommendation made by the British Columbia Law Institute in its 2007 report on the topic.¹⁴⁹

Recommended Policy

It is proposed that section 90 of the *Family Relations Act* not be carried forward into the new statute, largely for the reasons cited in the British Columbia Law Institute report:¹⁵⁰

- Section 90 is rarely used, and orders made under it are typically for very small amounts, too little to meet the financial needs of an elderly parent.
- The section creates more problems than it solves. The cost for an elderly parent to sue an adult child for parental support could often exceed the amount of support ordered, and such litigation is likely to damage the relationship between adult child and parent.
- There are a wide variety of programs that address issues of seniors' poverty more effectively than parental support, including the Canada Pension Plan, the Old Age Security Program and subsidized housing.

¹⁴⁹ British Columbia Law Institute, *Report on the Parental Support Obligation in Section 90 of the Family Relations Act*, Report No. 48 (March 2007) at 30, online:

http://www.bcli.org/sites/default/files/Parental_Support_FRA_section_90_Report.pdf (last accessed: April 27, 2010).

¹⁵⁰ *Ibid.* at 30 and 31.

CHAPTER 11: CASE MANAGEMENT AND ENFORCEMENT TOOLS

I. General

Society has a great interest in what the new Supreme Court Family Rules describe as “the just, speedy and inexpensive determination of every family law case on its merits.” Complexity and cost are major barriers to the family courts and, like other jurisdictions, British Columbia has been working hard to implement procedures and support processes that will streamline litigation and expedite outcomes.

There are about 25,000 family law matters filed in British Columbia courts each year.¹⁵¹ Only a small percentage of these actually go to trial. Of the remainder it appears that a significant number of claims are abandoned at some point before trial, and of course many are resolved before trial. In all events, considerable private and public resources are consumed in pre-trial litigation processes.

Some current pre-trial enforcement tools – such as fines for lack of disclosure under section 92 of the *Family Relations Act* – are intended to prompt full and timely compliance with the rules that guide litigation. The fine however is seen as ineffective and is rarely used, even though securing adequate disclosure can be an extremely time consuming and costly exercise for a party.

On the other end of the spectrum – after an order is made – there currently are a limited number of viable enforcement options in circumstances where a parent fails to abide by the terms of a parenting order or agreement. Contempt proceedings are used infrequently and are often criticized as being ineffective and inappropriate for families.

The Family Justice Reform Working Group Report recommended that judges be provided with more tools to both encourage settlement and promote the efficient and effective use of public and private resources.¹⁵² The Supreme Court Family Rules, which came into force on July 1st of this year, have already given judges some additional case management tools. It is proposed that the new legislation will provide judges with increased authority to use a greater range of tools to manage disputes, expedite the litigation process and enhance the enforceability of orders.

The Ministry was also mindful of the need to ensure Provincial Court judges, whose authority to act arises from the legislation, also have access to a range of case management tools. As a result, there may be some repetition between tools provided for in the Supreme Court Family Rules and the proposed new Act.

Consultation Feedback

Even though there was no specific consultation discussion paper published on the issues of case management and compliance, concerns were repeatedly raised about these topics. The two points most forcefully made were:

¹⁵¹ Court Services Branch, Above Note 6. Note: this total excludes matters under the *Child, Family and Community Service Act*.

¹⁵² Family Justice Reform Working Group, Above Note 7, Recommendation 18 at 71 and Recommendation 21 at 77.

- the need to give judges better tools to manage family cases effectively, including preventing and/or responding to breaches of agreements or orders, and
- the need to address the problem of non-disclosure.

The first issue was raised in almost every round of the consultations. Stakeholders noted that the existing legislation offers few effective responses where the terms of family law orders or agreements are not honoured. This was described as a problem in both courts, but as particularly problematic in the Provincial Court, which only has authority to act as provided by legislation and with limited constitutional jurisdiction. Stakeholders asked for:

- greater consistency of remedies between Supreme Court and Provincial Court, and
- more preventative tools (e.g. counselling in ongoing parenting disputes to address the underlying causes of conflict).

Stakeholders also sought better mechanisms to respond to non-disclosure. The problem of non-disclosure is so notorious that it has been judicially characterized as the “cancer” of family law cases. The following is an excerpt of Mr. Justice Fraser’s Reasons for Judgment in a property division case:

Non^s disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained [parties] simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably^s based suspicion that justice was not done. Non. disclosure also has a tendency to deprive children of proper support.¹⁵³

Recommended Policy

Conduct Orders

The proposed legislation will include a new category of orders called “conduct orders”. These are intended to help judges manage behaviour, de-escalate tensions, promote compliance, and facilitate the settlement of disputes.

There will be different kinds of conduct orders:

- orders to encourage compliance: a judge may dismiss an action or prohibit a party from making further applications or taking a step in a proceeding until a specified time or until compliance with another order has occurred;
- interim orders respecting property: a judge may grant exclusive occupancy of the family home, require a spouse to continue making rent or mortgage payments, or forbid the termination of basic utilities;

¹⁵³ *Cunha v. Cunha*, 1994 CANLII 3195 (B.C.S.C.) at para. 9, per Fraser J, online: <http://www.canlii.org/en/bc/bcsc/doc/1994/1994canlii3195/1994canlii3195.html> (last accessed: June 15, 2010).

- orders respecting dispute resolution: a judge may refer parties to counselling or to other programs to assist in the resolution of an issue or to reduce further conflict; and
- other orders: a judge may limit communication between parties, order a party to report back to the court, or prohibit a party from making frivolous or vexatious applications.

Conduct orders may be made on the court's own initiative. That is, in appropriate circumstances, a spouse need not necessarily bring an application for a judge to make the order.

Remedies

The proposed legislation will respond more effectively to breaches of family law orders and agreements by introducing new remedies and consequences for non-compliance. *Offence Act* proceedings will be eliminated and will be replaced with a greater array of options contained within the proposed statute (i.e., most of existing section 128 of the *Family Relations Act* will not be carried forward). There will be additional provisions to address non-compliance with parenting orders or agreements. See Chapter 6: When Orders for Time with a Child Are Not Respected for more details.

When a conduct order is breached a judge may make another conduct order, draw an adverse inference, or order the non-compliant spouse to:

- report back to the court,
- pay the other party all or part of the expenses reasonably and necessarily incurred resulting from the non-compliance, including legal fees or dispute resolution expenses,
- pay up to \$5,000 to a spouse, parent or child whose interests have been affected, or
- pay a fine of up to \$5,000.

If there are multiple breaches of a conduct order limiting communications or contact between parties, the judge may also make a protection order in recognition of the fact that multiple breaches of such orders are an indicator of risk to safety. Please see Chapter 12: Protection Orders which deals with safety-related protection orders in more detail.

The proposed legislation will also allow for imprisonment as an extraordinary remedy. In cases of non-compliance where the court concludes that no other remedy would be effective, a judge can order up to 30 days of imprisonment.

The range of remedies is intended to enable the application of progressively more serious responses, without unduly limiting the court's discretion to make orders appropriate to the circumstances of the case. Both the conduct orders and the remedies allow judges to tailor their response to the circumstances of the particular case.

These proposals would provide greater consistency between the remedies available in the Provincial Court and the Supreme Court. This is important given that British Columbia is not a unified jurisdiction (i.e. does not have a single family court). The Supreme Court will continue to have greater jurisdiction than the Provincial Court, and some remedies, such as those relating to

property, will continue to be available in Supreme Court only. However, where possible, the new law will offer overlapping remedies to judges in both levels of court. The inclusion of stronger remedies should reduce the need for contempt of court proceedings.

Disclosure

The proposed statute will specifically provide for a general duty to disclose information. The duty will encourage full and frank disclosure early in the process to promote settlement and ensure the parties have all the information required for fair and sound decision making. It will apply to all persons involved in a family dispute regardless of whether a court case has been formally initiated.

Currently, formal non-court dispute resolution processes, such as mediation, are governed by agreements that detail the scope of disclosure the parties agree to. In some cases, either in formal or informal non-court dispute resolution processes, people may choose to waive their right to full disclosure. This will remain possible. However, where an agreement is based on one person's representation that they have disclosed fully, and it is later found that there was significant non-disclosure that makes the agreement clearly unfair, the agreement can be set aside by the court. See Chapter 2: Non-Court Dispute Resolution and Agreements for more details.

When spouses invoke the jurisdiction of the court for assistance in resolving their family law dispute, the Rules of Court will apply to define what disclosure is required. A judge may, at any point in the proceeding, make an order for disclosure. A judge may also order reimbursement for expenses incurred while pursuing disclosure. This is intended to encourage people to make timely and appropriate disclosure without the need for the court to compel them to do so.

In response to a breach of an order for disclosure, a judge will have an array of options, including the ability to:

- make a further order for disclosure,
- draw an adverse inference, including attributing an income level,
- order the non-compliant person to pay the other party all or part of the expenses reasonably and necessarily incurred resulting from the non-compliance, including legal fees or dispute resolution expenses,
- order the non-compliant person to pay up to \$5,000 to the other party, a spouse or a child whose interests have been affected,
- pay a fine of up to \$5,000, or
- dismiss or strike out all or part of the non-compliant person's claim or application.

Outstanding Policy Issue

Many stakeholders identified disclosure as a problematic area under the current Act. Some suggested there should be an automatic right to seek full financial disclosure, without the need to start any legal action. The court rules, it was suggested, could be amended to include pre-action

disclosure demands. Many thought this would facilitate the use of non-court dispute resolution and argued that the lack of information is a barrier to use of these non-court processes.

The Ministry struggled with addressing these recommendations. On the question of imposing a disclosure obligation onto non-court dispute resolution processes, there was some concern that overlaying litigation-related tools onto non-court processes could hinder or distort their functioning by casting a litigation lens over often informal processes. As well, it was acknowledged that perhaps disclosure is better addressed within a dispute resolution process itself: for example, “Agreements to Mediate” include provisions regarding disclosure of information.

Questions:

1. Should the proposed statutory duty to disclose apply only to court processes or should it extend to non-court dispute resolution too? Why or why not?
2. Should there be a way to seek the assistance of the court in a limited manner to address issues, such as disclosure, while engaged in non-court dispute resolution without starting a full legal action on the larger family matter? Why or why not?

Recommended Draft Provisions

PART 10 – COURT PROCESSES	
Division 3 - Orders the Court May Make Generally	
Court may order disclosure	
170	(1) At any stage of a proceeding, a court may do one or more of the following:
	(a) require a party to the proceeding, or person who is not a party, to produce for the court or another party any information required under the Supreme Court Family Rules or the Provincial Court Family Rules;
	(b) require a party to provide security in any form that the court directs; or
	(c) make any other order the court considers appropriate in the circumstances to secure disclosure of information or a record in a timely manner.
	(2) If a party objects to the production of information on the grounds of privilege, the court may decide the validity of the objection.
	(3) The court may make an order under subsection (1) on its own motion or on application, and may give directions respecting compliance with the order.
	(4) If an order was made under subsection (1) the court may order the party to pay to the other party all or part of the expenses reasonably and necessarily incurred by the other party to pursue disclosure by the party, including legal fees and dispute resolution expenses.

Division 4 – Conduct Orders

Purposes for which conduct orders may be made

- 178** (1) The court may make an order under this Division for one or more of the following purposes:
- (a) to facilitate settlement;
 - (b) to facilitate or to manage behaviours that might frustrate the resolution, by agreement or court order, of a matter at issue between the parties;
 - (c) to prevent the misuse of the court process;
 - (d) to protect the rights or interests of a person in respect of whom an order has been or may be made under this Act;
 - (e) to further the purposes of an order made under this Act, or to avoid frustration of those purposes;
 - (f) to facilitate the family's arrangements pending final determination of the issues;
 - (g) to secure or facilitate compliance with an order made under this Act.
- (2) An order under this Division may be made
- (a) at any time during a proceeding or on making an order under this Act, and
 - (b) on application by a party or on the court's own initiative.

Orders respecting case management

- 179** (1) A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*], make an order to do one or more of the following:
- (a) dismiss, strike out or amend all or part of the party's claim or application;
 - (b) adjourn proceedings while
 - (i) the parties attempt to resolve one or more issues before the court, or
 - (ii) a party complies with an order made under this Division;
 - (c) prohibit a party from making further applications or continuing with a proceeding under this Act without leave of the court
 - (i) for a specified period of time,
 - (ii) until the party has complied with an order made under this Division;
 - (d) if an order is made under paragraph (c), impose any terms or conditions to the granting of leave for further applications or continuation of a proceeding;
 - (e) require a party to do, or refrain from doing, anything as the court considers appropriate to assist the parties to resolve one or more of the issues before the court.
- (2) A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*], order that all further applications be heard by the judge or master making the order unless that judge or master directs otherwise.
- (3) Nothing in this section limits any other order a court may make under an enactment or the common law for the purpose of controlling proceedings before the court.

Orders respecting property

- 180** (1) For the purposes of this section, “**family residence**” means a residence that is
- (a) owned or leased by one or both spouses, and
 - (b) is or has been occupied by the spouses as their family residence.
- (2) The Supreme Court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*] and before an agreement or a court order under Part 6 [*Property Division*] is made, make an order to do one or more of the following:
- (a) grant a party, for a specified period of time, exclusive occupation of a family residence;
 - (b) grant a party, for a specified period of time, possession or use of specified personal property, including to the exclusion of the other party;
 - (c) prohibit a party from taking, converting, damaging or otherwise dealing with property that the other party may have an interest in.
- (3) A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*], make an order to do one or more of the following:
- (a) require a specified person to supervise the removal of personal belongings from a residence by a person;
 - (b) require a party to make payments for a residence in respect of rent, mortgage, utilities, taxes, insurance and other expenses related to the residence;
 - (c) prohibit a party from terminating the basic utilities of a residence.
- (4) An order under this section does not
- (a) authorize a spouse to materially alter the substance of the family residence or personal property,
 - (b) grant a proprietary interest to a spouse in the family residence or personal property,
 - (c) subject to subsection (5), grant a spouse any right that continues after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.
- (5) If an order has been made under subsection (2) (a) or (b), the Supreme Court, on application, may
- (a) order that the rights of a spouse to apply for partition and sale or to sell or otherwise dispose of or encumber the property that is the subject of the order under subsection (2) (a) or (b) be
 - (i) postponed, and
 - (ii) subject to the right granted under the order made under subsection (2) (a) or (b).
- (6) Nothing in this section prevents the filing of an entry under the *Land (Spouse Protection) Act*.

Orders respecting dispute resolution, counselling and programs

- 181** (1) A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*] make an order to do one or both of the following:
- (a) require the parties to participate in a family dispute resolution process to assist the parties to resolve one or more of the issues before the court;
 - (b) require a party or a child to receive counselling or to attend a program or service, including, in the case of a child, without the consent of the child's guardian.
- (2) If the court makes an order under subsection (1), the court may, as appropriate in the circumstances,
- (a) allocate all or part of the expenses relating to the counselling, program or service among the parties, or
 - (b) require one of the parties to pay all or part of the expenses relating to the counselling, program or service.

Other orders

- 182** A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*], make an order to do one or more of the following:
- (a) set restrictions or conditions in respect of communications between the parties, including in respect of when or how communications may be made;
 - (b) require a party to provide security in any form that the court directs;
 - (c) require a party to report back to court or to a person named by the court, at the time and in the manner specified by the court.
 - (d) to do or not do anything the court considers appropriate to a purpose referred to in section 178 [*purposes for which conduct order may be made*].

Frivolous or vexatious applications

- 183** (1) A court may, for a purpose set out in section 178 [*purposes for which conduct order may be made*], make an order to prohibit a party from making further applications or continuing with a proceeding under this Act without leave of the court if satisfied that the party has made an application or is conducting a proceeding in a manner that is frivolous or vexatious or is otherwise a misuse of the court process.
- (2) If an order is made under subsection (1), the court may impose any terms and conditions on the granting of leave for further applications or continuing with a proceeding.

Division 5 - Enforcement of Agreements and Orders

Enforcement of orders generally

- 184** For the purposes of enforcing an order,
- (a) certification of the order by a proper officer of the court that made it is proof of that order, and
 - (b) it is not necessary to prove that the person against whom the order was made was served with the order.

Enforcement of disclosure orders

- 185** (1) This section applies if a party
- (a) fails to comply with an order for disclosure made under section 170 [*court may order disclosure*] within the time or in the manner required by the order, or
 - (b) provides information that is incomplete, falsified or misleading.
- (2) In the circumstances set out in subsection (1), the court may on application or on its own initiative do one or more of the following:
- (a) make a further order under section 170 [*court may order disclosure*];
 - (b) draw an inference that is adverse to the party, including attributing income to that party in an amount that the court considers appropriate;
 - (c) make an order requiring a person who is not a party to produce for the court or a party information or a record in the person's possession or control, at the party's expense;
 - (d) make an order requiring the party to pay:
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the failure to disclose or the incomplete, falsified or misleading information, including legal fees or dispute resolution expenses;
 - (ii) an amount not more than \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the person's failure to disclose; or
 - (iii) a fine of not more than \$5,000;
 - (e) in the case of the Supreme Court, find the party to be in contempt;
 - (f) make any other order the court considers appropriate in the circumstances to secure disclosure of information or a record.
- (3) The court may, in an order made under subsection (2) (c) or (d), order that payment be made within a specified time following the making of the order.

Enforcement of conduct orders

- 186** (1) If a person fails to comply with an order made under Division 4 [*Conduct Orders*], the court may on application or on its own initiative do one or more of the following:
- (a) make a further order under Division 4 [*Conduct Orders*];
 - (b) draw an inference that is adverse to the party;
 - (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including legal fees or dispute resolution expenses;
 - (ii) an amount not more than \$5,000 to or for the benefit of the party, or a spouse or child whose interests were affected by the person's non-compliance, or
 - (iii) a fine of not more than \$5,000;

	(d) in the case of the Supreme Court, find the party to be in contempt;
	(e) in the case of a failure to comply with an order made under section 182 (a) [<i>other orders</i>], make an order under Part 9 [<i>protection orders</i>];
	(f) make any other order the court considers appropriate in the circumstances.
	(2) The court may, in an order made under subsection (1) (c), order that payment be made within a specified time following the making of the order.
Extraordinary remedy	
187	(1) If a person fails to comply with an order made under this Act, other than an order under Part 9 [<i>Protection Orders</i>], the court may order that the person be imprisoned for a term of no more than 30 days.
	(2) An order must not be made under this section unless
	(a) the court is satisfied that no other order under this Part will be sufficient to secure the person's compliance, and
	(b) the person is given reasonable opportunity to explain the person's non-compliance and show cause why an order under this section should not be made.
	(3) The court may issue a warrant for the person's arrest for the purpose of bringing the person before the court to show cause why an order under this section should not be made.
	(4) Imprisonment of a person under this section does not discharge any obligations of the person owing under an order made under this Act.

II. High Conflict Families

There is no singular or agreed upon definition of what a high conflict family is. The federal government's *For the Sake of the Children* report described these families as follows:

*Legal and mental health professionals recognize that divorce and separation are difficult for all parents and children. For the majority of families this is a difficult transition phase. Some families seem to get stuck at this point, however, with one parent or both intent on maintaining such a degree of conflict and tension ... it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces is estimated at between 10 and 20 % of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses. ...*¹⁵⁴

¹⁵⁴ Parliament of Canada, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access, December 1998* (Report) by Joint Chairs L. Pearson and R. Galloway (Ottawa: Parliament of Canada, 1998) at ch. 5, online, Parliament of Canada, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1> (last accessed: June 15, 2010). The *For the Sake of the Children* report was completed by a parliamentary

Although high conflict families constitute a minority of separating or divorcing couples, they use a disproportionate amount of court resources.¹⁵⁵ Some reports speculate that 10% of families demonstrating high conflict behaviour use up to 90% of family justice system resources.¹⁵⁶

These families warrant special attention in order to manage and contain their extraordinary demands on the resources of the justice system. Further, the research shows that children in high conflict families are more likely to be damaged by their parents' ongoing conflict.¹⁵⁷

Section 2 of the *Family Relations Act* refers to a government-funded program of children's lawyers (family advocates) that was once used in these circumstances but is no longer available. Family advocates were used in some high conflict cases where there was concern that parents would not or could not represent their children's best interests.

Consultation Feedback

Consistent with the Family Justice Reform Working Group report and the federal government's *For the Sake of the Children* report,¹⁵⁸ stakeholders asserted the need to better manage high conflict families and rein in their use of justice system resources. A greater range of tools for judges, including more interventionist options such as parenting co-ordination, were suggested.

Most respondents thought that some form of legal representation for children in highly disputed parenting cases would be helpful, although there was no consensus on the role that advocate should play (a best interests role or an advocate voicing the child's views) or who should pay. Some thought it could be workable to allocate costs between the parties, while others thought this would be unaffordable to many families.

Recommended Policy

Some measures under the proposed legislation will respond to the needs of high conflict families:

- Conduct orders will enable judges to tailor processes to the needs of these families. For example, the ability to order parties to attend dispute resolution services could be used to involve a parenting co-ordinator. See Chapter 2: Non-Court Dispute Resolution and Agreements.

committee that heard from experts and witnesses on a range of child-related issues, and made recommendations in a number of family law areas.

¹⁵⁵ Justice M. Trussler, "Managing High Conflict Family Law Cases for the Sake of the Children," (2007) 86 Can. Bar Rev. at 515.

¹⁵⁶ See M. Mitcham-Smith. and W. Henry, "High Conflict Divorce Solutions: Parenting Coordination as an Innovative Co-Parenting Intervention," (2007) 15 Fam. J. at 368. See also R. Neff and K. Cooper, "Progress and Parent Education: Parental Conflict Resolution" (2004) 42 Fam. Ct. Rev. at 1.

¹⁵⁷ Department of Justice Canada, *High-Conflict Separation and Divorce: Options for Consideration* (Background Paper) by G. Gilmour (Ottawa: Department of Justice Canada, 2004) at 11-17, online Department of Justice: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/index.html (last accessed: July 9, 2010).

¹⁵⁸ Family Justice Reform Working Group, Above Note 7 at 72-74 and *For the Sake of the Children*, Above Note 154, Recommendation 32.

- Interventions such as counselling or programs can be used to de-escalate conflict, resolve underlying issues and promote adherence to orders or agreements.
- Other case management-related conduct orders may be used to restrain a person from making applications without leave or to ensure all applications are heard by the same judge.
- There is a new regime to deal with denial and failure to exercise time with a child where there are repeated disputes. See Chapter 6: When Orders for Time with a Child Are Not Respected.

It is also proposed that the reference in the current Act to the Family Advocate be removed and a new provision substituted that allows the court to appoint a lawyer to represent a child's interests in a parenting dispute on the basis that costs are allocated between the parties. This is similar to Alberta's recently modernized law.¹⁵⁹

Children's lawyers can be an extremely useful tool in highly conflicted parenting cases. Their appointment may serve to refocus attention on the child's best interests. Children's lawyers can help ensure that decision-makers have appropriate information before them when parents are unwilling or unable to do so.

Recommended Draft Provisions

PART 10 – COURT PROCESS	
Division 2 – Procedural Matters	
Children's lawyer	
166	(1) The court may at any time appoint an individual to represent the interests of a child in a proceeding under this Act.
	(2) If the court appoints an individual under this section, the court must allocate all or part of the expenses reasonably and necessarily incurred relating to the appointment among the parties, including the child, if appropriate.

III. False Allegations of Violence and Alienation of a Child

Some family law disputes involve allegations of family violence or alienation of a child (i.e. attempts to destroy the child's relationship with the other parent), or both. Commonly enough, one parent may assert abuse while the other responds with allegations of a deliberate campaign to alienate the child. Such struggles are typically very bitter, involve repeated recourse to the courts and are very problematic for the justice system.

The *Family Relations Act* does not specifically address situations where false allegations of violence are knowingly made or where one parent deliberately alienates a child from the other.

¹⁵⁹ AB *Family Law Act*, Above Note 32, ss. 95(3) and (4).

Consultation Feedback

While there was a broad consensus in the consultation that real harm results when one parent persists in asserting unfounded allegations of abuse against the other parent, or where one parent persists in behaving in a manner that alienates a child from the other, there was no agreement on a solution.

Some groups said there should be clear and specific statutory penalties available for both false allegations and alienation. Others argued that these cases are very complex and involve a broad range of potential issues and behaviours, and warned that a one-size-fits-all legislative scheme would be inappropriate and could work against some children and victims of violence. They noted the practical difficulty in determining when a child's rejection of a parent is or is not the result of alienation by the other parent, or in knowing when allegations of violence are true but unproven, maliciously false, or reflect a genuine but mistaken belief.

Recommended Policy

The proposed expansion of case management and other tools, discussed above, is designed to ensure that judges can direct families to appropriate interventions that can better address the underlying issues of the conflict.

While there have been calls to include remedies specific to child alienation in the new statute, this option was ultimately not taken. The research suggests that there may be many valid and complicated reasons why contact between a child and a parent diminishes over time.¹⁶⁰

Certainly, no presumption of active or deliberately alienating behaviour could be made in every case where a child rejects, or refuses to see, a parent.

That said, cases where it can be established that one parent has deliberately undermined the child's relationship with the other parent can be addressed in a number of different ways under the new family law. For example:

- A broad range of remedies is available to address disputes over time with a child, including denial of parenting time. See Chapter 6: When Orders for Time with a Child are Not Respected, for further detail.
- Conduct orders, could also be used. For example, a judge could order counselling, including for the child, or referral to a program or service, such as a parent education course to resolve underlying issues. Referral to a parenting co-ordinator would also be possible.

¹⁶⁰ N. Bala *et al.*, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts," (2007-2008) 33 Queen's L.J. at 79; J.B. Kelly and J.R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome," (2001) 39(3) Fam. Ct. Rev. at 249-266; and Department of Justice Canada, *Child Access in Canada: Legal Approaches and Program Supports* (Research Report) by P. O'Connor (Ottawa: Department of Justice Canada, 2002) at 9, online Department of Justice: <http://canada.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/index.html> (last accessed: June 16, 2010).

- If problems persist, improved enforcement tools offer a range of possible responses, including orders for payment of expenses, fines or imprisonment.
- A serious and deliberate campaign of alienation could be relevant to the revised best interests test applicable to parenting arrangements. The proposed definition of “family violence” is broad and captures psychological abuse, and violence is an explicit best interests factor that must be considered.

The Ministry also considered the possibility of making false allegations of family violence an offence under the statute, but decided against doing so in favour of responding to the issue through the broader range of case management and other tools that are proposed under the new Act. Reasons for this include:

- Research shows that deliberately false or maliciously false allegations of violence are, in fact, few.¹⁶¹ Research also suggests that denials or failure to report real abuse are more common than deliberately false allegations.¹⁶²
- The new law ought not to discourage or deter spouses from raising genuine concerns about family violence. It would be unfortunate if legitimate concerns about violence were held back out of fear of consequences of making the allegation.
- Australia’s legislation provides for mandatory cost orders against a party who knowingly makes false statements. This provision is rarely used and the consensus is that it is ineffective. The provision involves a high standard of proof, and few cases meet it. The provision has been criticized for creating a chilling effect for victims of violence.¹⁶³

¹⁶¹ Department of Justice Canada, *Putting Children First: Final Federal-Provincial-Territorial Report on Custody and Access and Child Support* (Ottawa: Department of Justice Canada, 2002), online Department of Justice: <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/flc2002/index.html> (last accessed: July 9, 2010). See also L. Neilson, *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund, March 2001* (University of New Brunswick: Muriel McQueen Fergusson Centre for Family Violence Research, 2001).

¹⁶² Department of Justice Canada, *Allegations of Child Abuse in the Context of Separation* (Discussion Paper) by N. Bala *et al.* (Ottawa: Department of Justice Canada, 2001); Centre of Excellence for Child Welfare, *False Allegations of Abuse and Neglect* (Information Sheet) by T. Knott, N. Trocme and N. Bala (Montreal: Centre for Research on Children and Families, 2004) at 2, online: <http://www.cccw-cepb.ca/sites/default/files/publications/en/FalseAlleg13E.pdf> (last accessed: July 9, 2010).

¹⁶³ E. McInnes, “Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law” (*Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 2003*); and Achimovich, “Parental Alienation Syndrome Revisited” (*Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 2003*).

CHAPTER 12: PROTECTION ORDERS

The *Family Relations Act* provides for three types of orders that are used to protect the safety of family members. Restraining orders to prevent harassment¹⁶⁴ and prohibit contact¹⁶⁵ are available in both Provincial and Supreme Court. A third type of order provides for temporary exclusive occupancy of the family home¹⁶⁶ and is only available in Supreme Court. In addition, peace bonds are available under the *Criminal Code*.¹⁶⁷

If a person breaches one of the family law restraining orders, there are two potentially overlapping responses. One is a quasi-criminal prosecution led by Crown counsel under section 128(1) of the *Family Relations Act* which provides that it is an offence not to comply with an order under the Act.¹⁶⁸ Crown counsel ultimately decides whether a prosecution is pursued under this section. The second response is a contempt application, which must be brought as a civil proceeding by the person alleging the breach of the restraining order, on their own or through a private lawyer. Contempt applications are heard in Supreme Court only and can be expensive. This also makes the person in need of protection responsible for managing the enforcement of any breach of the restraining order.

The existing scheme of safety-related orders is problematic on a number of other levels. The provisions lack clarity with regard to process and enforcement. As well, based on the specific wording used in the current provisions and the interpretations of those provisions by the court, it is not always clear who can apply for these types of orders and under which circumstances.¹⁶⁹

Consultation Feedback

Even though peace bonds remain a possibility for people who are concerned about their safety, many agreed that there was still a need for civil protection orders under the family law. However, there was a broadly held view that there is considerable room for improvement. Problems with enforcement were highlighted in particular: stakeholders pointed to recent family homicides to illustrate this point. Indeed, some said that obtaining a *Family Relations Act* restraining order could leave victims with a false sense of security since there is uncertainty that the justice system will respond to a breach in a timely, consistent and effective way.

¹⁶⁴ BC *Family Relations Act*, Above Note 1, s. 37.

¹⁶⁵ *Ibid.*, ss. 38 and 126.

¹⁶⁶ *Ibid.*, s. 124.

¹⁶⁷ *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 810, online CANLII: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html> (last accessed: May 4, 2010).

¹⁶⁸ BC *Family Relations Act*, Above Note 1, s. 128(1): “A person commits an offence by refusing or neglecting, without reasonable excuse, to comply with an order made against the person under section 37, 28, 124 or 126.”

¹⁶⁹ See British Columbia Ministry of Attorney General, *Family Relations Act Review Discussion Paper- Chapter 9: Family Violence* (April 2007) at 4-8, online: <http://www.ag.gov.bc.ca/legislation/pdf/Chapter9-FamilyViolence.pdf> (last accessed: June 11, 2010).

Stakeholders noted a number of challenges:

- Judicial interpretations of the legislation suggest restraining orders may not be available to spouses who do not have children and also may not be available on a stand-alone basis (i.e., independent from other matters to be decided under the *Family Relations Act*, such as custody).
- The two potentially overlapping ways of enforcing breaches of family law restraining orders (civil contempt and/or *Offence Act* proceedings under section 128) are confusing, onerous and ineffective.
- The existing law does not clearly delineate the authority or process for enforcement. This is a problem because police will not enforce an order without a specific enforcement clause or some other clear form of authority.
- The duration of family law restraining orders is not always clear. This is a problem because police are uncomfortable with enforcing a restraining order indefinitely without knowing whether circumstances continue to warrant the order.
- Current family law restraining orders can address a broad range of behaviours, only some of which appropriately require the response of the police and Crown counsel. This creates resource pressures for the police and Crown counsel and encourages the unfortunate viewpoint that civil restraining orders do not involve safety issues and that breaches need not be made a priority in the criminal justice system.

Recommended Policy

Protection Orders

It is proposed that existing restraining orders, which prohibit harassment and contact in specified circumstances, be replaced with one type of order: a “protection order”. Protection orders may:

- restrain or limit communication;
- restrain where a person goes (e.g., no attendance at or near a family home or school);
- prohibit a person from following another person;
- direct a peace officer to supervise the removal of personal belongings from a residence;
- direct a peace officer to seize firearms, weapons and related documents (e.g., permits); and
- direct a person to report to the court or to a person designated by the court.

The inclusion of protection orders in the proposed new family statute will provide an alternative to peace bonds under the *Criminal Code* for those who are not comfortable pursuing safety-related orders through the criminal courts or who do not meet the threshold for peace bonds. The consultation feedback on family violence focused largely on enforcement. This is not surprising given that breaches of protective orders are a key indicator of escalating risk and, therefore, a key part of any scheme designed to keep family members safe. The *Keeping Women Safe* report links

victims' continued safety with offender accountability,¹⁷⁰ which suggests that consistent enforcement of protection orders is important. The report specifically recommends clarifying the roles of the police and Crown counsel in enforcement.¹⁷¹

Given the importance of enforcement, the Ministry considered a number of options for the new law. For example, a detailed civil enforcement regime setting out specific sanctions and offences in the proposed new statute was considered. However, justice system stakeholders largely agreed that enforcement of safety-focused orders through section 127 of the *Criminal Code* would be clearer and more effective: clearer because the proposal streamlines enforcement and limits it to the criminal justice system, where the police and Crown counsel are familiar with the processes and tools; and more effective because enforcement under the *Criminal Code* sends the message that breaches of protection orders will be taken seriously. This approach of relying on section 127 of the *Criminal Code* is successfully being used to enforce civil protection orders in Manitoba and Alberta.¹⁷² Recently, Ontario amended its legislation to do the same.¹⁷³

Judicial discretion to include provisions in protection orders that are not directly safety-related will be limited to ensure protection orders remain safety-focused and appropriate for enforcement by police and the criminal justice system. Delineating between behaviour that involves a safety risk and behaviour that does not - and, therefore, between criminal and civil enforcement tools - is expected to make the proposed new legislation clearer and promote timely, effective enforcement.

In order to enforce breaches of protection orders under section 127 of the *Criminal Code*, section 128 of the *Family Relations Act* will not be carried forward into the proposed new statute. This is necessary because section 127 of the *Criminal Code* is a default enforcement mechanism that, by its terms, applies only where there is no other remedy available under the statute.

A number of other improvements to protection orders are proposed. For example, it is proposed that the new statute include a list of risk factors for judges to consider in assessing the likelihood

¹⁷⁰ Critical Components Project Team, *Keeping Women Safe: Eight Critical Components to an Effective Justice System Response to Domestic Violence* (April 16, 2008), s. 3.2, online Ending Violence Association of British Columbia: <http://www.endingviolence.org/files/uploads/KeepingWomenSafeExec0416.pdf> (last accessed: June 11, 2010).

¹⁷¹ *Ibid.*, ss. 3.2 and 3.6.

¹⁷² *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, online CANLII: <http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-p-27/latest/rsa-2000-c-p-27.html> (last accessed: July 13, 2010); *Domestic Violence and Stalking Act*, C.C.S.M. c.D93, online: CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-d93/latest/ccsm-c-d93.html> (last accessed: July 13, 2010). Note: as neither Act provides a general offence provision for breaches of protection orders, their enforcement is enabled through s. 127 of the *Criminal Code of Canada*. S.127 applies only where there is no other remedy available under a statute.

¹⁷³ *Family Statute Law Amendment Act*, S.O. 2009, c. 11, online ServiceOntario e-Laws: http://www.e-laws.gov.on.ca/html/source/statutes/english/2009/elaws_src_s09011_e.htm (last accessed: July 9, 2010). Note: as this Act does not provide a general offence provision for breaches of protection orders, its enforcement is enabled through s. 127 of the *Criminal Code of Canada*. S.127 applies only where there is no other remedy available under a statute.

of future violence and whether to grant a protection order. Where children are involved, the court must consider whether the child specifically requires protection.

The proposed provisions will broaden the range of family members who are eligible to apply for protection orders. In addition to spouses and former spouses, couples who are or who have been living together “in a marriage-like relationship for any period of time” and other family members or children who live in the home may seek a protection order. The inclusion of a broader category of people who may seek such orders is consistent with domestic violence laws elsewhere in Canada.¹⁷⁴

Protection orders will be available on a stand-alone basis. This means that they may be sought at any time, and they do not need to be connected to other family law proceedings.

Judges may specify the duration of a protection order, but if they do not, the order will expire after one year. This will allow judges to tailor orders to the particular circumstances of a case while at the same time providing greater clarity for the police in their enforcement role.

The proposed conflict of laws clause gives priority to safety-related orders; that is, protection orders, peace bonds or other safety-related orders will be enforced despite a conflicting family order. For example, if a parent has an order for parenting time with a child but later bail conditions prohibit contact, the safety-related bail conditions prevail and there is to be no contact with the child until the issue is resolved.

Enforcement of Canadian Judgments and Decrees Act

It is proposed that the new statute will adopt the Uniform Law Conference of Canada’s recommended amendments to the *Enforcement of Canadian Judgments and Decrees Act*.¹⁷⁵ These amendments allow civil protection orders made by judges elsewhere in Canada to be enforced like protection orders from British Columbia without the need to register the out-of-

¹⁷⁴ See e.g., AB *Protection Against Family Violence Act*, Above Note 172, s. 1(d); *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(a), online CANLII: <http://www.canlii.org/en/sk/laws/stat/ss-1994-c-v-6.02/latest/ss-1994-c-v-6.02.html> (last accessed: July 13, 2010); MB *Domestic Violence and Stalking Act*, Above Note 172, s. 2(1); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 1, online CANLII: <http://www.canlii.org/en/pe/laws/stat/rspei-1988-c-v-3.2/latest/rspei-1988-c-v-3.2.html> (last accessed: July 13, 2010); *Family Violence Prevention Act*, R.S.Y. 2002, c. 84, s. 1, online CANLII: <http://www.canlii.org/en/yk/laws/stat/rsy-2002-c-84/71502/rsy-2002-c-84.html> (last accessed: July 13, 2010); *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, s. 2, online CANLII: <http://www.canlii.org/en/nt/laws/stat/snwt-2003-c-24/latest/snwt-2003-c-24.html> (last accessed: July 13, 2010); and *Family Abuse Intervention Act*, S.Nu. 2006, c. 18, s. 2, online CANLII: <http://www.canlii.org/en/nu/laws/stat/snu-2006-c-18/74689/snu-2006-c-18.html> (last accessed: July 13, 2010).

¹⁷⁵ *Proposed Amendments by the Joint ULCC/CCSO Working Committee to the Uniform Enforcement of Canadian Judgments and Decrees Act - Civil Protection Orders*, online Uniform Law Conference of Canada: http://www.ulcc.ca/en/poam2/Civil_Protection_Orders_En.pdf (last accessed: July 9, 2010). See also *Enforcement of Canadian Judgment and Decrees Act* (March 1999), online Uniform Law Conference of Canada: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u5> (last accessed: July 9, 2010).

province order. Manitoba, Saskatchewan and Nova Scotia have already enacted these amendments.¹⁷⁶ This proposal will promote greater safety and consistency across Canada.

Other

Other related recommendations are as follows:

- Carry forward the temporary exclusive occupancy of the home provision as an order to be ancillary to other family proceedings, but clarify that this does not prohibit a judge from making safety-related orders restricting a person from attending at the family home under a protection order. Only Supreme Court has jurisdiction to make property orders, such as exclusive occupancy of the home. However, Provincial Court retains jurisdiction to act in matters related to public safety and therefore may make safety-related orders that prohibit attendance at a place, including a home in which a person resides.
- Include new provisions for conduct orders. This is important because it addresses the concern that currently judges put non-safety related provisions in family law restraining orders, which can complicate or undermine enforcement. Judges will retain the ability to make these types of orders but outside of the protection order scheme.
- Provide for a potential relationship between conduct orders and protection orders. For example, one conduct order a judge may issue is to limit the parties' mode of contact and communication. Repeated breaches of contact and communication orders are often an indicator of an escalating risk of violence. If there is a breach, the judge may, on his or her own initiative, replace the conduct order with a protection order. For more information about conduct orders, including orders for exclusive occupancy, please see Chapter 11: Case Management and Enforcement Tools.
- Define family violence in the new law to include:
 - actual or attempted physical harm or sexual abuse, including forced confinement or deprivation of the necessities of life; and
 - psychological or emotional abuse, which constitutes a pattern of coercive or controlling behaviour. The inclusion of a definition of "coercive and controlling behaviour" sets out behaviours that are considered high risk indicators of future violence by Statistics Canada.¹⁷⁷ For example, Statistics Canada found that where spouses experienced intentional damage to property the risk of physical violence

¹⁷⁶*Enforcement of Canadian Judgments Act*, C.C.S.M. c. E116, online CANLII: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-3116/latest/ccsm-c-e116.html> (last accessed: July 13, 2010); *Enforcement of Canadian Judgments Act*, 2002, S.S. 2002, c. E-9.1001, online CANLII: <http://www.canlii.org/en/sk/laws/stat/ss-2002-c-e-9.1001/latest/ss-2002-c-e-9.1001.html> (last accessed: July 13, 2010); and *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30, online CANLII: <http://www.canlii.org/en/ns/laws/stat/sns-2001-c-30/latest/sns-2001-c-30.html> (last accessed: July 13, 2010).

¹⁷⁷ *Measuring Violence Against Women: Statistical Trends 2006*, Above Note 70.

increased 20 times. Where a spouse exhibited unreasonable jealousy, such as limiting contact with others, risk of physical violence increased by eight times. Financial abuse resulted in the risk of violence increasing by ten times. Most other provinces include intentional damage to property in their definition of family violence in their protection order legislation and about half of these include psychological or emotional abuse.¹⁷⁸

- See Chapter 4: Children’s Best Interests for further discussion of the definition of family violence.

Recommended Draft Provisions

PART 1 – DEFINITIONS AND INTERPRETATION	
Definitions	
1	In this Act: “family violence” includes the following actions by a person towards a family member, (a) causing or attempting to cause, physical or sexual abuse including forced confinement or deprivation of the necessities of life, and (b) psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour, which may include, but is not limited to, the following behaviours by the person towards the family member: i) intimidation, harassment or threats, including threats to harm the family member, other persons, pets or property to obtain the compliance of the family member, ii) unreasonable demands to know where or with whom the family member is or restrictions on the family member’s activities or contact with friends or family members, iii) financial abuse, including unreasonable prevention of the family member from access to or knowledge about family income, iv) stalking or following the family member, or v) intentional damage to property, but does not include acts of self-protection, or protection of another person, if the force does not exceed what is reasonable in the circumstances.

¹⁷⁸ See e.g., SK *Victims of Domestic Violence Act*, Above Note 174, s. 2(a); MB *Domestic Violence and Stalking Act*, Above Note 172, s. 2(1); PEI *Victims of Family Violence Act*, Above Note 174, s. 1; YK *Family Violence Prevention Act*, Above Note 174, s. 1; NWT *Protection Against Family Violence Act*, Above Note 174, s. 2; and NUN *Family Abuse Intervention Act*, Above Note 174, s. 2.

PART 9 – PROTECTION ORDERS

Definitions

143 In this Part:

“family member,” with respect to a person, means

- (a) the person’s spouse or former spouse,
- (b) another person with whom the person is cohabitating, or any other persons with whom the person has cohabitated, in a marriage-like relationship for any period of time,
- (c) any other parents of the person’s child or children,
- (d) any other persons who
 - (i) are related by virtue of blood, adoption or a spousal relationship to the person or a person referred to in paragraph (a), (b) or (c), and
 - (ii) reside with the person or a person referred to in paragraph (a), (b) or (c), or
- (e) any children
 - (i) whose parent or guardian is the person or a person referred to in paragraph (a), (b), (c) or (d), or
 - (ii) who reside with the person or a person referred to in paragraph (a), (b), (c) or (d);

“protection order” means an order made under section 144 (1) [*protection orders*];

“residence” means a place where a family member, for whose protection the court has made or is considering making a protection order, normally or temporarily resides, and includes a place that was vacated due to family violence;

Protection orders

- 144**
- (1) If the court determines that family violence by a person towards a family member is likely to occur, the court may, on application or on its own initiative, make an order in the prescribed form to protect the safety and security of the family member.
 - (2) In determining whether family violence by a person towards a family member is likely to occur or reoccur, the court must consider, but is not limited to considering the following risk factors:
 - (a) the history of family violence by the person towards the family member or any other family member;
 - (b) whether family violence is repetitive or escalating;
 - (c) the separation of the person and the family member or the expressed desire or intention of the family member to end the relationship;
 - (d) the person engaging in alcohol or drug abuse;
 - (e) the person having employment or financial problems;

(f) any circumstance that may increase the vulnerability of the family member including pregnancy, age, family circumstances, health or economic dependence.
(3) When a family member is a child, the court must also consider the following factors:
(a) whether any children may be exposed to family violence if a protection order were not made; and
(b) whether, when making a protection order to protect the child's parent or guardian, an order to protect a child should also be made.
(4) The following circumstances should not preclude the court from making a protection order:
(a) that an order has previously been made against the person for the protection of the family member, whether or not the person complied with the order;
(b) that the person is temporarily absent from the residence;
(c) that the family member is temporarily residing in an emergency shelter or other safe place;
(d) that criminal charges have been or may be laid against the person;
(e) that the family member has a history of returning to the residence and of cohabitating with the person after occurrences of family violence by the person;
(f) that a conduct order under Division 4 [<i>conduct orders</i>] of Part 10 [<i>Court Processes</i>] is also made, or has previously been made, against the person in respect of the family member.
(5) A protection order may include one or more of the following:
(a) a provision
(i) restraining the person from directly or indirectly communicating with or contacting the family member or specified person, or
(ii) imposing limits on the person in communicating with or contacting the family members, including specifying the manner or means of communication or contact;
(b) a provision restraining the person from attending at, coming near to or entering a place regularly attended by the family member, including the residence, property, business, school or place of employment of the family member, even if the person owns, or has a right of possession of, the place;
(c) a provision restraining the person from following the family member;
(d) a provision directing a peace officer to remove the person from the residence immediately or within a specified period of time;
(e) a provision directing a peace officer to accompany the family member or specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings;
(f) a provision directing a peace officer to seize any weapons or firearms and related documents;

- (g) a provision requiring the person to report to the court or to a person designated by the court, at the time and in the manner specified by the court, respecting
 - (i) an order made under this Division, or
 - (ii) any other matter relevant to an issue before the court;
- (h) any other provision the court considers appropriate to protect the safety and security of the family member or to implement the order.

Orders without notice

- 145** (1) In cases of urgency, or if there is an immediate risk to the safety and security of a family member, an application for a protection order may be made without notice.
- (2) If a protection order is made without notice under this section, a copy of the order and the documents filed in support of the order must be served on each person against whom the protection order is made.
- (3) Where a protection order is made without notice under this section, the person against whom the protection order is made may apply to the court to set aside, vary or terminate the order.

Expiration of protection order

- 146** A protection order expires 1 year after the date it is made, unless a different term is provided for in the order.

Varying or terminating protection orders

- 147** (1) On application before a protection order expires, the court may do one or more of the following:
- (a) shorten the term of the order;
 - (b) extend the term of the order for a specified period of time;
 - (c) otherwise vary the order;
 - (d) terminate the order.
- (2) In making an order under subsection (1) of this section, the court
- (a) must take into consideration the risk factors and circumstances set out in section 144 (2), (3) and (4) [*protection orders*], and
 - (b) may include any provision that could have been included in the protection order in respect of which the order under subsection (1) is sought.

Enforcement of protection orders

- 148** Section 5 of the *Offence Act* does not apply to a protection order.

Conflict between orders

- 149** (1) In this section, “**protection order**” means a protection order made under this Act, an order made by a court in another Canadian jurisdiction that is similar to a protection order, or an order made under the *Criminal Code* restricting a person from contacting or communicating with another person.
- (2) If there is a conflict or inconsistency between a protection order and another order made under this Act, the protection order prevails and the other order is suspended, to the extent of the conflict or inconsistency, until
- (a) the protection order is varied or terminates, or
 - (b) the other order is varied so that a conflict or inconsistency between the protection order and that other order is eliminated.

Rights not diminished by Act

- 150** The making of a protection order does not affect any existing right of action of a person who has been the subject of family violence by a family member.

Immunity

- 151** (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a law enforcement agency, including any employee or agent of a law enforcement agency, because of anything done or omitted in the enforcement or supposed enforcement of a protection order.
- (2) Subsection (1) does not apply to an agency or a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.
- (3) Subsection (1) does not absolve the government from vicarious liability arising out of anything done or omitted by an agency or a person referred to in that subsection for which the government would be vicariously liable if this section were not in force.

Out-of-Province orders

- 152** The *Enforcement of Canadian Judgments and Decrees Act* applies to an order made by a court in another Canadian jurisdiction that is similar to a protection order.

CHAPTER 13: COURT JURISDICTION AND PROCEDURAL MATTERS

I. Jurisdiction of the Courts Generally

No major reforms regarding jurisdictional or related provisions found in Part 1 of the *Family Relations Act* were identified in the public consultation or otherwise. The proposed new statute will carry forward many of the jurisdictional provisions in the *Family Relations Act*. Some new sections will be added, but the changes will largely update language and re-organize the structure of the propose statute.

Recommended Policy

The jurisdiction of the Supreme Court and Provincial Court will stay essentially the same. However, several clarifications are proposed. Provincial Court judges will be restricted from making a declaration of parentage unless it is related to another matter, such as child support. The proposed statute will also restrict Provincial Court judges from making orders for exclusive occupancy of the family residence since case law has indicated that property issues are within the exclusive jurisdiction of the Supreme Court.¹⁷⁹ However, a new provision will reflect the fact that Provincial Court has jurisdiction with regard to public safety, and, therefore, may make safety-related protection orders that may have the effect of restricting access to a family residence by someone who lives there or has an ownership interest in it.

The new family statute will largely carry forward the jurisdictional and procedural provisions, such as:

- concurrent proceedings,
- the joining of proceedings,
- the enforcement of Supreme Court orders in Provincial Court, and
- appeals.

Recommended Draft Provisions

PART 10 – COURT PROCESSES	
Division 1 – Jurisdiction of Court Generally	
Supreme Court jurisdiction	
153	(1) The Supreme Court has jurisdiction in all matters under this Act.
	(2) Nothing in this Act limits or restricts the inherent jurisdiction of the Supreme Court to act in a <i>parens patriae</i> capacity respecting a child before the court.

¹⁷⁹ Reference Re Section 6 of the Family Relations Act (1982), 26 R.F.L. (2d) 113 (S.C.C).

Provincial Court jurisdiction

- 154** (1) Subject to subsection (2), the Provincial Court has jurisdiction in all matters under this Act.
- (2) The Provincial Court does not have jurisdiction
- (a) to hear and determine a matter respecting the parentage of a child, except as necessary to determine another family law matter over which the Provincial Court has jurisdiction,
 - (b) to make an order under section 180 [*Conduct orders respecting property*] giving a person exclusive occupancy of a family residence, or
 - (c) to hear and determine a matter under Part 6 [*Property Division*] or Part 7 [*Pension Division*].
- (3) Nothing in subsection (2) (b) prevents the Provincial Court from making an order under Part 9 [*protection orders*] restricting access to a family residence for the purpose of protecting the safety of a person occupying the residence.

Concurrent proceedings

- 155** (1) If both the Supreme Court and the Provincial Court have jurisdiction over a matter,
- (a) beginning a proceeding in the Supreme Court does not prevent a proceeding being brought in the Provincial Court unless the Supreme Court makes an order granting or refusing to grant the same relief being applied for in Provincial Court, and
 - (b) the making of a Supreme Court order does not prevent an application to the Provincial Court for an order in respect of any relief that has not been granted or refused by the Supreme Court order.

Joining proceedings generally

- 156** (1) This section applies if
- (a) a proceeding under this Act is before the court, and
 - (b) it appears to the court that other matters under this or any other enactment or law of British Columbia or of Canada should be determined
 - (i) before the matters at issue in the proceeding are determined, or
 - (ii) together with the matters at issue in the proceeding.
- (2) In the circumstances described in subsection (1), that court may
- (a) join and hear all proceedings together, to the extent that this is within the court's jurisdiction, or
 - (b) direct that the proceeding referred to in subsection (1) (a) be adjourned until other proceedings are brought or determined.
- (3) The court may act under this section on its own motion or on application of a party to the proceeding referred to in subsection (1) (a).

Supreme Court may join applications respecting Provincial Court orders

- 157** (1) This section applies if
- (a) a proceeding under Part 4 [*Guardianship and Parental Arrangements*] or Part 6 [*Property Division*] is before the Supreme Court, and
 - (b) an order has been made by the Provincial Court under
 - (i) section 128 [*child support orders*] or section 135 [*spousal support orders*], or
 - (ii) sections 129 [*varying, suspending or terminating child support orders*] or section 137 [*varying, suspending and terminating spousal support orders*].
- (2) On application by a party to a proceeding referred to in subsection (1) (a), the Supreme Court may join and hear an application to vary or terminate an order referred to in subsection (1) (b).
- (3) Subsection (2) applies even though an application has not been made to the Provincial Court.
- (4) If an order of the Provincial Court is varied by the Supreme Court under this section, the order is deemed to have been varied by the Provincial Court for the purposes of any subsequent application to vary, terminate or enforce the order.

Enforcement of Supreme Court orders by Provincial Court

- 158** An order for parenting time, contact or allocation of parenting responsibilities made by the Supreme Court under section 48 [*orders that allocate parental responsibilities*] or section 62 [*orders for contact with a child*] may be enforced by the Provincial Court in the manner in which it enforces its own orders under this Act if a copy of the order is certified by a proper officer of that court and filed with the Provincial Court.

Division 6 - Appeals

Appeals from Provincial Court orders

- 188** (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.
- (2) The time limit for bringing an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.
- (3) An appeal is brought by doing the following:
- (a) filing a notice of appeal in a registry of the Supreme Court;
 - (b) serving a copy of the notice of appeal on the parties to the proceeding in which the order of the Provincial Court was made, unless a judge of the Supreme Court orders otherwise;
 - (c) filing a copy of the notice of appeal in the registry of the Provincial Court at the location where the order was made.
- (4) The Rules of Court apply to an appeal to the extent that they are consistent with this section.

(5) After hearing the appeal, the Supreme Court may do one or more of the following:	
(a) confirm the order of the Provincial Court;	
(b) set aside the order of the Provincial Court;	
(c) make any order that the Provincial Court could have made;	
(d) direct the Provincial Court to conduct a new hearing.	
(6) On application, the Supreme Court may extend the time limit for bringing an appeal.	
Order under appeal remains in force	
189	Despite any other enactment, if an order made under this Act by a court is appealed, the order remains in full force and effect until the determination of the appeal unless the court that made it orders otherwise.

II. Procedural Matters

One of the goals behind the proposed legislation is to make separation and divorce less litigious and to ensure that settlement is encouraged wherever possible. Therefore, the settlement lens was applied to procedural matters in the proposed legislation.

Recommended Policy

It is proposed to include a provision similar to section 9 of the *Divorce Act* requiring lawyers to certify that they have complied with the duty to advise clients of family dispute resolution options before commencing an action. See Chapter 2: Non-Court Dispute Resolution and Agreements for more information. These certificates are one way that the proposed legislation can ensure that people have been informed about the existence of non-court dispute resolution processes before they resort to court. The certificate will be part of the pleadings, similar to the present certification requirement respecting reconciliation under the *Divorce Act*.

The proposed legislation will also express the objective that, to the extent possible, delay, cost and formality are minimized, and issues are determined in ways that are proportionate to the interests of any child affected and the importance and complexity of the issues. This is consistent with the general objectives of the new Supreme Court Family Rules.¹⁸⁰

The proposed legislation will provide the authority for applications to be made without notice or in the other parties' absence in appropriate circumstances. This is not a change to the law but ensures consistency between the Provincial and Supreme Courts.

For similar reasons, a confidentiality provision is provided in the proposed statute. Courts already make orders that some family proceedings be limited or closed to the public. However, to ensure that this power exists, express authority will be provided.

¹⁸⁰ *Supreme Court Family Rules*, B.C. Reg. 169/2009, Rule 1-3, online BC Laws: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_01 (last accessed: July 13, 2010).

In addition, children who are 16 years or older or who are parents, spouses or former spouses will be able to conduct court cases under the proposed statute without the need for a litigation guardian. This is a change from the current statute that makes the proposed statute more consistent with the new Supreme Court Rules.¹⁸¹

Recommended Draft Provisions

PART 10 – COURT PROCESSES	
Division 2 - Procedural Matters	
Certificate of compliance with duty to advise about family dispute resolution processes	
159	An application for a proceeding made under this Act presented to the court by a lawyer must be accompanied by a statement that (a) certifies that the lawyer has complied with section 4 [<i>duty to advise of family dispute resolution</i>], and (b) is signed by the lawyer.
Proceedings may be brought at any time	
160	Subject to this Act, a proceeding under this Act other than an appeal may be brought at any time.
Conduct of proceedings	
162	(1) A court must ensure that proceedings under this Act are conducted in the manner that, in the opinion of the court and to the extent that it is practical to do so, (a) minimizes the delay, cost and formality, (b) minimizes conflict and promotes co-operation of the parties if appropriate, (c) protects the parties against family violence, and (d) if the interests of a child are affected (i) protects the child against family violence, (ii) considers the impact of conduct of the proceedings may have on the child, and (iii) encourages the parties to consider the best interests of the child and to minimize the effect of the parties' conflict on the child. (2) Minimizing the delay, cost and formality includes conducting proceedings in ways that are proportionate to: (a) the interests of any child affected, (b) the importance of the issues in dispute, and (c) the complexity of the family law case.

¹⁸¹ *Supreme Court Family Rules*, Rule 20-2.

Applications may be heard in party's absence

- 163** (1) A court may hear an application and make any order the court has authority to make under this Act in the absence of a party only if any of the following apply:
- (a) the court is satisfied that the party has been served with notice of the application but has failed to respond or attend the hearing,
 - (b) the party is not required under this Act to be served with notice of the application.
- (2) A court may make an order without notice to one or more parties to the application where:
- (a) the application must be dealt with urgently,
 - (b) special circumstances exist such that it would be appropriate to hear the application in the party's absence, or
 - (c) the Act otherwise provides that notice is not required.
- (3) If an order was made in any of the circumstances described in subsection (1), the court may vary or set aside the order on application of the party who was absent when the order was made.

Intervention by Attorney General or other person

- 164** (1) The Attorney General may intervene in a proceeding and make submissions respecting any matter arising in the proceeding that affects the public interest.
- (2) Any person may apply to the court for leave to intervene in a proceeding and the court may make an order entitling that person to intervene.
- (3) An order under subsection (2) is subject to any terms or conditions the court considers appropriate in the circumstances.
- (4) The Attorney General or another person who intervenes in a proceeding becomes a party to the proceeding.

Legal capacity of married child

- 165** (1) A child who is:
- (a) 16 years or older,
 - (b) a spouse or a former spouse, or
 - (c) a parent
- has the capacity to make, conduct or defend an application under this Act without a litigation guardian.
- (2) Despite subsection (1), if the court considers it appropriate, it may on application or on its own initiative:
- (a) appoint a litigation guardian for a child referred to in subsection (1), or
 - (b) allow a child not described in subsection (1) to make conduct or defend an application under this Act without a litigation guardian.

Spouse compellable as witness	
167	In proceedings under this Act, spouses are competent and compellable witnesses for or against each other.
Confidentiality	
168	(1) A court may order that all or any member of the public, other than the parties, be excluded from any hearing under this Act.
	(2) On application or, on the court's own initiative, the court may make an order prohibiting the publication of a report of a hearing or any part of a hearing if the court believes that the publication of the report would have an adverse effect on or cause undue hardship to the party or to a child who is a family member of the party.

III. General Orders

Recommended Policy

The proposed legislation will continue to provide for general authority for judges to:

- make consent orders,
- incorporate terms of an agreement into a court order,
- make interim orders,
- vary, suspend or terminate orders, and
- include any terms and conditions in orders.

Various parts of the proposed statute will provide for some exceptions to these general rules, including the following:

- Consent orders for child support that diverge from the *Federal Child Support Guidelines* can be made if the judge is satisfied that reasonable arrangements for support of the child have been made (section 93.1 of the existing Act).
- A judge cannot include terms or conditions unrelated to safety in protection orders. This is discussed in more depth in Chapter 12: Protection Orders.
- Variations cannot be made to property orders (section 20 of the existing Act).

Currently, child custody and access assessments may be ordered under section 15 of the *Family Relations Act*. These reports can provide important information for judges, but they take time and there have been issues about demand exceeding the supply of section 15 report writers. The new statute will retain the ability for the court to seek expert advice into family cases. As is presently done, an investigation into a family may be sought through private assessors or through publically-funded family justice counsellors in appropriate cases.

The new law will also require the court to provide information, in a prescribed form, to the parties when an order is made under the proposed statute. This is similar to Australia where

every parenting order has a standardized information sheet attached.¹⁸² The attachment tells parents, in plain language, about their obligation to follow the order until it is changed and how to change the order through dispute resolution or court. It also informs parties of the consequences of breaking their parenting order, including attendance at parenting programs or penalties such as fines.

Recommended Draft Provisions

PART 10 – COURT PROCESSES	
Division 3 - Orders the Court May Make Generally	
Court may order investigation	
169	(1) For the purposes of a proceeding under this Act, the court may, by order, appoint a person to assess the needs of a child and the ability and willingness of a party or parties to satisfy the needs of the child (a) who has had no previous connection with the parties or to whom each party consents, and (b) who is a family justice counsellor, social worker or other person approved by the court. (2) The court shall not appoint a person under subsection (1) unless the person has consented to make the assessment. (3) The court may make an order under subsection (1) (a) on its own initiative, or (b) on application, including an application made without notice to any other person. (4) A person who carries out an investigation under this section must (a) prepare a report respecting the results of the investigation, (b) unless the court orders otherwise, give a copy of the report to each party, and (c) make the report available to the court. (5) The court may order one or more parties to the proceeding to pay all or part of the expenses of an investigation. ***
Persons may consent to order being made	
171	(1) A person may consent to the making of an order under this Act. (2) Consent under subsection (1) must not be considered an admission of a fact or matter alleged in a proceeding unless the fact or matter is specifically admitted. (3) This section is subject to section 130 [<i>determining child support</i>].

¹⁸² AUS *Family Law Act 1975*, Above Note 29, s. 65DA.

Court may incorporate terms of agreements

- 172** A court may incorporate into an order made under this Act all or part of any relevant provision in a written agreement respecting a family law matter made by 2 or more parties to the proceeding.

Court may make interim order

- 173** (1) On application, or on adjournment of an application, the court may
- (a) make an interim order for the relief applied for, and
 - (b) direct that the interim order be served on the persons and in the manner it may specify in the interim order.
- (2) The court may make an interim order on an application made without notice to any other person.
- (3) If an application for an interim order is in relation to an order that could be made under section 128 [*child support orders*], the interim order, if made, must be made in accordance with section 130 [*determining child support*] to the extent this is practicable given the need for interim maintenance and the records and other information available at the time of the hearing.

Court may make order on behalf of child

- 174** If a court is satisfied that an application for an order under this Act should also have been made on behalf of a child, the court may make an order on behalf of the child.

Terms and conditions of orders

- 175** The court may include in any order made under this Act any terms or conditions the court considers appropriate in the circumstances, except orders made under section 144 (*Protection orders*).

Court may vary, suspend or terminate orders

- 176** (1) Subject to this Act and subsection (2), the court may on application vary, suspend or terminate an order made by the court under this Act if circumstances have changed since the order was made.
- (2) Subsection (1) does not apply to an order made under Part 6 [*Property Division*] or Part 7 [*Pension Division*].

Information accompanying orders

- 177** (1) If a court makes an order under this Act, prescribed information respecting the order, if any, must be given to each party by
- (a) the lawyer acting on behalf of the party, or
 - (b) the court or a person designated by the court.

CHAPTER 14 – TRANSITION

Recommended Policy

The new family law will need a provision to ensure an orderly transition from the *Family Relations Act*. The following general principles are proposed:

- Where a court action has been started but not yet resolved before the effective date, the *Family Relations Act* applies unless the parties enter into a written agreement stating that the new Act governs. Cases that have already been time-barred under the *Family Relations Act* are not revived by the new Act.
- Where a court action has been started on or after the effective date, the new Act applies.
- Orders and declarations made under the previous law continue in force according to their terms, but subsequent applications made on or after the effective date (e.g. to vary or enforce) are governed by the new Act.

In summary, applications to court made on or after the effective date, whether these are originating applications or subsequent applications, are governed by the new Act.

The proposal is intended to maximize certainty by ensuring that previously concluded or time-barred matters cannot be disturbed with the introduction of the new Act. There will need to be significant lead time before the introduction of the new Act so that professionals and the justice system can adjust to and prepare for the proposed reforms. This will allow people to make agreements and otherwise order their affairs prior to the new Act's effective date. The model also proposes a parallel flexibility to enable those who are in the middle of resolving a family matter as of the effective date to agree to apply the new Act.

The final point is designed to ensure continuity while still allowing for future change. It is based on the transition clause found in Alberta's *Family Law Act*¹⁸³ and provides that declarations and orders made under the previous law continue in force according to their terms but may be varied, suspended or terminated, as the case may be, under the new Act.

¹⁸³ AB *Family Law Act*, Above Note 32, s. 108.

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American Association of Matrimonial Lawyers

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Withheld pursuant to/removed as

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